THE ROLE OF ARGENTINA IN THE HUMAN RIGHTS COUNCIL



SEBASTIÁN ROSALES

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For Matu and Constantino

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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 on Human Rights and Fundamental Freedoms
European Court: European Court of Human Rights
EU: European Union
GA: United Nations General Assembly
GRULAC: Group of Latin American and Caribbean States
G-77: Group of 77
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 Cooperation (formerly Organization of the 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 for 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: 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 Procedure: 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 intergovernmental 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 intergovernmental 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 of sensitive issues where

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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: https://bit.ly/3eSHBkW; 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.

there was no consensus to establish binding international instruments.

Furthermore, following the broadening of its mandate in the late 1960s, the Commission was able to 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 established was designed to discuss human rights violations[3] and soon it was followed by the establishment of a confidential procedure, widely known by the name of the resolution that created it: the 1503 Procedure.[4] The process of decolonization helped to deal with specific issues of international concern which were rejected by the Great Powers, such as 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 important legacy, in 2006, 60 years after its establishment, the Commission ended its work immersed in a context of discredit and extreme politicization and was replaced by the Human Rights Council. Particular key events were at the core of the international decision to terminate this body. In its final years, the Commission's mem-

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3 United Nations Economic and Social Council Resolution 1235 (XLII).

4 United Nations Economic and Social Council Resolution 1503 (XLVIII).

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://bit.ly/3kt90Lu.

bership 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. In addition, there were accusations and counter-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 being considered at the Commission.[7]

The Human Rights Council was the result of a strategic proposal by 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 advocate 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. 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 of establishing a mechanism to avoid selectiveness in dealing with country situations.[9] The main question when its review took place in 2011,[10] and even now, a decade and a half after its creation, is whether or not the Council has lived up to the expectations.

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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: https://bit.ly/3kt90Lu.

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.

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.

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 has not been able to overcome the politicization and selectiveness of its predecessor.[11]

Even though there were relevant changes that significantly improved the system (i.e. the composition of the new body, the periodicity of its sessions, the possibility of holding special sessions and the establishment of the universal periodic review), the very nature of an intergovernmental body naturally 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 its status as an international body, composed of States with different legal backgrounds and cultures, should be emphasized, as it has been able to successfully deal with country situations when there was the 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.

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

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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://bit.ly/2JZA5cw; Human Rights Watch, *Curing the selectivity syndrome. The 2011 Review of the Human Rights Council*, 2011, available at: https://bit.ly/3pjEBTn; 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://bit.ly/3nfhxDr; New York Times, "Trump Administration withdraws from the Human Rights Council", 19 June 2018, available at: https://nyti.ms/3ln0TBi.

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 their 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 endeavor 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 on human rights. This could have been different if one considers that the United Nations composition is at present much more diverse and complex than it was in 1946. However, the vast majority of States from all over the world still consider it essential to have a say in the Human Rights Council.

In this context, the Council has also taken stock and reflected on some norms and standards which were developed 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 Islamic Cooperation) and even in some specific countries with strong national agendas and policies on human rights, such as 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, this country 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, before moving on to 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 addressing some of its limitations.

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 assessment of the work of the Human Rights Council 15 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 on the role of the Republic of Argentina as a case study. In particular, this work will study

Argentina's role in the Human Rights Council through the analysis of its position during the creation of the Council in 2006, and its review in 2011, as well as the main initiatives promoted by the country in this intergovernmental body from its creation until the 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, 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 and impact of specific actors, such as Argentina, in the international human rights system, including in particular the development of international human rights law and standards.

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 individuals as having any rights, or obligations. 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 from the latter part of the seventeenth century, in line with the development of the modern European State system after the Peace of Westphalia.[1]

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.[2] From the perspective of the philosophy of law, the starting point is challenging: to define whether international law should really be considered law or a set of moral, political and social norms.[3]

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

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1 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.

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

3 Besson, Samantha and Tassioulas, John, *Philosophy of International Law*, Oxford University Press, 2010, pages 6-9, available at: https://bit.ly/3kqmUxI.

authority that is superior to States. This situation is said to provide States with an enormous margin of discretion as to whether or not to respect those binding rules which they voluntarily accept.[4]

In response to the 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 happens in domestic legal systems, where persons are subject to the jurisdiction of a particular State.[5] According to this view, 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 existing 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.[6]

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

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

5 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.

6 Besson, Samantha and Tassioulas, John, *Philosophy*…, Ibid, pages 8-9.

to respect and comply with international norms as main subjects of international law.[7]

What is more, in an inter-related world, international norms—although not ratified and, therefore, not obligatory for a particular State—could have consequences for this State and its nationals.[8]

Other major critiques of international law include the lack of enforcement and the absence of effective compliance.[9] Regarding the alleged lack of enforcement, it should be said that breaches of 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 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 addressing impunity for serious crimes committed in some States.[10] It is also worth mentioning that there is a growing tendency to resolve 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.[11]

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

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7 Clapham, Andrew, *Brierly's law of nations*…, Ibid, pages 44 to 54.

8 See Pinto, Mónica, *El derecho internacional*…, Ibid, page 59.

9 Besson, Samantha and Tassioulas, John, *Philosophy*…, pages 11-12.

10 United Nations, "Uphold International Law", "Courts and Tribunals", available at: https://bit.ly/35jz5YL.

11 World Trade Organization, "Understanding on Rules and Procedures Governing the Settlement of Disputes", available at: https://bit.ly/2JV6ssJ, and Convention on the Settlement of Investments Disputes between States and nationals of other States, 1966, available at: https://bit.ly/3eNEbzC.

States incorporate international law into their domestic legal order or decide to apply it directly through their competent authorities, including national judicial systems.

Nevertheless, there are other enforcement mechanisms provided by international law that 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 UN Charter, which even allows the conduct of legitimate military operations in response to any situation that affects international peace and security.[12] 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.

Regarding critiques on the lack of compliance with 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.[13]

International law has not only been considered as a political, moral or social concept alone. Since the seventeenth century, when the European State system was consolidated, and even earlier, various scholars have provided a foundation for this new emerging body of law in a more positive tone.

During the Roman era, the term *jus gentium*—although it was part of Roman internal law—was applied to relations among Roman and foreign citizens and relations among States. In the sixteenth century, Francisco de Vitoria and Francisco Suarez stated that the foundations of the *jus gentium* came from natural law. Its validity was understood under the premise of faith and an ideal of eternal and

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12 Charter of the United Nations, Articles 23-32.

13 Besson, Samantha and Tassioulas, John, *Philosophy…*, Ibid, pages 13-15.

universal justice. De Vitoria used the term *jus 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.[14]

Hugo Grotius is often regarded as the founder of international law. Whilst natural law was considered to have a divine basis, Grotius believed its existence to be based on the need to have rules for the preservation of society and emphasized the importance of customary norms. As a consequence, he fostered its laicization.[15]

As of the seventeenth 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 made a key contribution when he based the validity of international law in State consent. The positivist approach has influenced the majority of scholars ever since and has prevailed for centuries. Even today it is the basis of mainstream thinking in modern international law.[16]

State consent is an essential condition for regulating 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[17] Notwithstanding its importance, it is

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14 Orakhelashvili, Alexander, *Akehurst's Modern Introduction…*, Ibid, page 2.

15 Gross, Leo, "The Peace of Westphalia", 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.

16 Orakhelashvili, Alexander, *Akehurst's Modern Introduction…*, Ibid, pages 2-15.

17 Barreiros, Lucas, "El derecho internacional contemporáneo y el problema de la soberanía. Un intento de reconciliación", in Pinto, Mónica, *Las fuentes*

also generally recognized that if it is applied in absolute terms, it could be lethal for compliance with international law because such compliance would depend on the State's will alone.[18]

To determine the margin of discretion of sovereign States, Dionizio Anzilotti affirmed that the 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 State consent at the center of international law—was first made by Hans Kelsen, who based international law on a hypothetical norm at the top of a normative pyramid that admits no demonstration.[19] Sociologists such as Nicolas Politi (1872-1942) also defined international law as a social product founded in people's consciousness.[20]

A different approach to the fundamentals of international law emerged from the perspective of political science and foreign policy scholars. Before World War II, political scientists adopted a formalistic approach that focused on the content of international norms and judicial decisions. Later, the realist theory prevailed and political scientists focused solely on State power, considering international law as an instrument in this regard. This approach, however, did not explain the fundamentals of international law and was gradually replaced by other theories, including those of the legal scholars who focused on case-study research relating to international conflicts. A current approach to international law and international relations—the joint work of legal scholars and political

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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.

18 Diez de Velasco Vallejo, Manuel, *Instituciones de derecho internacional público*, Tecnos, Sixteenth Edition, pages 276-278. See also Gross, Leo, *The Peace of Westphalia…*, Ibid, page 44.

19 Gross, Leo, "The Peace of Westphalia", Ibid, pages 44-45. See also Pinto, Mónica, *El derecho internacional…*, Ibid, pages 50-51.

20 Pinto, Mónica, "El derecho internacional...", Ibid, pages 52-53.

scientists—is based on three theories associated with realism that may provide a response to skeptics: institutionalism, constructivism and liberalism. The content of these theories is vast and continues to evolve.[21]

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 issues of international concern—e.g. the use of force, disarmament, and human rights—and global commons—including the environment, trade and development.[22]

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 the rules of law.[23]

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, to which States decide to become parties. Treaties are written agreements concluded

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21 See in this regard 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 William Thompson & Keith E. Whittington eds., *Oxford Research Encyclopaedia of Politics: The politics of law and the judiciary*, 2016, pages 4-5, available at: https://bit.ly/36rFocb.

22 United Nations, "Uphold International Law", "What is International Law?", available at: https://bit.ly/35jz5YL.

23 Kennedy, David, "The Sources of International Law", American University, International Law Review 2, no. 1, 1987, pages 1-96, available at: https://bit.ly/3ng3gWY.

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.[24]

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 with 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 juris*—i.e. wide legal acceptance of this specific norm. These elements depend, to a great extent, on judicial interpretation.

Menno Kamminga has studied the work of the International Court of Justice (ICJ) in this regard. According to this scholar, in the past, the approach of the ICJ to identifying a rule of customary international law had been to heavily rely on the *opinio juris* (e.g. North Continental Shelf Cases, 1969).[25] This *opinio juris* can be found, for instance, in principles, declarations and resolutions widely accepted by States. Later, the ICJ required that the *opinio juris* be confirmed by State practice. In other words, the tribunal emphasizes that it is important to focus on what States do rather 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).[26] The approach is subject to debate and the ways to identify these norms will probably continue to evolve over time.[27]

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24 Vienna Convention on the Law of Treaties, 1969, Article 2.

25 North Sea Continental Shelf Cases, International Court of Justice, Judgement of 20 February 1969, paragraph 77.

26 Case concerning military and paramilitary activities in Nicaragua, International Court of Justice, Judgment of 27 June 1986, paragraphs 184-186.

27 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.

There are two exceptions where there is no discussion about the obligatory nature of international customary norms. One is 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 recognized by the ICJ.[28] Indeed, Kamminga highlights that this concept is one of the few human rights notions developed by this tribunal.[29] The other type of norms accepted and recognized by the international community of States from which no derogation is permitted are known as *jus cogens* (or *ius cogens*).[30] These have been expressly consecrated in international law instruments.[31]

The existence of these norms is undeniable; their content, however, is still subject to interpretation.[32] This has not impeded other courts from considering them**.** However, Kamminga indicates that the ICJ has been more reluctant to refer to the notion in its judgments.[33]

Today, some scholars study the existence and scope of the sources of international law beyond those formally included in Article 38 of the ICJ Statute.[34] The issue is still under debate and there is no unanimous consensus on

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28 Case concerning the Barcelona Traction, Light and Power Company Limited, International Court of Justice, Judgement of 5 February 1970, paragraph 33.

29 Kamminga, Menno, "Humanisation of International Law", Ibid, page 32.

30 See also in this regard, Clapham, Andrew, *Brierly's law of nations…*, Ibid, page 502.

31 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.

32 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.

33 Kamminga, Menno, "Humanisation of International Law", Ibid, pages 32-33.

34 See for instance, Cançado Trindade, Antonio Augusto, *International Law for Humankind,* The Hague Academy of International Law. Martinus Nijhoff Publishers, 2010, pages 128-132.

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 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 to States.[35] 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.[36]

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35 International Court of Justice, "Reparations for injuries in the Service of the United Nations", Advisory Opinion of 11 April 1949, page 174.

36 See in this regard, 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.

There is also a debate on the legal international personality of individuals.[37] On the one hand, individuals can submit claims before international human rights bodies or tribunals and at the same time they can, under certain circumstances, have 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, individual criminal responsibility at the international level is primarily 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 to 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 by scholars of ancient civilizations, in particular from Greece and Rome. Nevertheless, it was in the seventeenth and eighteenth centuries that this notion of rights started to develop, in particular through philosophers such as Locke, Montesquieu, Rousseau or Paine, who based this concept on theories of natural law.[38]

Indeed, the notion of individual rights and freedoms was codified in legal texts by certain Western countries during the last part of the eighteenth century, notably, the American Declaration of Independence in 1776 and the

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37 See for instance, Janis, M. W., "Individuals as Subjects of International Law", Cornell International Law Journal: Vol. 17: Iss. 1, Article 2, 1984, available at: https://bit.ly/35j3EOu. See also Pinto, Mónica, *El derecho internacional…*, Ibid, pages 15-16.

38 Freeman, Mark et al., *Essentials of Canadian Law. International Human Rights Law*, Ibid, page 5.

French Declaration of the Rights of Man and the Citizen in 1789.[39]

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 were considered an internal affair of that 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.[40]

Gradually, the protection of the rights of individuals was considered to 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.[41] 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.[42]

The protection of minorities was also an issue early addressed by the international community. It can be found in the Treaty of Westphalia, in a number of treaties to protect Christian minorities during the Ottoman Empire, after the fall of certain 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

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39 Pinto, Mónica, *El derecho internacional…*, Ibid, pages 91-92.

40 Freeman, Mark et al., *Essentials of Canadian Law. International Human Rights Law*, Ibid, pages 9-10.

41 International Committee of the Red Cross, "Advisory Services on International Humanitarian Law", 2004, pages 1-2, available at: https://bit.ly/3nd1-BS6.

42 Donnelly, Jack, *International Human Rights…*, Ibid, page 4.

were the abolition of slavery in the late nineteenth century and the recognition of workers' rights in some specific areas.[43]

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 provisions on human rights, but it developed some specific norms relating to the abolition of the slave 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.[44] In this context, a specific agency was established as soon as 1919: the International Labor Organization, which still exists today.[45]

Nevertheless, it was only after the horror of Nazism that the international community created the United Nations Organization (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.[46] They have been classified at the international level into two main groups: civil and political rights and economic, social and cultural rights. This was the result of the long-standing division at the international

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43 Freeman, Mark et al., *Essentials of Canadian Law. International Human Rights Law*, Ibid, pages 10-15.

44 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.

45 Information on the ILO is available at: https://bit.ly/3kniAzo.

46 United Nations, "Shaping our future together", "Human Rights", "What are human rights?", available at: https://bit.ly/2Imw693.

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 distinctive characteristics of international human rights law *vis-à-vis* the rest of the issues regulated by international law is that it provides rights to individuals, not to 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 their effective realization.

As with 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, sets of principles and guidelines that contribute to the progressive development of this body of law.

International human rights law has been 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 on the part of those who commit international crimes, including gross and massive human rights violations as defined by international law such as genocide or crimes against humanity.[47]

According to international human rights law, the State is primarily 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 within its jurisdiction. In fact, several States have not only 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 light of the principle of State sovereignty, any international monitoring system 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 each 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 very significant indeed because it has

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47 Sudre, Frédéric, *Droit européen et international…*, Ibid, pages 28-34.

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.[48]

48 Office of the United Nations High Commissioner for Human Rights, "International Human Rights Law", available at: https://bit.ly/3lnpuG9.

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 protection systems, 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.[1]

Although there were doubts about the desirability of developing regional protection systems, 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 policies. They have the advantage of proximity in terms of influencing each other's behavior and promoting the implementation of common norms and standards. There is also general agreement on the approach for enforcement mechanisms, which vary from region to region. In some

[1] Information on the regional systems of protection is available at their respective websites: Council of Europe, European Court of Human Rights (https://bit.ly/38yWbN6); Organization of American States (https://bit.ly/2Itwqmi); African Union (https://bit.ly/32w7guA). There is also information available at: https://bit.ly/32CmHl7.

cases, there is an emphasis on a judicial approach; in others non-judicial mechanisms, such as commissions, have a greater influence.[2]

There is a parentage relationship between international or regional organizations and the institutions which form part of the universal and regional human rights protection systems. 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 the aforementioned institutions and supervise the implementation of their decisions. Nevertheless, like their parent bodies, international and regional human rights bodies have a life of their own and enjoy a great level of autonomy.

These protection systems share some common features: a 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, adopt preventive mechanisms, interrelate with civil society and national human rights institutions, make recommendations and/or investigate human rights violations. In some cases, they can even issue compulsory judicial decisions, which can include the obligation to provide reparation for the victims.[3] There are also other regional and sub-regional mechanisms and arrangements which provide a space for dialogue, promoting or discussing human rights issues, coordinating public

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2 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://bit.ly/2IriTfA.

3 Information on human rights systems and arrangements can be consulted at: https://bit.ly/3lnrQ7H.

policies and taking decisions of common interest such as the High Level Meeting of Authorities of MERCOSUR.[4]

At the UN level, before the Human Rights Council was established at the turn of the new millennium, the universal human rights system underwent remarkable normative and institutional development over a period of 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 it soon 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. For instance, 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

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4 Information in this regard is available at: https://bit.ly/36sv0AX.

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

The GA has six 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.[5] 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 for all without distinction as to race, religion, sex or language.

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 establish commissions on a series of issues, including the promotion of human rights.

There is also a reference to respect for human rights without discrimination in Article 76(c) relating to the competences of the now defunct International Trusteeship system established at the time for territories under the control of foreign powers. In some cases, the SC also has

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5 Steiner, Henry and others, *International Human Rights in Context. Law, Politics, Morals*, Oxford University Press, Third Edition, 2008, page 739.

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 the 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

The Commission was the most important body of the United Nations on human rights issues for six decades. Its main functions consisted of promoting the progressive development of international human rights law and monitoring 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.[6]

In 1946, during its first session, the so-called "nuclear" Commission for one single time was composed of important figures from different countries, including Eleanor Roosevelt and Rene Cassin. The vast majority of these individuals recommended that the new body be composed of experts, but this was not accepted by the ECOSOC, which decided that the composition would be at the level of State

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6 Pinto, Mónica, *Temas…*, Ibid, pages 155-156.

representatives. The ECOSOC also decided that the Commission would be a technical body.[7]

This decision was expected because it was difficult to concede control over sensitive issues such as human rights.[8] Ultimately, 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.[9]

The composition of the Commission was 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 decolonization that made it necessary to have a more equitable geographic distribution in terms of representation.[10] 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 with developing norms regarding human rights. This meant including a declaration, a convention and implementation measures. At the beginning, the mandate did not allow the Commission to address specific human rights situations.

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7 United Nations Economic and Social Council Resolution 9 (II), Article 2.

8 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: https://bit.ly/32BbuB6.

9 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; Mallory Conall, "Membership of the UN Human Rights Council", Canadian Journal of Human Rights, 2013, 2:1 Can J Hum Rts, page 5.

10 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.

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 under the framework of 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).[11]

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.[12]

The law-making process involves the decision to promote a specific instrument, followed by deliberations on its appropriateness, 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, 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.

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11 Boyle, Alan et al., *The making of International Law*, Oxford University Press, 2007, pages 98-162.

12 Boyle, Alan et al., *The making of* …, Ibid, pages 116-117.

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 engaged for two more decades in the elaboration of two treaties that led to 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 mainly 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".[13]

Although 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. Also, 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

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[13] Office of the United Nations High Commissioner for Human Rights, Fact-sheet No. 2 (Rev.1), "International Bill of Rights", United Nations Geneva, 1996, page 1, available at: https://bit.ly/2GRuCTQ.

All Migrant Workers and Members of Their Families were negotiated and eventually adopted.[14]

Nevertheless, from 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 against torture, inhuman or cruel and degrading treatment, among others.[15] 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.[16] 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.[17]

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, sets of guidelines or principles, resolutions and other documents which have the character of recommendations.[18]

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

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14 Boyle, Alan et al., *The making of…*, Ibid, page 121.

15 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://bit.ly/3knBLJt.

16 Donnelly, Jack, *International human rights*, Ibid, page 59.

17 Donnelly, Jack, *International human rights*, Ibid, pages 59-60.

18 A list of human rights instruments of a 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://bit.ly/2K3jBAh.

have normative significance. They can be useful for establishing or interpreting State practice or the *opinio juris* on 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.[19]

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 benefitted from 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. By the time it had completed its work in 2006, its membership had extended to 26 human rights specialists with equal geographical representation. This body was called the 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.[20]

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 acquired a significant degree of independence and contributed to a series of declarations and guidelines on human rights issues, including

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19 Boyle, Alan et al, *The making of…*, Ibid, pages 212-311.

20 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://bit.ly/35kzdXZ.

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 on Indigenous Populations, the Working Group on Minorities, the Working Group on Business and Human Rights, the Social Forum and the Working Group on Contemporary Forms of Slavery. [21]

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 the 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. Thus, the Commission can clearly be said to have contributed greatly to the establishment of a universal system of protection based on human rights treaties, which can be compared to the ones existing at the regional level.

The international human rights treaty system comprises nine core treaties, supplemented in some cases by optional protocols, whose implementation is monitored by treaty bodies.[22] As the core human rights treaties came

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21 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://bit.ly/3nks8Nv.

22 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

into force, the treaty bodies (also referred to as committees) that were provided for in these instruments to monitor their implementation were gradually established.[23] 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.[24]

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 recommendations that by nature are not binding.

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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.

23 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://bit.ly/3loXQZc.

24 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://bit.ly/3pkAZAx.

A positive aspect of this mechanism is that, 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 of legislation and/or practices. It could also provide good practices and models for other States.[25]

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.[26] As a general rule, the State Party has to expressly recognize the competence of the treaty body to deal with complaints.[27] 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.[28]

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25 Donnelly, Jack, *International Human Rights*, Ibid, pages 57-62.

26 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).

27 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.

28 Office of the United Nations High Commissioner for Human Rights, "Human Rights Bodies", webpage of CERD, "Inter-State communications", available at: https://bit.ly/2GWhnkW.

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.[29] In all cases, there is a high political and moral cost for any State that decides not to comply with the committee's decision. Therefore, several States have changed their behavior or redressed the victims.[30]

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 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 the most recent international human rights treaties, such as visits,[31] urgent actions[32] or the opportunity to address the GA in cases where enforced disappearance is being practiced on a widespread or systematic basis.[33]

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29 Office of the United Nations High Commissioner for Human Rights, "Follow-up to Concluding Observations", available at: https://bit.ly/2Ugwfxl.

30 A series of significant examples of changes produced as a follow up to recommendations of the Human Rights Committee are described in Donnelly, Jack, *International human rights*, Ibid, pages 58-59.

31 See in this regard the Optional Protocol to the Convention against Torture, which empowers the Sub-Committee 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.

32 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.

33 International Convention for the Protection of All Persons from Enforced Disappearance, Article 34.

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 being among the most positive legacies of the Commission and they both still have 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 between this and 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.

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 on 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.[34]

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 in the 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.[35]

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 interpreting Resolution 75 (V), which was later amended and complemented by other resolutions.[36] 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 Commission's practice of taking note of 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 of the list and replies, which continued to be distributed during the Commission's sessions.[37]

Ultimately, the terrible situation of the apartheid in South Africa pushed the GA to create a special committee

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34 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.

35 Bartolomei, Maria Luisa, *Gross and Massive Violations…*, Ibid, pages 57-60.

36 Bartolomei, Maria Luisa, *Gross and Massive Violations…*, Ibid, pages 61-62.

37 Bartolomei, Maria Luisa, *Gross and Massive Violations…*, Ibid, pages 61-62. See also, Donnelly, Jack, *International human rights*, Ibid, page 52.

to deal with individual claims against that regime, setting a useful precedent that led to 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.[38] 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.[39]

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.[40] 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 as a first step.

Once considered, the Sub-Commission could dismiss these communications or transmit them to a second Working Group on Situations (WGS), which was composed of five members of the Commission acting in an individual capacity. The WGS 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 such as 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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38 Sunga, Lyal S., "What effect if any will the UN Human Rights Council have on special procedures?", in: Alfredsson, Gudmundur et al (eds.), *International human rights monitoring mechanisms: essays in honour of Jakob Th. Möller*, Leiden, Martinus Nijhoff Publishers, 2009, pages 169-183.

39 United Nations Economic and Social Council Resolution 1235 (XLII).

40 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 involved the apartheid regime in South Africa (1967), the territories occupied by Israel (1967), the situation in Chile (1974), and the use of country mandates was then extended to many more cases during the 1980s.[41]

These decisions were made at a specific moment in history: the Commission had experienced an enlargement of African, Asian and Caribbean members, who were pushing for a change at a time when Western Powers were not interested in dealing with country situations for different reasons, including in particular, the decolonization process and a shameful institutional framework of racial discrimination in some countries.[42]

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 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.[43]

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41 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.

42 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://bit.ly/3kmB0jQ.

43 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://bit.ly/35kJrrq.

Within 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 rights issues and country situations. At the same time, they have had a very close relationship with other stakeholders such as NGOs.[44]

Regarding country visits, special procedures mandate-holders currently make an average of two 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 thematically sensitive in the country.

In terms of their communications-related function, 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, and to take specific measures.

Special procedures mandate-holders can help to put issues on the international agenda through thematic reports, as occurred a few years ago with the report

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44 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://bit.ly/3phYHxb.

on secret detention;[45] they can make recommendations, including on ways to interpret existing provisions; or develop new norms and standards, as was the case with the Guiding Principles on Internal Displaced Persons a few decades ago.[46]

These mandates took different forms, including special rapporteurs, Secretary-General representatives or special representatives, independent experts and working groups, and they all helped 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 UN.

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.[47] As of October 2020, there are 44 thematic mandates and 11 country mandates reporting to the new Human Rights Council.[48] In the last few decades, the number of thematic mandates has steadily grown, promoted by States in accordance 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 encouraging States to comply with recommendations.

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45 Alston, Philip, "Hobbling the monitors. Should UN human rights monitors be accountable?", Volume 52, N° 2, Harvard University, Summer 2018, page 573, available at: https://bit.ly/38B26S6.

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

47 Human Rights Council Resolution A/HRC/RES/5/1, Appendix 1.

48 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://bit.ly/2K3lsVL. See also: https://bit.ly/35mGXJh.

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 evaluating the situation of their peers. It may also help to facilitate information on specific issues and consider the possibility for States to develop standard-setting.[49]

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, ultimately, influences States to seriously consider the advisability of following 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 in the international arena and usually pay a high political cost as a result.

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 of various kinds 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 enabled the competence of non-conventional mechanisms to be 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

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49 Alston, Philip, "Hobbling the monitors…", Ibid, pages 579-580.

Arbour—the defunct Commission, NGOs and relevant scholars.[50] 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 from the mid-1990s until the establishment of the Human Rights Council.[51]

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.[52] The UN High Commissioner was thought to reinforce the work of the existing Center for Human Rights of the Secretariat. According to GA Resolution 48/141, the candidate for the post is appointed by the Secretary-General, approved by the GA, and has a four-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 and international law; he or she shall promote

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50 See for instance, 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.

51 Alston, Philip, "Hobbling the monitors…", Ibid, pages 571-572.

52 United Nations General Assembly Resolution A/RES/48/141.

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 (now the Council) and to the GA (formerly through the ECOSOC, now 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 on a significant relevance in the whole universal human rights system. His or her Office provides secretariat support to the 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 improvement efforts made by his predecessor, Boutros Boutros Galli, on 14 July 1997, then Secretary-General, Kofi Annan, submitted a report in which he informed the GA of 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 designed to increase efficiency and coordination on human rights throughout the whole organization.[53]

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 matters 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 helped to strengthen all the work of the Office both at the administrative—support provided to 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.[54]

Since its creation, this high-level position has been held 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 provided to UN intergovernmental bodies dealing with human rights, as well as to the system of treaty bodies and special procedures, in addition to 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

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53 United Nations Report "Renewing the United Nations. A Programme for Reform", UN Document A/51/950, 14 July 1997, pages 63-64.

54 Office of the United Nations High Commissioner for Human Rights, News and Events, "UN Budget shortfalls seriously undermine the work of human rights treaty bodies", 17 May 2019, available at: https://bit.ly/3ncr3Ht.

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.[55]

I.2.1.7 The decline of the Commission

In its final years, the Commission received criticisms of politicization, selectivity and double standards. These were the main reasons for its discredit and decline as well as its eventual replacement by the Council.[56] The politicization of the Commission was 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

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55 Information available on the website of the Office of the United Nations High Commissioner for Human Rights, "Our priorities": https://bit.ly/3pnxHwa.

56 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.

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.[57] This working group prepared a report on the issue and made recommendations in this regard.[58] However, these efforts were not enough either to improve the mechanisms or to stop the growing negative image of the system. These difficulties deepened in 2000, when some of the Commission's subsidiary bodies, notably the Sub-Commission, faced limitations on their competences. Indeed, the Sub-Commission lost its mandate to adopt resolutions on country situations.[59]

At the same time, although 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: Libya and Syria.[60]

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

58 This decision can be consulted from UN Document E/CN4/dec/2000/109.

59 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: https://bit.ly/38Dq6-DV. 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.

60 Mallory, Conall, "Membership of the UN Human Rights Council…", Ibid, page 7.

Criticisms deepened in 2003, when Libya was appointed as Chair of the Commission.[61] 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.[62] In this sense, the election of Sudan in 2004 was severely criticized by many actors, including the United States.[63] 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 tried 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.[64]

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 change, but it was only when then Secretary-General, Kofi Annan, decided to intervene that a major reform was finally considered and implemented.

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61 Alston, Philip, "Reconceiving the Human Rights Regime…", Ibid, page 2.

62 Mallory, Conall, "Membership of the UN Human Rights Council…", Ibid, page 7.

63 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.

64 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 eight-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.[1] In this report, he focused on five substantive issues: peace, security and disarmament; economic and social affairs; development cooperation, environment, habitat and sustainable development; humanitarian affairs; civil society and human rights.[2] Regarding human rights, Annan announced that he had 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.[3]

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".[4] 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

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1 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.

2 Ibid, pages 36-69.

3 Ibid, page 26, paras. 78-79; page 64, paras. 97-206 and action 14.

4 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.

Declaration—but warned of the credibility challenges that this body faced at the time, due to its politicization and the risks that this situation entailed for the system.[5]

Despite 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.

During the previous two years, Annan had contributed in a significant way to creating awareness about the existence of a new historical 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—which included the creation of a Peacebuilding Commission— went beyond the threats to peace and security and referred to a way to enhance the effectiveness of the work carried out by the United Nations, including many of its main bodies: the GA, the SC, the ECOSOC, the Commission on Human Rights and the Secretariat.[6]

Regarding the Commission on Human Rights, while the panel of experts appreciated the efforts made by the High Commissioner and the Secretary-General to inte-

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5 United Nations General Assembly, report of the Secretary-General "Strengthening of the United Nations…", Ibid, page 11, paragraph 46.

6 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.

grate human rights into the work of the UN as a whole, they affirmed that the credibility and professionalism of the Commission had been severely undermined.[7] Indeed, according to the panel of experts, States had sought membership of the Commission to avoid being criticized or to criticize other States.

In this context, the panel affirmed that law-making and standard-setting could not be performed by States which demonstrated a lack of commitment to the promotion and protection of human rights. Moreover, the experts indicated that the Commission could not have double standards when dealing 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 that Member States of the UN consider upgrading the Commission to a Council, in line with the importance of the issue as a main pillar of the Organization, together with the ECOSOC and the SC.[8]

The report by 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

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7 United Nations General Assembly, report of the Secretary-General "A more secured world…", Ibid, page 88.

8 United Nations General Assembly, report of the Secretary-General "A more secure world…", Ibid, page88.

rights for all", where he suggested important changes for the organization, including in relation to human rights issues.[9]

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 21st century: peace and security, development, and human rights. He affirmed that they are not only imperative but that they also reinforce each other.[10]

The changes proposed by Annan have to be understood in the historical context. As the former Secretary-General himself recognized in his report, certain events had created mistrust in the UN, sometimes for conflicting reasons. He cited as an example the fact 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.[11] Nevertheless, Annan was convinced of the relevance of multilateralism. He took stock of his eight 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.[12]

The first part of the 2005 report, entitled "Freedom from want", focused on international strategies to promote development and achieve the proposed goals.[13] The second part of the report, on "Freedom from fear", echoed the

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9 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.

10 Ibid, paragraphs 14, 16 and 17.

11 Ibid, paragraph 10.

12 Ibid, paragraph 4.

13 Ibid, paragraphs 25-73.

proposal by the panel of eminent experts to create a Peacebuilding Commission.[14]

The third 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, which are key in terms of prevention. These teams are able to provide timely information and draw attention to urgent situations that require UN intervention. 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.[15]

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 but emphasized the credibility problems faced by this body. In this context, he suggested creating a Human Rights Council.[16]

He framed this initiative as a major change, which came 60 years after the creation of the UN. Indeed, he recalled that the UN had a system of three Councils: the SC, the ECOSOC and the Trusteeship Council—which had suspended its work and continued to exist only on paper. 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

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14 Ibid, paragraphs 74-126.
15 Ibid, paragraphs 127-152, in particular paras 140-147.
16 Ibid, paragraphs 181-183.

a subsidiary body of the GA, with a smaller size, elected by a two-thirds majority present and voting.[17]

In addition, the Secretary-General produced an explanatory note to his report, in which he only focused on the future Human Rights Council and provided more inputs on the need for reform and the way to achieve it. Indeed, Annan indicated that a standing body would make it possible to deal with emergency situations. He also emphasized that being elected by the GA would make members more accountable and the body more representative.[18]

Annan also argued 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.[19]

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 instead it would provide peer scrutiny on the basis of the Universal Declaration. He also thought that OHCHR could help in the process by making information available in this regard. In his opinion,

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17 Ibid, paragraph 183.

18 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.

19 Ibid, paragraph 5.

OHCHR could also have competences to contribute in cases of urgent situations.[20]

The then Secretary-General believed that the body should lead to a rationalization of the work of the Third Committee of the GA. In addition to the new peer mechanism, Annan emphasized the importance of the Council also focusing on the interpretation and development of international human rights law.[21]

The final decision about the reform of the human rights system came 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 over the following five 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 of continuing the States' commitment regarding certain specific groups, such as indigenous peoples, persons with disabilities and minorities.[22]

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).[23] It was decided that the Council would be responsible for promoting respect for the protection of all human rights and freedoms without discrimination. The leaders also decided that the Council should address situations involving human rights violations and

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20 Ibid, paragraphs 6-11.
21 Ibid, paragraphs 11-17.
22 United Nations General Assembly Resolution A/RES/60/1, paragraphs 121-131.
23 United Nations General Assembly Resolution A/RES/60/1, paragraphs 157-160.

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 all essential elements of the new UN body.

Overall, the World Summit did not bring major institutional changes as proposed by the Secretary-General. Although the original proposal was very ambitious and some of the most important proposals were not incorporated, the major consequence in this resolution came with the decision taken regarding the universal human rights system.

Not all the suggestions for structural changes were able to be carried out, but Annan's proposal to upgrade human rights in the United Nations became a reality. The decision to create the Human Rights Council was undoubtedly one the most important legacies of his eight-year mandate, which 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.[1]

It was decided that the Council would be based in Geneva, where the sessions of the former Commission had taken 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.[2]

The competence to deal with human rights situations was preserved. In line with the 2005 World Summit decision, the Council was not only tasked with promoting

1 United Nations General Assembly Resolution A/RES/60/251. See also A/60/PV.72, pages 5-6.

2 United Nations General Assembly Resolution A/RES/60/251, operative paragraph 4.

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 promote the mainstreaming of human rights within the UN.

The decision to specifically include the possibility to address and prevent human rights violations in specific countries was particularly positive. [3] Although the competence to do so started in the 1970s 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 a later stage, in the institution-building process for the new body in 2006. Indeed, the decision was taken against the will of some States which would have preferred to have an intergovernmental body with a limited mandate regarding country situations.[4]

Furthermore, the mandate of the Council also managed to preserve a significant and positive continuity of several functions performed by the defunct Commission, namely making recommendations to further develop international human rights law. There was also a positive continuity in the sense of allowing observers, including NGOs, to participate in the new Council, in line with the practice of the Commission.[5]

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3 United Nations General Assembly Resolution A/RES/60/251, operative paragraphs 2-5.

4 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.

5 United Nations General Assembly Resolution A/RES/60/251, operative paragraphs 5 and 11.

II.2.2 Main changes in enthe 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 make clear and specific changes to the new Council. To 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 of making 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.[6]

Regarding its status, it was decided that the Human Rights Council would be a subsidiary inter-governmental body of the GA.[7] As a consequence, the Council directly reports to the GA, the most democratic UN body, composed of all States of the Organization.[8] The decision to officially upgrade the Council was of 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, for which there were already two separate Councils (SC and ECOSOC) in place.[9]

From a legal perspective, the ideal change for the Council would have been a recognition of its existence in

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6 United Nations General Assembly Resolution A/RES/60/251, operative paragraphs 5 and 7-10.

7 United Nations General Assembly Resolution A/RES/60/251, operative paragraph 1.

8 United Nations General Assembly Resolution A/RES/60/251, operative paragraph 5(j).

9 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://bit.ly/3kqKNVM.

the UN Charter. However, 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, the 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 open because operative paragraph 16 of Resolution 60/251 provided for a review of the work and functioning of the Council five years after its creation. However, in 2011, during the review, nothing was changed in this regard.[10] Consequently, the Council has a consolidated higher status than its predecessor.

A second relevant change was the HRC's composition, which had become a major problem for the defunct Commission by the beginning of the new millennium. The election of a number of 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 criteria to be applied when electing 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.[11] The United States added another proposal to these criteria: that the State should not have had sanctions imposed by the Security Council.[12]

During negotiations, the 2004 proposal by the panel of eminent experts—consisting of universal membership—enjoyed the support of countries such as Canada. Annan's own proposal in his 2005 report—i.e. a reduced membership of 15 states—was strongly supported by the

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10 United Nations General Assembly Resolution A/RES/65/281, operative paragraphs 1-3.

11 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://bit.ly/32yxKM0.

12 Alston, Philip, "Reconceiving the Human Rights Regime…", Ibid, page 3.

United States. Nevertheless, the majority of the GA members decided otherwise.

This was because several States considered that there were many problems with both extreme options: on the one hand, 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 with regard to the 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.[13]

Consequently, GA Resolution 60/251 decided that the Council would consist of 47 Member States. The membership would be based on an 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.[14]

Although 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 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.

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13 Mallory, Conall, "Membership of the UN Human Rights Council…", Ibid, page 12.

14 United Nations General Assembly Resolution A/RES/60/251, operative paragraph 7.

The new distribution represented a significant power shift, as in the defunct 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 was more influenced by the African Group and the Organization of Islamic States (OIC) in several although not all initiatives.[15]

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 the then Secretary-General.[16]

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

A third change focused on the periodicity of sessions. The Commission had one single annual session and only convened special sittings to discuss emergency situations on an exceptional basis. Firstly, because the ECOSOC only authorized the Commission to have special sessions as

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15 Mallory, Conall, "Membership of the UN Human Rights Council…", Ibid, pages 13-14.

16 In this regard, see Alston, Philip, "Reconceiving the Human Rights Regime…", Ibid, Chapter III.B and C. See also A/60/PV.72, pages 6-7.

late as 1990 through Resolution 1990/48. In the following years, until 2005, it held five special sessions.[17] In part, this could be explained by the fact that 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 three sessions per year for a duration of no less than ten weeks and that it would be able to hold special sessions if one third of the members so requested.[18] 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 October 2020, the Human Rights Council had 45 regular sessions and 28 special sessions. The latter were held to deal mainly with specific country situations, with two exceptions where the special sessions were convened to deal with urgent matters. 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.[19]

A fourth change was related to the terms and conditions 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.[20] The election of the members of the Council by the General Assembly—and not the ECOSOC as in the case of the predecessor body—is more democratic and, in principle, it requires more support to be elected. The limit on re-election was designed to allow small States to be

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17 Human Rights Council, "About HRC", "HRC Archives", "Sessions", "Previous sessions", available at: https://bit.ly/35nXhta.

18 United Nations General Assembly Resolution A/RES/60/251, operative paragraph 10.

19 Human Rights Council, "HRC Sessions", "Regular Sessions", available at: https://bit.ly/3kqacPF. See also Human Rights Council, "HRC Sessions", "Special Sessions", available at: https://bit.ly/36v3hzK.

20 United Nations General Assembly Resolution A/RES/60/251, operative paragraph 7.

members of the Council and, at the same time and probably more importantly, to limit the influence of powerful countries on the results 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, cooperation with non-conventional mechanisms such as special procedures—including standing invitations to visit the country at any given moment—and the information provided by NGOs. None of these proposals were included in the final result of the negotiations.

The United States suggested that membership should 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 this suggestion and, ultimately, it was not accepted.[21]

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.[22] This decision was criticized for its vagueness and limited scope.[23] 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 the highest standards in the field of human rights and fully cooperate with the Council, and that they would be reviewed by the universal periodic review mechanism (UPR) during their

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21 Mallory, Conall, "Membership of the UN Human Rights Council…", Ibid, page 22.

22 United Nations General Assembly Resolution A/RES/60/251, operative paragraph 8.

23 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.

membership.[24] What is more, in cases of grave and systematic violations, the GA could suspend membership of States by a two-thirds majority.[25]

Some analysts consider the possibility of suspension as an important deterrent, while others consider that the prospects of suspension are low because it has to be originated in the Council by a qualified majority—a two thirds majority— and the decision has to be confirmed by the GA.[26] In practice, there has only been one 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.[27]

When it comes to assessing the membership provisions set out in Resolution 60/251, I 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 creating an unrepresentative institution, both geographically and in terms of religious, political and cultural backgrounds. At the same time, it would be wrong not to exercise 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 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.[28]

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24 United Nations General Assembly Resolution A/RES/60/251, operative paragraph 9.

25 United Nations General Assembly Resolution A/RES/60/251, operative paragraph 8.

26 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.

27 Human Rights Council Resolution on the "Situation of Human Rights in Libyan Arab Jamahiriya", A/HRC/RES/S-15/1, operative paragraph 14.

28 Mallory Conall, "Membership of the UN Human Rights Council…", Ibid, pages 10-11.

In this context, it should be said that, even if it is not enough to guarantee the most appropriate composition, there have been cases of States with very negative human rights records which have not taken part in 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.[29]

Nevertheless, since the requirements set out in Resolution 60/251 are not as strong as they should be, it could well happen that States with very negative human rights records are elected to the Council. The secret nature of the election, the growing practice of clean slates—that is to say, putting forward the same 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 this to occur.[30]

The 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 footing. 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 of dealing 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 that the creation of the UPR has been considered one of the most important innovations of the HRC.[31]

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29 Mallory Conall, "Membership of the UN Human Rights Council…", Ibid, pages 25-26.

30 Mallory, Conall, "Membership of the UN Human Rights Council…", Ibid, pages 32-33.

31 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://bit.ly/3lpfDPT.

II.3 Main mechanisms of the Human Rights Council

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

Although the GA outlined many of the novel 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 of concluding negotiations on its institution building process within the deadline of 365 days.[1] 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.[2]

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

1 United Nations General Assembly Resolution A/RES/60/251, operative paragraph 6.
2 United Nations General Assembly Resolution A/RES/60/251, operative paragraph 6.

six pillars of the so-called institution-building process of the Council.[3]

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 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 were personally presided over by the President of the Human Rights Council who, on the very last available day, presented a compromise proposal which was accepted minutes before midnight.

In light of the negotiation dynamics 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.[4] To achieve this, the President had to agree to abolish two country mandates from the system of special procedures, on the human rights situations in Cuba and in Belarus. This concession consolidated a trend towards a decrease in country mandates—from 26 in 1998 to 13 in 2006.[5] This tendency changed over time, as we will see below.

The whole intense year of negotiations ended in 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.

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3 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, 2007, page 9.

4 Megna, Abraham, *Building the New Human Rights Council*, Ibid, page 5.

5 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.

Nevertheless, the following day Canada highlighted to the newly elected President of the Council that the previous night there had been no consensus on the adoption of the so-called institution-building package. The new President, Ambassador Costea, from Rumania, put the interpretation of Canada to a vote, on the understanding that the package had indeed been approved the night before. By 46 votes in favor and 1 against—Canada—the President's interpretation prevailed.[6]

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 institution-building package, Resolution 5/2 imposed some specific rules on special procedures mandate-holders in regard to their conduct when performing their activities. Resolutions 5/1 and 5/2 were endorsed by its hierarchical body, the General Assembly.[7]

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.

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6 Megna, Abraham, *Building the New Human Rights Council*, Ibid, page 11.
7 United Nations General Assembly Resolution A/RES/62/219.

In this sense, a few decades ago, a group of countries known as the "Like-Minded Group" questioned the Commission's 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 adopt a more cooperative approach.[8]

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 in the early days of the Commission on Human Rights. In 1950, France had 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 existing treaties and, at the same time, to share its human rights policy with Member States of the Commission.[9]

Finally, a reporting 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. In the opinion of experts, this procedure suffered from 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

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8 Alston, P., "Reconceiving the human rights regime…", Ibid, page 6.
9 Alston, P., "Reconceiving the human rights regime…", Ibid, page 7.

ceased to be of general interest and lost support, concluding its work in 1981, after 25 years of existence.[10]

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 significant participation by stakeholders different from States, but in the end that did not happen.[11]

During negotiations relating to the UPR, a number of 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 of the ILO treaties. The Conference Committee composed of State representatives selects some cases for further review each year, providing the mechanism with political support and also a higher level of scrutiny. There are also specific mechanisms to deal with violations of the right to freedom of association and freedom from discrimination in employment. The ILO also has a procedure of direct contacts designed to provide advice on improving 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.[12]

II.3.2.2 Negotiations and agreement on the new mechanism

The President of the Human Rights Council requested Morocco to facilitate negotiations of this important pillar

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10 Alston, P., "Reconceiving the human rights regime…", Ibid, page 7.
11 Megna, Abraham, *Building the New Human Rights Council*, Ibid, page 34.
12 Donnelly, Jack, *International human rights*, Ibid, pages 63-64.

of the so-called institution building package, and the country successfully achieved a general agreement before the deadline. Negotiations included the legal basis of the mechanism; principles and objectives; cycles and periodicity 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, the voluntary commitments of the State concerned¬including those presented as candidates of the HRC—and applicable international humanitarian law.

Bearing in mind the issues that contributed to the demise of the former Commission, States adopted a number of principles that would 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.[13] 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.[14]

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13 Human Rights Council Resolution A/HRC/RES/5/1, "Institution-building of the United Nations Human Rights Council", Annex, paragraph I.3(g).

14 Human Rights Council Resolution A/HRC/RES/5/1, Ibid, paragraph 3 (a)-(l).

The principles also expressly included a reference to the fact that the mechanism would not diminish the possibility of dealing 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.

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.[15] 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 of ensuring 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 examination 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.[16]

Thus, the solution was more inclined towards a lesser participation by 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 feature, which distinguished it 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,

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15 Human Rights Council Resolution A/HRC/RES/5/1, Ibid, paragraph 3(m).
16 Human Rights Council Resolution A/HRC/RES/5/1, Ibid, paragraph 31.

cooperation, and technical assistance with the consent of the State concerned.[17]

At the time, it was decided that the periodicity of the mechanism would be four years and, during that period, all UN Member States would be under examination, 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.[18] These decisions sought to emphasize that the Council would take its members' commitment to human rights seriously .

During the negotiations, there were conflicting positions regarding the information to be considered during each review. Several African and Asian States emphasized the need to consider information provided by the State exclusively. In contrast, 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.[19]

In the end, it was agreed that there would be a report from the State and two summaries prepared by 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.[20]

During the negotiations, there were exchanges on the role of OHCHR in the review process. Some States wanted to give the High Commissioner the capacity to analyze the

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17 Human Rights Council Resolution A/HRC/RES/5/1, Ibid, paragraph 4.

18 Human Rights Council Resolution A/HRC/RES/5/1, Ibid, paragraphs 5-14.

19 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.

20 Human Rights Council Resolution A/HRC/RES/5/1, Ibid, paragraphs 15-17.

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.[21]

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 could participate in the review and other stakeholders could be present. The majority of States rejected the possibility that NGOs or national institutions could participate in the dialogue.[22]

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 might ask that one member of the troika be from its regional group and could 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 three hours, during which there would be a presentation by the State concerned followed by an interactive dialogue. An additional half hour would be devoted to the adoption of the outcome in the plenary of the Council.[23]

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 by 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 significant achievement because there was a

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21 Megna, Abraham, *Building the New Human Rights Council*, Ibid, page 38.
22 Human Rights Council Resolution A/HRC/RES/5/1, Ibid, paragraph 18.
23 Human Rights Council Resolution A/HRC/RES/5/1, Ibid, paragraphs 19-25.

proposal to include only recommendations accepted by the State.[24]

Resolution 5/1 decided that the reviews in subsequent cycles would focus on implementation, called on 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.[25]

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.[26] 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 parameter for the failure or success of the new body.[27]

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

An initial assessment of the creation of the UPR is positive and allows a certain degree of optimism. This new mechanism was seen as an improvement, even by scholars who from the beginning had a very negative opinion about the Council's performance. The major achievement is that the

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24 Megna, Abraham, *Building the New Human Rights Council*, Ibid, page 37.
25 Human Rights Council Resolution A/HRC/RES/5/1, Ibid, paragraphs 27-36.
26 Human Rights Council Resolution A/HRC/RES/6/17.
27 Megna, Abraham, *Building the New Human Rights Council*, Ibid, page 35.

human rights record of every UN Member State is subject to international scrutiny. [28]

Indeed, there are significant grounds for welcoming the new mechanism and its impact. For six decades, albeit in a selective manner, the Commission considered the situation of several developing countries facing dictatorships, armed conflicts or even cruel regimes founded on institutionalized race-based discrimination. 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 significant 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 for suspected terrorists or serious problems of violence against women.[29]

In any case, during the first cycle, which reviewed all UN Member States, there was also a serious procedural problem: the list of speakers. It became usual practice for some States to arrive at the Council as early as possible on the day when the list was opened—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 human rights situation of the State concerned instead of making recommendations to

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28 Baehr, Peter, "The Human Rights Council: A preliminary evaluation", Column, Netherlands Quarterly of Human Rights, Vol 28/3, 2010, pages 329-331.

29 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.

improve the situation at the national level. The results of the dialogue impacted the outcome report on the State under review. Fortunately, this situation was resolved during the 2011 HRC review, as 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, the UPR is in its third cycle (2017-2021) and is trying to focus more on implementing the recommendations made by the mechanism in the previous cycles.

The level of cooperation by 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 of adopting 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 examination during that same year.[30] The review finally took place in October 2013 and Israel participated again in the third cycle in January 2018.[31]

Since the creation of the UPR, a number of States have submitted midterm implementation reports (approximately two years after the recommendations were made) on a voluntary basis. 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

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30 UPR Info, "Israel absent from its own UPR", 30 January 2013, available at: https://bit.ly/38xr1pz.

31 Office of the United Nations High Commissioner for Human Rights, "Universal Periodic Review-Israel", available at: https://bit.ly/3lomxVT.

the implementation of the recommendations they received during the first and/or second cycle, and one State had submitted a report regarding the implementation of selected recommendations concerning the third cycle.[32] These reports constitute a key 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 therefrom.

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 egalitarian mechanism has represented significant progress for the universal system of protection of human rights.

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 rap-

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[32] Human Rights Council, "Universal Periodic Review", "UPR Mid-term information", "UPR Mid-Term reports", available at: https://bit.ly/38CE60K.

porteurs, 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 all submit nominations. OHCHR is now mandated to prepare an updated list of all nominated candidates and publicize the vacancies.[33]

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 convening a panel of experts to do this work, but in the end this option was ruled out.[34]

The Consultative Group considers candidates from the public list prepared by OHCHR, but in exceptional cases it may consider candidates not on 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.[35]

Moreover, the Council decided that technical and objective requirements for eligible candidates should be adopted by a resolution at a later stage.[36] Thus, the HRC, in

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

34 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.

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

36 Human Rights Council Resolution A/HRC/RES/5/1, Ibid, paragraph 41.

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 of 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 on 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.[37]

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 on the support of any State, international organization or NGO. Moreover, the selection procedure now has more filters—e.g. the consultative group and OHCHR—and there are objective requirements for selecting 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

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

would be taken on a case-by-case basis, within the context of negotiations of specific Council resolutions.[38]

Resolution 5/1 only specifies that the discontinuation of mandates should be based on the premises of better promotion and protection of human rights. Also, as general rules for improvement, the resolution indicates that mandates should be consistent 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 by expanding an existing one, or requesting joint action from various mandate-holders.[39]

Negotiations on the future of the mandates were very difficult and divisive. There was general disagreement on the criteria for establishing 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 at a consensus decision on any of these topics.

There were also exhausting negotiations about whether to maintain country mandates or not. Some States, mainly from Asia and Africa, requested the elimination of country mandates or the definition of stricter criteria for their establishment. These States argued that specific human rights situations could be considered in special sessions or within the UPR.[40] In contrast, other countries, including Argentina, supported their preservation.

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

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

40 Megna, Abraham, *Building the New Human Rights Council*, Ibid, pages 27.

During the last days of negotiations prior to the adoption of Resolution 5/1, the HRC President proposed preserving both thematic and country mandates. In this context, China insisted on the need to set a 2/3 majority of votes to establish new country mandates and even threatened to oppose consensus on the whole institution-building package if this proposal was not taken on board. This proposal was opposed by the EU. Finally, China accepted a simple majority for the establishment of country mandates.[41]

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.[42]

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.[43] 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.[44]

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

The possibility of adopting 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 had been proposals to reform the incipient system of special procedures. At the time, the Group of

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

42 Human Rights Council Resolution A/HRC/RES/5/1, Ibid, paragraphs 60 and 62.

43 Human Rights Council Resolution A/HRC/RES/5/1, Ibid, paragraph 60.

44 Human Rights Council Resolution A/HRC/RES/5/1, Appendixes I-II.

77 (G-77)[45] suggested a radical reform: replace the system of special procedures with working groups composed of Government representatives based in Geneva. The proposal was not accepted and the system became even stronger in the following years.[46]

However, during the 1990s, there was a new wave of proposals for reform at the intergovernmental level. In this sense, the Asian Group refloated 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. 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.[47]

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 of a code of conduct for special procedures mandate-holders.[48] This resolution—which faced strong opposition from the EU—was put to a vote and, consequently, was adopted with the support of all African and Asian States, Brazil and Ecuador, and a number of abstentions, including those of Uruguay and Argentina.[49]

In this context, in June 2007, the Council adopted Resolutions 5/1 and 5/2 on the institution-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.

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45 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.

46 Alston, Philip, "Hobbling the monitors…", Ibid, pages 582-584.

47 Alston, Philip, "Hobbling the monitors…", Ibid, pages 585-587.

48 Human Rights Council Resolution A/HRC/RES/2/1.

49 Megna, Abraham, *Building the New Human Rights Council*, Ibid, page 31.

In the preamble to Resolution 5/2, one can observe many of the reasons put forward by the AG during negotiations for pushing 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 on the scope of the mandate given by the Council as well as the UN Charter.[50] In its short operative part, resolution 5/2, which adopts the Code of Conduct, urges States to cooperate with special procedures, provide all information and respond to communications in a timely manner.[51]

The Appendix to Resolution 5/2 includes the text of the Code of Conduct. It affirms that its objective is to enhance the ethical conduct and professionalism of mandate-holders in the performance of their functions and indicates that the draft manual for special procedures —at that time being drawn up by mandate-holders themselves during their annual meetings— should be in conformity with the Code.[52]

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

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50 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.

51 Human Rights Council Resolution A/HRC/RES/5/2, operative paragraphs 1-2.

52 Human Rights Council Resolution A/HRC/RES/5/2, Appendix, Code of Conduct, articles 1-2.

not to be influenced by any stakeholder; to perform their activities with the promotion of cooperation with States in mind; to 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.[53]

Mandate-holders have to consider objective and reliable information from credible sources and cross check this information, as well as 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.[54]

The Code of Conduct also includes specific requirements for the admission of letters of allegations by individuals claiming human rights violations (e.g. they 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, which states that they can only be carried out with the concerned State's consent.[55]

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 managed through diplomatic channels. This changed a former practice on the part of some mandate-holders who used to address local authorities directly.

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53 Human Rights Council Resolution A/HRC/RES/5/2, Appendix, Code of Conduct, article 3.

54 Human Rights Council Resolution A/HRC/RES/5/2, Appendix, Code of Conduct, articles 4-7.

55 Human Rights Council Resolution A/HRC/RES/5/2, Appendix, Code of Conduct, articles 9-11.

Finally, the Code of Conduct established that mandate-holders are accountable to the Council for the fulfillment of their mandates.[56] Algeria (on behalf of the AG), Pakistan (on behalf of the OIC) and Cuba (on behalf of the G77) called for the establishment of an ethics committee to monitor compliance with the Code.[57] This initiative was excluded in the final version of the Code of Conduct.

II.3.3.3 Assessment of reforms to the special procedures system

The result of the institution-building package was mixed. On a positive note, there was a clear improvement in the system for nominating, selecting and appointing mandate-holders. Indeed, this process is now much more democratic and transparent than that of the Commission. Moreover, the preservation of country mandates in a resolution adopted by consensus represented an achievement, even though they have to be renewed annually.

Regarding the Code of Conduct, although during negotiations the majority of States promoted a system of special procedures that was 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 ultimately 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. Although the special procedures manual—adopted in 2008 with the aim of self-regulating the behavior and working methods of mandate-

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56 Human Rights Council Resolution A/HRC/RES/5/2, Appendix, Code of Conduct, articles 12-15.

57 Alston, Philip, "Hobbling the monitors…", Ibid, pages 566-567.

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.[58]

Scholars—even those who are critical of the result in this important pillar—highlight the fact that the system was preserved and, therefore, has the same potential to develop all the ways and means created during the time of the Commission.[59]

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 given the ideological and political differences among States, the dynamics in inter-governmental negotiations at the Council and the complex participation of many stakeholders in negotiations on a resolution regarding the mandates of special procedures mandate-holders.[60]

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58 Alston, Philip, "Hobbling the monitors…", Ibid, pages 618-628.

59 Spohr, Maximilian, "United Nations Human Rights Council…", Ibid, pages 185-187.

60 Alston, Philip, "Hobbling the monitors…", Ibid, page 582.

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 having a roster of experts who could be called for specific purposes. In contrast, the vast majority of countries from the South—including Argentina—pushed for a formal mechanism that could be the heir to the Sub-Commission and technically assist the new Council in performing its mandate.

In the end, there was consensus on having a consultative body called the Advisory Committee, composed of 18 members—instead of 26 like the former Sub-Commission—which would serve as the think tank for the Council. The vast majority of States wanted to ensure that the limits placed on the Sub-Commission's power of autonomy in the last years of its work were maintained.[61]

The election process for the experts of this Committee begins with the nomination by States of candidates from their own region and ends with the election by secret ballot held in a specific meeting of the Council.[62] They have a three-year mandate renewable only once. [63]

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61 Human Rights Council Resolution A/HRC/RES/5/2, paragraph 65.

62 Nomination 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.

63 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.

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 submit 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-setting by the expert body unless the Council decides otherwise.[64]

The new expert body has two sessions each year for a maximum of ten working days per year. It was decided that 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.[65]

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 states that the fate of all subsidiary mechanisms of the former Sub-Commission will be decided by the Human Rights Council.[66]

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. There were four of these

64 Human Rights Council Resolution A/HRC/RES/5/2, paragraphs 75-78.
65 Human Rights Council Resolution A/HRC/RES/5/2, paragraphs 79-83.
66 Human Rights Council Resolution A/HRC/RES/5/2, paragraph 81.

mechanisms at the time that the Sub-Commission ended its work: 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.[67] During its long existence, it produced reports and made recommendations based on 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 ILO Convention No. 29 on Forced Labor of 1930.

The task of the Working Group was complemented by the GA's decision to establish a UN Voluntary Trust Fund on Modern Forms of Slavery in 1991.[68] The fund is managed by OHCHR, with the advice of a Board of Trustees composed of experts from all regions of the world. At the end of each year, the Secretary-General approves yearly grants, which are paid the following year.[69]

In 2007, the recently established Council decided to replace the former Working Group with a Special Rapporteur who would report directly to it.[70] The new Special Rapporteur gives careful consideration and recommendations

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67 United Nations Commission on Human Rights Resolution 1998/42.

68 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.

69 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://bit.ly/3eSZCPT.

70 Human Rights Council Resolution A/HRC/RES/6/14, operative paragraph 7.

on the issue using the existing legal framework as a basis for his or her work. The work of this mandate is valuable due to the regrettable fact that we continue to see instances of modern slavery.

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

A working group focusing on indigenous populations was created by the Sub-Commission in 1982 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.[71]

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.[72] 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.[73] Its 16 members have a three-year mandate renewable only once.[74]

In addition to the working group and the forum, in 2001, the Commission decided to establish a Special

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71 United Nations Economic and Social Council Resolution 1982/34, operative paragraphs 1-2.
72 United Nations Commission on Human Rights Resolution 1998/20.
73 Economic and Social Council Resolution 2000/22, operative paragraph 1.
74 Economic and Social Council Resolution 2000/22, preambular paragraph 7 and operative paragraph 1.

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.[75]

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 with 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 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.[76] 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.

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75 United Nations Commission on Human Rights Resolution 2001/57, operative paragraph 1.

76 Human Rights Council Resolution A/HRC/RES/6/36.

II.3.4.2.3 The Forum on Minority Issues

The Sub-Commission's Working Group on Minorities 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 examine possible solutions for the problems among minorities and States and recommend further measures when necessary.[77] For 11 years, it helped by preparing studies on the notion of minorities and specific issues such as education, participation in public life, inclusive development and conflict prevention.[78]

In 2005, the Commission decided to establish an Independent Expert on minorities to promote the Declaration along with best practices on the issue, while avoiding duplication with existing mechanisms. At the time, 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.[79]

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 defunct Sub-Commission with a forum for dialogue which promoted the exchange of 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

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77 Economic and Social Council Resolution 1995/31.

78 Office of the United Nations High Commissioner for Human Rights, "The former Working Group on minorities", available at: https://bit.ly/3lGLKep.

79 United Nations Human Rights Commission Resolution 2005/79, operative paragraph 9.

appoint a chairperson for the forum every year from among experts on minority issues, who must prepare a summary of the discussion.[80]

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 on the enjoyment of economic, social and cultural rights.[81] 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 on the agreements reached at the major world conferences and the Millennium Summit.[82] 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 according to 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.[83]

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80 United Nations Human Rights Commission Resolution 2005/79, operative paragraphs 1-4.

81 United Nations Sub-Commission on Human Rights Resolution 2001/24.

82 United Nations Sub-Commission on Human Rights Resolution 2001/24, Ibid, operative paragraph 2.

83 Human Rights Council Resolution A/HRC/RES/6/13, operative paragraphs 3-5.

II.3.4.3 Assessment of the work of the Advisory Committee

The final result was somewhat different from the proposal that the Sub-Commission itself submitted to the Commission in 2005 regarding 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 contribution of the Sub-Commission to the elaboration of principles on the fight against impunity and on the right to reparations—and to fill in the existing protection gaps.[84]

In the end, the Council did create an expert body but of 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 prohibit it.

In line with an increasing trend, the Advisory Committee has no ability to submit any initiatives 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;[85] and both in 2003 and in 2004, the Commission reminded it of the prohibition on adopting country resolutions.[86]

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84 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.

85 United Nations Commission on Human Rights Resolution E/CN.4/RES/2003/59, operative paragraph 3.

86 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.

It is clear that the new body has limited ability to promote standard-setting by itself, but it could perform this function if the Council requires it to do so. In practical terms, the results of the work of the Advisory Committee largely depend 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".[87] GA Member States decided to preserve a procedure of this nature in the Council, but they did not specify whether 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.[88] Secondly, the confidential nature prevented local actors—such as opposition parties or local NGOs—as well as international NGOs from participating 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

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87 United Nations General Assembly Resolution A/RES/60/251, paragraph 6.
88 Donnelly, Jack, *International human rights*, Ibid, page 53.

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."[89]

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. [90]

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.

Following the 1503 model, there are two working groups which deal with those communications and take decisions by simple majority: the Working Group on Communications and the Working Group on Situations. The Working Group on Communications is composed of five members of the Advisory Committee, appointed by this body and representing the five regional groups of the world,

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89 Human Rights Council Resolution A/HRC/RES/5/1, Ibid, paragraph 85.
90 Human Rights Council Resolution A/HRC/RES/5/1, Ibid, paragraph 86.

with gender balance. They have a three-year mandate, only renewable once.[91]

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.[92] 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.[93]

The Working Group on Communications assesses the cases and dismisses those which are considered inadmissible, may require additional information from the State concerned or further study of the issue. In any of those circumstances, 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.[94]

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.[95]

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91 Human Rights Council Resolution A/HRC/RES/5/1, Ibid, paragraphs 89-93.

92 Human Rights Council Resolution A/HRC/RES/5/1, Ibid, paragraph 86.

93 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.

94 Human Rights Council Resolution A/HRC/RES/5/1, Ibid, paragraphs 96-97.

95 Human Rights Council Resolution A/HRC/RES/5/1, Ibid, paragraphs 98-99.

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 their consideration and the cases remain confidential. The Council may decide to have a public session if there is an evident lack of cooperation on the part of the State concerned. The Council must deal with the case no later than two years after the communication was received.[96]

One remarkable difference with regard to the 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 may be kept confidential as per his or her request and, in that case, it will not be revealed to the State concerned.[97]

As with 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.[98]

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96 Human Rights Council Resolution A/HRC/RES/5/1, Ibid, paragraphs 101-105.

97 Human Rights Council Resolution A/HRC/RES/5/1, Ibid, paragraphs 106-108.

98 Human Rights Council Resolution A/HRC/RES/5/1, Ibid, paragraph 109.

III.3.5.2 Assessment 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—like 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 one or more international human rights treaties or not. 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.

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 take more than 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 has doubled, from one to two sessions per year.

Finally, public information is now available on the cases, for instance on the discontinuation of cases.[99] Nevertheless, there are still serious limits to the effectiveness of this procedure. Confidentiality in the process limits trans-

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[99] Human Rights Council, "Complaint Procedures, Frequently asked questions", available at: https://bit.ly/32DAXd9.

parency, 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 has also created new fora since its inception, in addition to the Social Forum. They are composed of experts and are 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.[100]

In addition, Resolution 5/1 did not address the Intergovernmental Working Groups which existed by the end of the former Commission and continued to function after the establishment of the Council. These working groups should not be confused with those 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 here.

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

[100] Human Rights Council, "Subsidiary expert mechanism", available at: https://bit.ly/2UmXqH3.

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, sets of principles and guidelines. 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 advisability of elaborating an instrument related to a specific human rights issue. The IGWG focuses its first sessions on exchanges about the need—or not—to have an instrument in place to deal with the issue. It also discusses whether this instrument should take the form of a binding international treaty or a declaration, principles or guidelines. Once this is decided, negotiations begin on the basis for a text until agreement is reached 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 time the Council was established, there were two IGWG of this kind: one with the task of elaborating an International Convention against Enforced Disappearances and the other of elaborating 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 transmit-

ted to the Council for approval.[101] Both instruments were adopted by the Council, endorsed by the GA, and are currently in force.[102] At present, for instance, 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.[103]

Other examples of progress can 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.[104]

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 so far successfully continued with this important task. New IGWG will be created in the future to address emerging human rights issues and challenges, and

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101 See for instance, 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://bit.ly/2Ik9Flp.

102 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://bit.ly/36vGzr4).

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

104 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://bit.ly/2UmXqH3).

it is expected that they will 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

In 2006, the Council inherited two IGWG in charge of monitoring existing instruments on human rights issues. The first 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 of monitoring the implementation of the 1986 Declaration of the Right to Development and providing recommendations and further analysis on related issues, including reports submitted by States on the implementation of the right to development.[105] In 2007, the Human Rights Council decided to renew the mandate of the working group and it still exists.[106] This IGWG is continuing its work at present.[107]

The second one, focusing on the implementation of a specific instrument, is the IGWG in charge of the implementation of the 2001 Durban Declaration and Program of Action 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[108] and constitutes a main priority for

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105 United Nations Commission on Human Rights Resolution 1998/72, operative paragraph 10. See also Economic and Social Council Resolution 1998/269.

106 Office of the United Nations High Commissioner for Human Rights, "The Intergovernmental Group on the Right to Development", available at: https://bit.ly/2UlBGeE.

107 See in this regard Human Rights Council Resolution A/HRC/RES/4/4.

108 United Nations Human Rights Commission Resolution 2002/68, operative paragraph 7.

the AG, notably South Africa.[109] 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.[110] Thus, this mechanism introduced a mandate which could lead to the development of standard setting, but in practice it has focused until now 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 from each regional group—to follow up on the 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 in preparing the annual report on the issue, in coordination with all relevant stakeholders at the UN level.[111]

The Working group of African Descent is a specific special procedure established following the DDPA.[112] 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

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109 Its latest session to date is available on the website of the Office of the United Nations High Commissioner for Human Rights (https://bit.ly/2IxmoBd).

110 Human Rights Council Resolution A/HRC/RES/1/5, operative paragraphs 2-3.

111 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://bit.ly/3kpirv9.

112 See in this regard, United Nations Human Rights Commission Resolutions 2002/68 and 2003/30.

by people of African descent, and submits recommendations to eliminate racial profiling, among other issues.[113]

These two mechanisms existed in the Commission and continued in the Council.[114] After the DDPA, Durban-related mechanisms continued to grow. The Council decided to establish another mechanism related to the DDPA: the aforementioned *Ad Hoc* Committee on Complementary Standards, which is part of those IGWG in charge of developing standard setting.[115]

A final development regarding the DDPA process was the 2006 decision by 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 ultimately excluded from the Outcome Document.[116]

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113 Office of the United Nations High Commissioner of Human Rights, "Working Group of Experts on People of African Descent", available at: https://bit.ly/3lryWrX.

114 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.

115 Office of the United Nations High Commissioner for Human Rights, "The *Ad Hoc* Committee on the elaboration of complementary standards", available at: https://bit.ly/36oeDFC.

116 "Outcome Document of the Durban Review Conference", Geneva, 20-24 April 2009, available at: https://bit.ly/3plodSj.

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

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 in order to be able to measure the relevant changes made in this regard. In 1998, the Commission adopted 21 points on its agenda after long negotiations. This agenda remained unchanged for almost 20 years, so it was predictable and facilitated the participation of stakeholders during each session. The problem was its rigidity, which did not allow pressing issues to be addressed.[1] During negotiations of the Council's institution–building package 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 arose during the negotiations of the agenda was the inclusion of the Occupied Palestinian Territories (OPT) as a separate 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

1 Abraham, Megna, *Building a new Human Rights Council*, Ibid, page 16.

have a single item for all situations or to single out all those who require special attention.[2]

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.[3] 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 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 states 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, for a maximum of three days. The President of the Council has to convene a consultation prior to the special session.

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2 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).

3 Abraham, Megna, *Building a new Human Rights Council*, Ibid, page 17.

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: whether the Council had to change its status as a 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 the consideration of the GA, while the second was put to the Council itself.[1]

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 in different regions of the world with the participation of many States and other stakeholders to discuss the modalities and content of the review.[2]

There was a retreat in Algiers with a wide representation of countries of all regions, including Argentina.[3] The retreat discussed substantive issues related, among other aspects, 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

1 United Nations General Assembly Resolution A/RES/60/251, operative paragraphs 1 and 16.

2 Human Rights Council, "About HRC", "HRC Review (2011)", "Human Rights Council Review", available at: https://bit.ly/3kl0AWp.

3 Retreat of Algiers on the review of the work and functioning of the Human Rights Council. From 19 to 21 February 2010.

France, which included Argentina.[4] 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 urgent situations effectively and the need to work on cross-regional initiatives as a way to avoid polarization. Discussions among this informal reflection group continued in Marrakech, Paris, Seoul and Buenos Aires.[5] There were also seminars, such as the one organized in Montreux, under the auspices of Switzerland.[6] The last informal international consultation was convened by the then President of the Human Rights Council and 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.[7]

As happened during the institution-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

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4 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.

5 For instance, Reflection Group on the strengthening of the Human Rights Council. Second Working Session, Paris, 26 January 2010.

6 Open ended Seminar on the Review of the Human Rights Council, Summary Report under the responsibility of the Chair, Montreux, 20 April 2010.

7 The aforementioned working group was established under United Nations Human Rights Council Resolution A/HRC/RES/12/1, operative paragraph 1.

Document prepared by the President, which was finally adopted in 2011.[8]

At the time that the process began in the working group, there were serious criticisms of 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.[9] As a general reaction to all pillars under negotiations, Egypt—on behalf of the Non-Aligned Movement—indicated that it would oppose any significant changes to the adopted institution-building package.

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 of blocking all interventions with early submissions by States friendly to 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

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8 Human Rights Council Resolution A/HRC/16/21.

9 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://bit.ly/35lWaKq.

American countries were 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 a mechanism, there was a growing feeling of intimidation among special procedures mandate-holders due to possible unjustified accusations.[10] 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, mainly 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 Resolutions 5/1 and 5/2 as well as other Council related resolutions, decisions and presidential statements.[11]

Regarding the UPR, the outcome document extended the periodicity for the second cycle of reviews starting in 2012 from four years to four and a half years in order to consider 48 States; decided that the State report would focus on the follow-up of accepted recommendations and the current situation; and decided that the report of other

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10 Alston, Philip, "Hobbling the monitors…", Ibid, pages 643-644.

11 Human Rights Council Resolution A/HRC/RES/16/21, operative paragraph 3.

stakeholders would include a separate section for national human rights institutions.[12]

Regarding the modalities of the UPR, one 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.[13] The implementation and follow-up of the UPR included the possibility of submittinga mid-term report on a voluntary basis, and it was decided that national and regional UN offices would assist States in implementing UPR recommendations.[14]Council Resolution 17/119 adopted guidelines regarding some aspects of the second cycle.[15]

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 would apply when all speakers could be accommodated within the available time, if not the time

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12 Human Rights Council Resolution A/HRC/RES/16/21, Outcome Document, paragraphs 1-9.

13 Human Rights Council Resolution A/HRC/RES/16/21, Outcome Document, paragraphs 10-17.

14 Human Rights Council Resolution A/HRC/RES/16/21, Outcome Document, paragraphs 18-21.

15 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.

would then be reduced and divided among all delegations registered so as to enable 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 prior to the commencement of the session there would be a drawing of lots to decide the order of the list.[16]

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 could submit candidacies.[17]

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 would maintain updated information.[18]

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 using 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 on introducing a general reference to the importance

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16 Human Rights Council Decision A/HRC/DEC/17/119, paragraphs 5-8.

17 Human Rights Council Resolution A/HRC/RES/16/21, Outcome Document, paragraph 22.

18 Human Rights Council Resolution A/HRC/RES/16/21, Outcome Document, paragraphs 23-30.

of supporting all mandates and the fact that the voluntary contributions should be to the fullest extent possible un-earmarked.[19]

Some small procedural changes were made to the Advisory Committee during the review to enhance its visibility. In this sense, its sessions would be held before the March and September sessions of the Council.[20]

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 resolutions with the help of the Bureau; and established the Office of the President of the Council, among other measures.[21]

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, the United States, Israel and Palau 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 up many other issues such as the reform of the composition of the SC.[22]

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 obtain the approval of the GA Fifth Commission to be able to work appropriately. Finally, the GA endorsed the outcome

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19 Human Rights Council Resolution A/HRC/RES/16/21, Outcome Document, paragraphs 31-34.

20 Human Rights Council Resolution A/HRC/RES/16/21, Outcome Document, paragraphs 35-39.

21 Human Rights Council Resolution A/HRC/RES/16/21, Outcome Document, paragraphs 42-62.

22 United Nations General Assembly Resolution A/RES/65/281.

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.[23]

Although 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.[24] The GA did not request this time that the Council 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 during 2019. Consequently, the review of this still new body is not over.

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23 Rathberg, Theodor, *New Prospects for Human Rights…*, Ibid, pages 7-20.
24 United Nations General Assembly Resolution A/RES/65/281.

II.6 Assessment 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 now has some important attributes that give it its own unique character and distinguish 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 lasting a total of ten weeks; it also has many Intersessional Working Groups which work during the whole year, including three sessions of the WG of the UPR and sessions of all IGWG.[1] 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, although 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).[2] Indeed, with all States having recognized that human rights is one of the three pillars of the United Nations, the only reason to officially avoid upgrading the Council to 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.

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1 Human Rights Council, "HRC Bodies", "Human Rights Council Subsidiary Bodies", available at: https://bit.ly/2UmXqH3.

2 United Nations General Assembly Resolution A/RES/60/251, operative paragraph 1.

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 to deal with human rights situations, including commissions of enquiry.[3] The GA confirmed several decisions almost as a formal procedural step, and the Third Committee reproduced some political discussions but, in 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, designed to mitigate politicization. The UPR demonstrated that the system could benefit from a democratic, non-selective procedure whereby 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 for enhancing the conclusions and recommendations of special procedures mandate-holders and NGOs.

Furthermore, the existence of the UPR has led to a number of positive results. Many States have ratified international human rights treaties, accepted open and standing invitations to special procedures mandate-holders, and established or strengthened national human rights institutions.[4]

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

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3 Human Rights Council, "Independent Investigations", "International Commissions of Inquiry, Commissions on Human Rights, Fact-Finding missions and other Investigations", available at: https://bit.ly/35qy1CJ.

4 Spohr, "United Nations Human Rights Council…", Ibid, pages 214-217.

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 reasons to remain optimistic and to believe that this mechanism is able to make an important contribution to the system, as was intended when the Council was created.

Evidently, there are challenges to overcome in the future for the UPR. One of them is to maintain the high visibility and significant level of participation shown to date, where the majority of delegations participate at a Ministerial level. It is also a serious challenge to verify whether States are prepared to monitor and follow up on the recommendations made in previous cycles. One 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, although political negotiations during the institution-building process 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 has continued to grow. Indeed, a number of thematic mandates have been 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, although the country mandates have been at risk since the institution-building process and some country mandates were suppressed during its establishment,[5] many country mandates have been renewed ever since,[6] one mandate was re-established,[7] and new country mandates have been established.[8]

Also, changes in nomination, selection and appointment represented a positive improvement in 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.

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 on establishing 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 of contributing 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.

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5 That was the case of country mandates on Cuba and Belarus.

6 The country mandates renewed include: Cambodia, South Sudan, Somalia, Haiti, Myanmar, Democratic People's Republic of Korea.

7 The renewed country mandate was on Belarus. A list of all country mandates, including Belarus, is available on the website of the Office of the United Nations High Commissioner for Human Rights, under the title "Special Procedures", "Country Mandates": https://bit.ly/3niqhc4.

8 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://bit.ly/32CQmdS.

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 in the system. As this exercise is very risky in political terms, it remains to be seen if it will happen anytime 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 formed the basis for future international instruments.[9]

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.[10] Thus, in practical terms, though more limited than its predecessor, its main role during the Commission has been able to be performed in the Council and its contributions are significant.

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9 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://bit.ly/3pnX7d5.

10 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://bit.ly/36utVbL.

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

Moreover, the civil society participation is the same as 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 for 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 well represented.[11] Furthermore, the level of participation by 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.[12]

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11 Mutua, Makau, "Standard Setting and Human Rights: Critique and Prognosis", Human Rights Quarterly 29, Johns Hopkins University Press, 2007, pages 589-604.

12 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 specialized organizations 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 understanding the outcomes 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 the domestic-policies approach. [1]

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 argued 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 States more space and time to interact, understand their positions, and eventually move forward, irrespective of the will of a hegemonic State. Nonetheless, according to Cox, the neoliberalist

1 Cox, Eric, "State interests…", Ibid, pages 89-97.

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 over time. Consequently, it is really challenging—and sometimes not possible—to converge with the position of other peers on certain issues under specific circumstances.

The constructivist theory, according to Cox, attempts to fill the gaps in 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, along with the possibility of benefitting 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 reforming a highly criticized universal human rights body.

At the same time, the domestic policy theory serves to better explain 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. [2]

In my opinion, the domestic policy approach could also be a tool to understand States' interest in pushing for specific initiatives in the Human Rights Council, both as a 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 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).

2 Cox, Eric, "State interests…", Ibid, pages 93-97.

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 though it is a UN intergovernmental body, all these actors have a certain degree of influence on the decisions and actions taken by the Council.

In any case, this body remains State-centered, and there is no significant influence exerted by the Council itself to take actions beyond State interests, so, as could be expected in any UN body, sponsors of any initiative need to have the support of the majority of Member States to adopt any resolution, decision, 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.[1]

The composition of the Council is decided according to specific vacancies for each regional group.[2] Furthermore,

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1 United Nations Department for General Assembly and Conference Management, "United Nations Regional Groups of Member States", available at: https://bit.ly/3kjcHmI.

2 United Nations General Assembly Resolution A/RES/60/251, operative paragraph 7.

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;[3] and each regional group elects a member for the Group of Communications of 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 those years, the regional group which has been able to coordinate positions most often has been the AG.

Indeed, as we saw before, the AG has had a very clear and sound voice in many important issues.[4] 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 maintained a clear opposition to country resolutions or country mandates when an African country was concerned, unless that 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

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3 Human Rights Council Resolution A/HRC/RES/5/1, Ibid, Annex, Paragraph 49.

4 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://bit.ly/2IsrgY2. See also Ramcharan, Bertrand, *The UN Human Rights Council*, Routledge, 2011, page 13.

also played a significant role in the work of the Human Rights Council.[5]

The EU consolidated its political framework during this period, in particular after the entry into force of the Lisbon Treaty. During the institution-building process, 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. On several occasions, the EU was able to count on the sponsorship or support of some South American States for thematic resolutions and even for some country initiatives.

For its part, the OIC successfully advocated 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 whether 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.

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5 See, for instance, European Union External Action, "The EU as a strong supporter of the UN Human Rights Council", available at: https://bit.ly/3lq0Y7g.

Three regional groups were not able to coordinate positions on substantive issues except on rare occasions: the GRULAC, Eastern European States and Asian States. Some of these regional groups have heterogeneous compositions, different political systems, and diverse national interests.

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 Nicaragua.[6] This position is remarkably different from the vast majority of groups when dealing with a country from their own bloc, which in general is more defensive, unless there is the consent of the country concerned or the resolution deals with a recalcitrant State. Countries from Latin America have also greatly contributed to the progress achieved in advancing the rights of LGBTI individuals.

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 to not always be healthy for the Council because they ended up being quite confrontational. This did not help to promote dialogue and enhance cooperation among

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6 See for instance, 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://bit.ly/3ko1eSQ. See also Human Rights Watch, "UN Rights Body should probe Nicaragua", 19 March 2019, available at: https://bit.ly/3eTKWA6; Human Rights Watch, "Venezuela. Landmark UN Human Rights Council Resolution", 27 September 2018, available at: https://bit.ly/2UrdnvD; 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://bit.ly/38xzZmJ.

countries with different cultures and religions. In order to resolve this situation, there have been initiatives to deal with issues from a cross-regional perspective. This was the case, for instance, with the process that led to the successful adoption of the Declaration on human rights education and with 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 helped to achieve results by consensus.

III.3. The role of individual States

III.3.1 The influence of the Great Powers

It is not only regional or other groups that 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 by 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 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.[1]

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 work.[2] 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 institution- building process under the G.W. Bush

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1 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.

2 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.

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. The absence of the United States during the first period of the Council favored the positions of some of the aforementioned groups on certain specific issues.

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 in creating an environment that eventually allowed the need to address violence and discrimination against LGBTI persons to be introduced. The US was also a key actor in the creation of new country mandates such as the one on Iran.[3] The US also promoted the creation of a new thematic mandate on freedom of association, together with Egypt, in the context of the Arab Spring.

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 in 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 several country mandates because they considered it was not a constructive approach. Nonetheless, 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.

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3 The White House, President Barak Obama, "Fact Sheet: Obama Administration leadership on International Human Rights", 4 December 2013, available at: https://bit.ly/38BZ5k8.

A third change arrived in 2017. After the start of the Trump administration, criticisms of the Council for its politicization, poor records in terms of the quality of membership, and the selective manner in which human rights violations by Israel were dealt with, eventually led to a new withdrawal of the US from the Council in 2018.[4] The absence of the United States is to be regretted because of its strategic importance, the difficulties that like-minded countries will face when attempting to move particular human rights issues forward, and also because it sets a risky precedent which can be emulated by others.[5]

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 that of a main Power, has limits in the Council. During the institution-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 remove 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.

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4 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://wapo.st/2IzEUs7.

5 Freeman, Rose, "Why the US left the UN Human Rights Council and why it matters", in The conversation. com, 20 June 2018, available at: https://bit.ly/2GUrO8B.

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

Although the influence of the 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 having 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.[6]

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 significant 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 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 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 on 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 demonstrated a national position with

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6 Donnelly, Jack, *International human rights*, Ibid, pages 110-114.

firm values and conviction about the importance of the issue at the international level. Its commitment to the universal system is clearly shown by, *inter alia*, the fact that it has been world's largest voluntary contributor to the work of OHCHR.[7] 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—in 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 eliminated at the end of negotiations on the institution-building process of the Council. The Cuban role in the Council was not only restricted to this 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 support for the independent expert on the negative effects of foreign debt on 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 at the top of the national

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7 See for instance, Office of the United Nations High Commissioner for Human Rights, "United Nations Human Rights Report 2018", pages 84-94, available at: https://bit.ly/3eYVVIv.

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 as 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 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.[1] Argentina waited until 2008 to present a new candidacy. It then won a seat again and, thus, became a Member for the period 2009-2011.[2] After one year as an Observer during 2012, Argentina was elected for the period 2013-2015,[3] and later again for the period 2019-2021.[4] As a consequence, it could be affirmed that Argentina has had a long presence in the Council, having been a Member State of this body for nine out of its 15 years of existence.

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1 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://bit.ly/3eT7Rvj.

2 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://bit.ly/3lkrrmF. 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://bit.ly/32FX1UK; 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://bit.ly/36qCDIk.

3 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://bit.ly/2UkPINA. 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://bit.ly/35n50Yh; 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://bit.ly/32CnuSR.

4 Human Rights Council, "Presidency & Membership", "Current Council Members", "Current Membership of the Human Rights Council, 1 January – 31 December 2020 by regional groups", available at: https://bit.ly/2GUQCNN.

Over this period, Argentina was a Member 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 institution-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 close to that of 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 on 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.

Regarding the Advisory Committee, Argentina promoted a body of experts, in line with its predecessor, with the capacity to contribute to the development of international 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 elimination 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 renamed as the complaints procedure, as well as improving 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 on which major differences among countries had long existed. The agreement, in the end, was not to alter the 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, had 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. Like the rest of the countries, Argentina only made proposals to adjust the new mechanism. 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,[5] and submitted follow-up reports regarding the status of implementation of recommendations.[6]

Secondly, Argentina was in favor of not re-opening a "Pandora's 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.

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5 Human Rights Council, "HRC Bodies", "UPR Cycles", "Cycles of the Universal Periodic Review", available at: https://bit.ly/3nhxyZr.

6 Human Rights Council, "HRC Bodies", "UPR Mid-term information", "UPR Mid-term reports", available at: https://bit.ly/38CE60K.

Finally, in relation to other sub-bodies and mechanisms, such as the Advisory Committee and the complaint procedure, Argentina supported their maintenance and also some specific proposals to enhance them. In relation to the program of work and methods of work, Argentina—with the support of Mexico and Chile—suggested the possibility for OHCHR to be able to propose to the Council the convening of special sessions. 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

The following sections will describe how has 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

Following its traumatic experience during the 1976-1983 dictatorship, Argentina recognized the right to the truth within the framework of a friendly settlement facilitated by the Inter-American Commission at the end of the 1990s.[1] The case related to the truth about the fate of victims of gross human rights violations, notably enforced disappearances. The recognition of this right contributed to intense judicial work, which made it possible for many families to discover the fate and whereabouts of their relatives as well as to find out the circumstances of their disappearance and who was responsible for those crimes. In 2005, after a long

1 See "Informe 21/00 de la Comisión Interamericana de Derechos Humanos", Caso 12.059, Carmen Aguiar de Lapaco vs Argentina, 29/02/2000.

fight against impunity, through which 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.[2]

In its preambular part, the resolution refers to IHL provisions, i.e. Articles 32 and 33 of the Additional Protocol (I) to the 1949 Geneva Conventions,[3] 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 prisoners of war.

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.[4]Indeed, principle 2 of the Updated Set of Principles against Impunity recognizes the right to the truth.

Nevertheless, the aforementioned principles were not endorsed at the inter-governmental level either by the Commission or 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

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2 United Nations Commission on Human Rights Resolution 2005/66.

3 Additional Protocol (I) to the Geneva Conventions, of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts, articles 32-33.

4 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.

All 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 inclusion is to be regretted because the two 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 for information, the State is able to legitimately reject the request if that information is confidential on different grounds, including national security. In contrast, the right to the 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 serious crimes. If equated with 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.[5]

In the operative part, Resolution 2005/66 recognizes the existence of the right and highlights the importance of respecting and protecting the right to the truth. This

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5 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 1-2.

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 non-judicial mechanisms. It also encourages States to establish, where appropriate, non-judicial mechanisms to complement the justice system. Finally, it requests 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.

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.[6] This study starts with the legal and historical basis for the right to the truth as a right. In this regard, it recognized the origin of the right in IHL with regard to missing persons, 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.[7]

The study also reiterates that the right to the truth was recognized by the Working Group on Enforced or Involuntary Disappearances and the Human Rights Committee within the context of enforced disappearances in the Latin American region. 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,

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6 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.

7 Ibid, pages 4-5.

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 states that the right to the truth was recognized by the then Secretary-General in the Bulletin on the observance by the UN forces of international humanitarian law, and also affirms the importance of this right in peace processes. The High Commissioner has also affirmed the importance of respecting the right to the truth, for instance, in a report on the human rights situation 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 of knowing 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).[8]

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 that the right has also been recognized in some peace agreements and national courts. Nevertheless, it was in the Inter-American system that the right to the truth underwent 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, torture and serious violations of IHL.[9]

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8 Ibid, page 6.
9 Ibid, pages 7-10.

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 in certain cases as 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, which is essential in any democratic society.[10]

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 help to find the truth by using 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.[11]

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, nonjudicial 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 some limits: the timeframe which is investigated, the time

10 Ibid, page 12.
11 Ibid, page 13.

actually available to the commission to conduct its work, and the material scope of what is investigated.[12]

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 truth commissions have replaced the criminal processes for the judgment of those allegedly responsible. However, truth commissions constitute a valuable aid, as they not only clarify events but also compile information with the purpose of contributing to the justice system. Likewise, the commissions must 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 in 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

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12 Ibid, page 14.

example, with the General Framework Agreement for Peace in Bosnia and Herzegovina.[13]

The study of the High Commissioner also affirms that national human rights institutions can 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.

The study concludes that the right to the truth is an inalienable and autonomous right that is related to the obligation of States to investigate gross human rights violations and serious violations of IHL as well as providing reparations. The study also affirms that the right is also related to the principle of the rule of law in addition to other human rights. The study also concludes that the right implies the need to know the facts about how human rights violations were committed and why those events happened and, in some specific violations, to know the fate of victims. It also recognizes the collective dimension of the right, because society has a right to know the truth about the commission of heinous crimes. Furthermore, the study concludes that the right to the truth is a stand-alone right that admits no derogation. Amnesties should not deny or limit the right. Finally, the study reiterates that the right can be implemented by various means, including tribunals and truth commissions.[14]

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 the 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 interna-

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13 Ibid, page 8.
14 Ibid, pages 14-15.

tional practices on the right to the truth and on the individual and societal dimensions of this right, taking into consideration the views of States, international organizations and NGOs. In this context, OHCHR submitted a second report.[15]

In its introduction, OHCHR indicates that a group of States made contributions to the report (including Argentina) and recalls the main conclusions of its first study on the right to the truth. Regarding the implementation of the right, the report makes reference to national experiences submitted by States for the report.[16]

Regarding developments at the UN level, OHCHR mentioned, for example, that the Human Rights Committee has indicated the importance of truth commissions in ensuring 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 mainly promoted by Argentina.[17]

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 it 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

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15 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.

16 Ibid, pages 4-5.

17 Ibid, pages 15-16.

matter; and the question of records and the right to the truth in order to elaborate guidelines on the issue.[18]

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

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 advocated for its adoption. In this case, it was a substantive resolution which decided to take stock of the developments to date, and to request from OHCHR further analysis of issues related to the implementation of the right to the truth, following the recommendations of its latest report, notably on the question of archives. The initiative ended up being 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 a binding international human rights 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, recognized it as a stand-alone right.

In its operative paragraphs, the resolution remarked on 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 by sending inputs to this report,

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18 Ibid, pages 16-18.

including Argentina. Regarding archives, the Office begins by explaining that the archive system in a given State is created according to 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 has its own archive, which is very valuable for the history of a given country. [19]

OHCHR indicates that archives can be governmental or privately-owned and records can originate from States, 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 recommends that all archives be kept in a national institution and copies in a separate place —e.g. another ministry, an international criminal court, a mixed truth commission—which in some cases could be outside the country for security reasons.[20]

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.[21]

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

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19 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.

20 Ibid, pages 5-6.

21 Ibid, page 6.

need to protect witnesses with the obligation to investigate gross human rights violations and to provide effective remedy. 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 cases of transnational crimes, witnesses tend to be insiders and the State is usually not involved, in cases of gross human rights violations, witnesses mostly are victims or relatives of victims of gross human rights violations and State agents are involved in those violations.[22]

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 from other sources.[23]

OHCHR also reports that there is a significant 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 appear in court—and psychological support. OHCHR considers that witness protection programs should be framed by law and include psychological assistance.[24]

A witness who participates in a program has to comply with strict requirements, which often include a certain level of isolation from his or her previous social environment.

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22 Ibid, pages 9-11.
23 Ibid, page 11-13.
24 Ibid, pages 13-15.

Failure to comply with those requirements may result in dismissal, but the person can leave the program on a voluntary basis, assuming the risks in terms of safety. In the long term, the objective is to end the program when the risk no longer exists.

The report concludes that archives are important for guaranteeing the right to the truth, for instance through truth commissions; for vetoing officials who might have been involved in past crimes; and for making reparations. Archivists can help States to elaborate access laws. In transitional periods after gross human rights violations and serious violations of IHL, truth commission archives tend to be national and, in some cases, there are hybrid situations, where the archives are in UN possession.[25]

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 essential that witness protection programs are not managed by the police, the security forces or the military. Finally, it would be desirable 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.[26]

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 OHCHR.[27] Argentina considered this

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25 Ibid, pages 17-18.

26 Ibid, page 18.

27 Office of the United Nations High Commissioner for Human Rights, "News and events", "The right to the truth", 12 March 2010, available at: https://bit.ly/3plZZr8.

event to be an important one for discussing the way to systematize all aspects regarding this right and participated actively in the organization of the panel. During 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 desirability of considering 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 in ratifications of 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 ask 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 produced a new report on the right to the truth.[28] The report affirms that

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28 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.

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 structures.[29]

The report informs that some countries—such as Canada or South Africa—allow their competent authorities to cooperate with other States in relocation. Other countries started to cooperate on related issues among their sub-region, such as the Nordic States.[30] Finally, OHCHR concludes that there are not many experiences of national courts which have 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 advisable to have a justice sector strategy, which provides appropriate training to the police, prosecutor and judicial institutions.[31]

Moreover, in conformity with Resolution 12/12, OHCHR organized a seminar on the right to the truth and the preservation of archives.[32] 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.

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29 Ibid, page 14.
30 Ibid, pages 12-13.
31 Ibid, pages 18-19.
32 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.

In the report on the event, OHCHR indicates that archives often contain 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 in place for archives in the possession of both the State and individuals.

The participants in 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. They also agreed that the 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.

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 new developments, such as 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, helped to clarify even further the notion, content and scope of the right to the truth regarding enforced disappearances.[33]

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[33] 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://bit.ly/3lkuYBr.

In its operative paragraphs, the resolution refers to the need to cooperate with the new mandate-holder on issues related to truth-processes, calls on 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; 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.[34]

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 General Assembly through Resolution 168/65. 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

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34 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://bit.ly/3px8rE6.

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.[35]

In its operative part, GA Resolution 168/165 refers to the important role of civil society in monitoring the implementation of the recommendations issued by 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 Assessment of the development of the right to the truth and Argentina's contribution in this regard.

Since 2005 to date, Argentina has 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

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35 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://bit.ly/36x4lTs.

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 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 resolutions at the OAS and, at the sub-regional level, contributed to developing a specific commission on the right to the truth, memory and justice within the human rights body of the MERCOSUR.[36] All these initiatives have in a way been an "export" of successful policies and legislation on the issue at the national level, which were some 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 persons missing in armed conflicts, violent situations or catastrophes, and the terrible crime of enforced disappearances committed by State

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36 MERCOSUR, Reunión de Altas Autoridades sobre Derechos Humanos, "Comisión Permanente Memoria, Verdad y Justicia", available at: https://bit.ly/36xiiB5.

agents under repressive regimes, have caused a great deal of suffering not only to those who are victims of these tragic situations themselves but also to their loved ones, who search for them, dead or alive.

In numerous cases, following serious violations of IHL or gross international human rights violations, many people disappeared. The first systematic use of forensic science in the search for 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.[37]

Argentina was a pioneer in the use of forensic genetics, to investigate the cases of enforced disappearance by 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 reestablish links with their families of origin.[38]

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 informed consent, the right to privacy, the recovery of remains and the collection of samples, all of which can be aggravated by

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37 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://bit.ly/32CDhRD. See also International Committee of the Red Cross, *Missing People, DNA Analysis and Identification of Human Remains. A Guide to best practice in armed conflicts and other situations of armed violence*, 2nd ed., ICRC, Geneva, 2009, available at: https://bit.ly/2Un2F9M.

38 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 September 2014.

the number of people to be identified and the multiplicity of actors involved.[39]

By 2008, there were UN standards for specific situations—e.g. the manual for the use of forensic genetics in cases of extrajudicial executions[40] and the Istanbul Protocol for the investigation and documentation of torture and ill treatment.[41] Nevertheless, there was no systematic guidance on the use of forensic genetics in the context of gross human rights violations and some aspects were not fully covered, such as certain legal and ethical issues.[42]

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 by 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 Argentina's national policy on the pillars of memory, truth and justice in the aftermath of gross human rights violations, the

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39 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://bit.ly/3nod01H.

40 United Nations Manual on the effective prevention and investigation of extra-legal, arbitrary and summary executions. Document E/ST/CSDHA/.12.

41 Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (The Istanbul Protocol), 2004. See also 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.

42 Tidball-Binz, Morris et al, "A good practice guide…", Ibid, page 213.

country had decided to support three forensic teams from Argentina, Guatemala and Peru in promoting the establishment of genetic banks to identify victims of gross human rights violations.[43]

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, an internationally renowned organization that has worked in several countries in different regions of the world.

It is clear that there is a strong link between the work of forensic experts, 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 made it possible to identify 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 illegal adoptions. The opportunity to satisfy the right to the truth about the fate of loved ones, including the circumstances involved and the whereabouts of their remains, was key to providing some comfort for several families.

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43 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://bit.ly/3ngh8R9.

As it was quite a novel issue which had to be discussed and understood 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, including a member of the Argentine Forensic Team and the President of the prestigious Argentine NGO "Grandmothers of Plaza de Mayo". It was 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 adopted between 1993 and 2005.

The preambular part of the resolution also makes 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 of restoring the identity of 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 addressing 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 reporting the results to the 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.[44] The report starts by recalling the three main objectives that Argentina was promoting with this initiative within the Council: to acknowledge the importance of forensic genetics in cases of gross human rights violations and serious violations of IHL; to promote cooperation on the issue of locating victims' relatives who have moved from their places of origin; and to promote the development of international standards on the issue through the elaboration of a manual.[45]

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 agrees that it would be advisable to have a general framework for the exhumation and identification processes, including the establishment of protocols for

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44 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.

45 Ibid, page 4.

exhumation, autopsies, and reliable methods for producing evidence; an appropriate way to involve families in this scientific activity; and procedures for handing over the remains to the family.[46]

The report describes the experience of El Salvador, Colombia and Argentina on the issue. It 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 the bank, the greater the chance of identifying remains that are found and believed to correspond to a victim. Those databanks would allow for future identifications as additional graves are discovered. [47]

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 confirm that the goal is to identify a genetic relation between victims and their relatives and there is no other motive—e.g. scientific or commercial. It is also important to establish that donation should be voluntary and that there is a clear limitation on the use of DNA samples.[48]

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 that includes 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.

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46 Ibid, pages 11-12.
47 Ibid, pages 8-11.
48 Ibid, pages 14-15.

OHCHR also addresses the possibility of producing 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 on identification measures for victims of disasters. ICMP had also consulted a series of organizations that work in 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. Nevertheless, 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 keep 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, emphasizing that, to the maximum extent possible, efforts should be made to have objective scientific methods, 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. Of particular relevance for such guidelines would be the issues of genetic data protection and informed consent.[49]

The report concludes by supporting the Argentine initiative—included in Council Resolution 10/26—emphasizing the importance of the use of forensic genetics and national data banks.[50]

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49 Ibid, page 12.
50 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 refers 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.[51] The report recalls that Argentina, as main sponsor of Council resolutions on forensic genetics and human rights, decided to set up 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

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51 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.

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 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 Assessment of Argentina's contribution to the field of forensic genetics

Argentina introduced into 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 genet-

ics 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 drawn up 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.[52]

The guidelines are designed 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 widespread and serious. It is hoped that the guidelines will provide a valuable reference for dealing with the tragic legacy of armed conflicts and gross human rights violations of human rights and humanitarian law.[53]

The set of guidelines was presented in a side event of the Human Rights Council during its 28th session[54] and it would be desirable that Argentina and interested States

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52 Tidball-Binz, Morris et al, "A good practice guide…", Ibid, page e213.
53 Tidball-Binz, Morris et al, "A good practice guide…", Ibid, page e213.
54 Guidelines for the use of forensic genetics in investigations into human rights and international humanitarian law violations.

could submit them for adoption by the Council as a way to recognize its importance in an intergovernmental setting.[55]

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 adopted by any 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 intended to be applied in the context of gross human rights violations and serious violations of international humanitarian law.

From 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. From

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55 See for instance Ministerio de Relaciones Exteriores, Comercio Internacional y Culto de Argentina, Misión Permanente ante los Organismos Internacionales en Ginebra, "Guía de Buenas 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://bit.ly/35mUv7q. See also, Guidelines for the use of forensic genetics in investigations into human rights and international humanitarian law violations, available at: https://bit.ly/3nTCvbt.

the beginning, and despite their different approaches on how to move forward, Argentina and Switzerland shared the common goal of promoting the protection of victims to the fullest extent possible.

After meetings of different formats at the expert and governmental levels, as well as common efforts and flexibility from both partners, these countries decided to promote the establishment of a broad mandate, which was a careful balance between their approaches: a rights-based approach more inclined towards identifying elements which could lead to the development of standard setting on the three rights of the mandate (truth, justice and reparations) and an implementation approach, based on a general framework (transitional justice) not yet universally recognized in international human rights treaties but useful for specific cases.

The outcome of these fruitful negotiations was the decision to promote the establishment of a Special Rapporteur on truth, justice, reparation and guarantees of non-recurrence After long negotiations, Argentina and Switzerland managed to include as main sponsors of the initiative relevant countries from all over the world, namely, Morocco, Ivory Coast, Uruguay, Peru and Austria. The resolution had 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 in 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 situ-

ations 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 make recommendations thereon; identify, exchange and promote good practices and lessons learned, as well as identifying potential additional elements with a view to recommending ways and means to improve and strengthen the promotion of truth, justice, reparation and guarantees of non-recurrence; and conduct country visits; among others.[56]

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 the main sponsors of the resolution.[57]

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56 Human Rights Council Resolution A/HRC/RES/18/7, operative paragraph 1.

57 See Human Rights Council Resolutions A/HRC/RES/36/7 and A/HRC/45/10.

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 relevant aspects of 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 and implementation strategies of the mandate.[58]

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.[59]

Before going any further, I would like to indicate that I do not agree with the word "measures" to refer to the rights to the truth, justice and reparations when referring to the mandate. They are not just tools of a still unconsolidated concept of transitional justice. They are human rights expressly incorporated in international human rights law. 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-alone

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58 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.

59 Ibid, pages 5-6.

rights and can be exercised independently of a specific framework. I prefer, therefore, to refer to the rights to the truth, justice and reparations. From my perspective, the concepts of truth, justice, reparations and guarantees of non-recurrence on the one hand, and transitional justice on the other, 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 aims of his work: to contribute to reconciliation; strengthen the rule of law, recognition of victims as persons and as right-holders; and build trust in society.[60] Although 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 at the specific request of some 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 concept 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.

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

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60 Ibid, page 19.

"measures" and includes areas of work such as development and security.[61] In my opinion, the inclusion of development and security, which coincides with the two other pillars of the UN together with human rights, shows the interest of the mandate-holder in following an approach that goes well beyond the mandate, 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 liable to lose its precise substance.

In his second report of 2012, the mandate-holder decides to focus on the concept of the rule of law and the relation and mutual interaction between transitional justice and the rule of law.[62] The report includes in this context the concept of transitional justice as a framework for strengthening the rule of law. The rapporteur thus interprets 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 on 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.

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, about which I have reservations as mentioned above, the Special Rapporteur includes the contributions of truth-seeking mechanisms, reparations and justice. He concludes by indicating that it is necessary

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61 Ibid, pages 15-18.

62 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.

to include a gender perspective and the specific needs of men, women and children.

In his third report in 2013, the mandate-holder persists with the framework of transitional justice—including the four pillars of the mandate in this context—and links it to development.[63] In this regard, he affirms the importance of justice and rights considerations to development. He affirms that justice, security and development are interrelated 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.[64] He decides to include them within the somewhat vague term of transitional justice.[65]

The first report on the pillars, regarding the right to the truth, makes a very brief 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.[66] In his following report, on the

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63 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.

64 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.

65 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.

66 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.

pillar of the right to justice, the expert considers the right to the truth as "part of an effective right to remedy".[67]

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 character of recommendations. In this context, it has to be stressed that, as seen above, the right to the truth was recognized in several HRC and GA resolutions and 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. These elements have been considered by scholars in recent works.[68] Consequently, I believe that, even if the right to the truth has a clear link with other human rights, at this stage, it is a standalone right.

The report on the right to the truth also describes practical aspects of truth commissions and some key national experiences, and calls attention to the expansion of these truth mechanisms from victim-tracing to investigation of the 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 for caution about the inclusion of crimes other than gross human rights violations and serious violations of IHL; the means of staffing, budgeting and managing; the way to extend the lifetime of the commission archives; and cultural interventions including memorials.[69]

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67 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.

68 Alston, Philip, *International Human Rights…*, Ibid, pages 1406-1410.

69 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.

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.[70] 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.[71] In the recommendations, the report, among other things, calls for the need to respect the duty to investigate and prosecute gross and serious violations, applying the universal jurisdiction for these cases where that option is possible, and insists on 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 refers to the pillar of reparations and begins by recognizing that courts are unlikely to be the main avenue of redress in cases of gross human rights violations or serious violations of IHL.[72] It also describes the legal background, including the UN Principles on Reparations,[73] and affirms that until now no reparations program has taken a comprehensive approach, including for instance reparations for violations of the freedom of association.[74]

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70 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.

71 Ibid, pages 4-17.

72 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.

73 Ibid, pages 5-6.

74 Ibid, pages 7-8.

Regarding the benefits of reparations, the report distinguishes between material reparations (e.g. payments in cash) and symbolic ones (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 reiterates that reparations include medical services—e.g. psychological support—and other forms of rehabilitation.[75] 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.[76]

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 tends to be implemented even in countries with harsh economic conditions. In this context, the report recommends not resorting to economic reasons to not implement a program, and avoiding unjustified exclusions when designing and implementing programs. 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.[77]

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75 Ibid, pages 9-11.
76 Ibid, pages 11-12.
77 Ibid, pages 14-23.

The fourth and last report on the pillars of the mandate focuses on guarantees of non-recurrence.[78] According to the report, the international standards relating to these guarantees have been growing since 1993, when the term was used for the first time 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 of addressing legal reforms—e.g. statutes of limitation and retroactivity issues in accordance with international law.

As a means 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 by the mandate-holder focuses on one specific guarantee of non-recurrence, which relates to the reform of the security sector, known as "vetting"—the removal from this sector of individuals associated with any regime that has committed gross violations—and provides strategies in this regard.[79]

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78 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.

79 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.

In the subsequent 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";[80] the victim participation in the design and implementation of those measures;[81] 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;[82] prevention in the UN system; the proposal of a framework approach in this regard, which contains all the elements and proposals of the report on guarantees of non-recurrence;[83] the differences between post-authoritarian regimes and post-conflict situations;[84] 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.[85]

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80 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.

81 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.

82 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.

83 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.

84 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.

85 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.

In 2018, the newly appointed Special Rapporteur, Fabián Salvioli, submitted additional reports: one on atrocity prevention and preventive initiatives in the institutional sphere;[86] a second one on areas of interest—i.e. the fight against impunity, national and regional experiences on the four elements of the mandate, further development of guarantees of non-recurrence;[87] and a third 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.[88] In 2019 and 2020, the expert delivered another four thematic reports, namely on apologies for gross human rights violations and serious violations of international humanitarian law, on practical experiences of domestic reparations programs, on gender perspective in transitional justice processes, and on memorialization processes as a fifth pillar.[89]

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86 Ibid.

87 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.

88 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.

89 Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, UN Document A/HRC/42/45, 11 July 2019; Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, UN Document A/74/147, 12 July 2019; Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, UN Document A/HRC/45/45, 9 July 2020; Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, UN Document A/75/174, 25 July 2020.

III.5.3.3 Assessment of the work of the mandate promoted by Argentina and Switzerland.

Both Argentina and Switzerland share the same values in terms of the importance of promoting democracy and human rights at the international level and have been committed to the fight against impunity for a long time. Having different national experiences was not an obstacle to reaching consensus on establishing 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 significant contribution not only in relation to specific cases of gross human rights violations, but also to the progressive development of international human rights law.

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 the main human rights at stake in the 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. On 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 Inter-governmental 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.[90] 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.[91] At the time, at the UN level, there was a declaration on the issue adopted by the GA in 1992. Nevertheless, this instrument, like any other of its kind, was not legally binding.[92]

In this context, the working group in charge of the elaboration of the draft instrument met for the first time in January 2003. The initiative was promoted at the Commission by France, the same country which advocated for the establishment of a specific mandate on enforced disappearances in this body at the end of the 1970s in relation to Latin American dictatorships, which at the time strongly opposed the French initiative.[93]

Fortunately, things radically changed in the region and, in 2003, France found a profoundly committed ally during the whole process of promoting the new convention:

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90 United Nations Commission on Human Rights Resolution 2001/46.

91 United Nations Commission on Human Rights Resolution 2002/41.

92 Declaration on the Protection of All Persons from Enforced Disappearances (United Nations General Assembly Resolution A/RES/47/133).

93 Pervou Ioanna "The Convention for the Protection of All Persons from Enforced Disappearance: Moving Human Rights Protection Ahead." European Journal of Legal Studies, Volume 5, Issue 1 (Spring/Summer 2012), page 124.

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 sizeable delegation composed not only of officials from the Argentine Mission in Geneva, but also of a significant delegation from Buenos Aires, both from the Ministry of Foreign Affairs and from 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 included 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 signing of the convention by the then Senator and first lady, and later Argentine President, Cristina Fernandez de Kirchner.

During the first session of the working group, the 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 the wrongful removal of children.[94] From the beginning, the task was not easy because a few States were not convinced about the need for this instrument and expressed reservations about many of the proposals made during negotiations.

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94 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.

The second session of negotiations took place in January 2004, and there was a more comprehensive discussion on different topics. For instance, the delegations discussed whether the crime could or not be committed by non-State actors, whether the crime was an independent offence, and what the accessories to the crime and the penalties were.[95] Argentina promoted the definition of an autonomous crime and emphasized that the crime should not include non-State actors.[96]

During this second session, the 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, although it preferred a wording different from the one used in that instrument.[97]

The fight against impunity for such a 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 would be legal to provide amnesties or similar measures.

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95 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.

96 See as a reference De Frouville, Olivier, « La Convention Des Nations Unies Pour La Protection De Toutes Les Personnes Contre Les Disparitions Forcées : Les Enjeux Juridiques D'une Negociation Exemplaire », Droits fondamentaux, n° 6, janvier - décembre 2006, footnotes 61 and 91, available at: https://bit.ly/35N2fzJ.

97 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 8-9. De Frouville Olivier, "La Convention…", Ibid, footnote 78.

Argentina strongly supported more progressive positions, including, for instance, the need to avoid the possibility of issuing amnesties or other similar measures. In contrast, some delegations considered the importance of amnesties and other measures in promoting reconciliation.[98]

Other elements considered were: prosecutions in domestic courts; international cooperation; prevention; victims of enforced disappearances, including children; and the desirability of establishing a treaty body to monitor compliance with treaty obligations.[99] Argentina had a strong and progressive position with respect to these matters.[100]

The last part of discussions of the second session included the functions of the future treaty body and the coordination with the existing Working Group on Enforced Disappearances, the first thematic special procedure created in 1980 by the Commission.[101] In this regard, Argentina was in favor of establishing a new treaty body. Argentina supported all functions of the committee and saw no incompatibility between the work of the future committee and that of the existing Working Group on Enforced or Involuntary Disappearances because the latter mainly had a humanitarian mandate focused on the clarification of cases in any country in the world, which was possible due to its non-conventional nature. Not all delegations were as supportive though. Some 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

98 Ibid, pages 11-14.
99 Ibid, pages 14-25.
100 See for instance, De Frouville, Olivier, "La Convention…", Ibid, page 91 and footnotes 329.
101 Ibid, pages 25-30. See also, De Frouville, Olivier, "La Convention…", Ibid, footnote 167.

monitoring body, and a number of delegations defended the need to have a retroactivity clause.[102]

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, which was supported by several States, including Argentina.[103] 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 referring 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; the rights to justice and reparation; and, in a separate paragraph, the right to the truth.[104] Thus, 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. In relation to the definition of the crime, Argentina reaffirmed its opposition to the inclusion of non-State actors, as requested by one delegation, because such a proposal would rob

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102 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 26-28.

103 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.

104 International Convention for the Protection of All Persons from Enforced Disappearance, Preamble.

the instrument of its power 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.[105]

The Argentine position prevailed; the adopted convention recognized the right not to be subjected to enforced disappearance and defined the crime as an act of State agents or individuals who act with the acquiescence of the State. The final definition also included the refusal 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 the definition of enforced disappearance) committed by persons or groups of persons acting without the authorization, support or acquiescence of the State.[106]

Argentina also supported the need to ensure that enforced disappearances would be considered an offence under criminal law. Its position contrasted with that of other States, which preferred to have the 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 into their national laws.[107]

Argentina also spoke out in general support of including enforced disappearance as a crime against humanity in accordance with international law, as it was finally

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105 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.

106 International Convention for the Protection of All Persons from Enforced Disappearance, Articles 1-3.

107 International Convention for the Protection of All Persons from Enforced Disappearance, Article 4.

included in the adopted convention.[108] The South American country also explained 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, as was finally established in the convention.[109] Negotiations in the third session also discussed attenuating circumstances (e.g. helping to find the victim alive) and aggravating circumstances (e.g. the commission of enforced disappearance of pregnant women or children), which were included in the adopted convention.[110]

Regarding the statute of limitations, the Chair's proposal was indeed a very good one, and Argentina strongly supported it. It was to depend on national legislation, but it should be substantial; proportional to the serious nature of the crime; and should operate only after the establishment of the fate of the disappeared person. This is because it is a crime of a continuous nature 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.[111]

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.[112] In contrast, provisions regarding specific conditions of detention (including

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108 International Convention for the Protection of All Persons from Enforced Disappearance, Article 5.

109 International Convention for the Protection of All Persons from Enforced Disappearance, Article 6.

110 International Convention for the Protection of All Persons from Enforced Disappearance, Article 7.

111 International Convention for the Protection of All Persons from Enforced Disappearance, Article 8.

112 International Convention for the Protection of All Persons from Enforced Disappearance, Articles 9-15.

the express prohibition of secret detention, access to information on detained persons, training of law enforcement personnel, and ways to ensure the effective release of people following their detention), all key aspects of the subject under negotiation, resulted in a long and exhausting debate. Argentina and other delegations made proposals to ensure that these provisions were as strict and complete as possible, as a means to prevent enforced disappearances. Many of these proposals were included in the final version of the adopted convention.[113]

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.[114]

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 also enshrined in the operative part of the adopted convention.[115] In a separate paragraph of the same provision, negotiations also covered the right to reparation, which includes

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113 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.

114 International Convention for the Protection of All Persons from Enforced Disappearance, Article 24 (1).

115 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.

restitution, rehabilitation, satisfaction and guarantees of non-recurrence. Those elements were finally included in the adopted convention.[116]

The final version of the convention also included other relevant provisions that Argentina supported.[117]

The discussion during the third session of the working group related to a series of proposals to criminalize 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 those 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.[118]

The last part of negotiations considered the functions of the future treaty body in charge of monitoring the provisions of the convention.[119] 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 was finally agreed and reflected in the adopted convention.

The working group also agreed that the committee would cooperate with all UN mechanisms and human

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116 International Convention for the Protection of All Persons from Enforced Disappearance, Article 24 (4-5).

117 International Convention for the Protection of All Persons from Enforced Disappearance, Article 24 (6-7).

118 International Convention for the Protection of All Persons from Enforced Disappearance, Article 25.

119 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.

treaty bodies related to the issue. [120] There was also consensus on including a reporting mechanism and the individual and inter-State procedures as functions of the new committee.[121] 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 of alerting the GA in cases of a systematic practice of enforced disappearance. [122]

Argentina supported all these functions of the new treaty body and emphasized, together with Chile and Italy, the continuous nature of the crime, in particular in relation to the rights to the truth, justice and reparations.[123]

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.[124]

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 spoke out against the right to the truth and indicated that it preferred to include the right to information. It also highlighted the difficulty for a federal country of including the crime as an independent one; it proposed the deletion of the article on

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120 International Convention for the Protection of All Persons from Enforced Disappearance, Articles 26-28.

121 International Convention for the Protection of All Persons from Enforced Disappearance, Articles 29-32.

122 International Convention for the Protection of All Persons from Enforced Disappearance, Articles 33-34.

123 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.

124 Ibid, pages 16-18. See also International Convention for the Protection of All Persons from Enforced Disappearance, Articles 26-36.

enforced disappearances as a crime against humanity; and opposed the provision on the statute of limitations because of its federal system. None of these proposals were taken on board by the French Chairperson.[125]

Negotiations ended with an expression of special gratitude to Ambassador Mr. Bernard Kessedjian, the French Chairperson, who was particularly committed to adopting a strong and valuable convention, as was finally the case.[126] 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.[127]

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.[128] It was the first thematic mandate of the Commission, and it was composed of five members from different regions, who were in charge of assisting families in determining the whereabouts of persons who have disappeared.

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125 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.

126 Ibid, pages 27-52.

127 United Nations Treaty Collection, "Depositary", International Convention on the Protection of All Persons from Enforced Disappearance, available at: https://bit.ly/2UkKT6X.

128 United Nations Commission on Human Rights Resolution 20 (XXXVI), 29 February 1980.

The mechanism has been a channel between families and States. It receives communications and keeps them pending 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.[129] Since the entry into force of the Convention against Enforced Disappearances in 2010, the Working Group and the Committee have coexisted, as with other thematic human rights issues, with a different scope.

When, after negotiations and the adoption of the Convention against Enforced Disappearances in 2006, France proposed to Argentina that they 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 in the fight against enforced disappearances, both at the national and international levels, especially taking into consideration its dark past of human rights violations.

Thus, many Council resolutions were led by 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,[130] 2010,[131] and

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129 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://bit.ly/36tkpWD.

130 Human Rights Council Resolution A/HRC/RES/10/10.

131 Human Rights Council Resolution A/HRC/RES/14/10.

2012.[132] These thematic resolutions dealt with a number of issues, including the need for 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 for the Victims of Enforced Disappearance.

Resolutions extending the mandate of the Working Group were adopted in 2008,[133] 2011,[134] 2014,[135] 2017[136], and more recently in 2020.[137] 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.

III.5.4.3 Assessment of the contribution of Argentina and France in the field of 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 undergone a great transformation and become 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

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132 Human Rights Council Resolution A/HRC/RES/21/4.
133 Human Rights Council Resolution A/HRC/RES/7/12.
134 Human Rights Council Resolution A/HRC/RES/16/16.
135 Human Rights Council Resolution A/HRC/RES/27/1.
136 Human Rights Council Resolution A/HRC/RES/36/6.
137 Human Rights Council Resolution A/HRC/RES/45/3.

country can turn from a negative to a positive example in relation to the same specific human rights issue.

Indeed, Argentina, in conjunction 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 jointly led an international campaign for its ratification.[138]

The Convention against Enforced Disappearances entered into force in December 2010, and the Committee began its work, first establishing how it would 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 helping to fill the gaps on issues relating to enforced disappearances. For instance, it made a broad interpretation of Article 35 of the Convention in relation to the reporting mechanism, emphasizing the need to address the full range of obligations under the Convention at present.[139] It also had its first individual communication, which concerned Argentina, where it established that the duration of an enforced disappearance is not relevant to it being qualified as such.[140] Moreover, recently, the committee adopted guidelines on the search for disappeared persons, which will probably be a useful tool in the field. Argentina joined

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138 See for instance Comunicado de Prensa de la Cancillería 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://bit.ly/3eTAGYw.

139 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: https://bit.ly/3loolOE.

140 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://bit.ly/3nmlBBF.

other States and stakeholders in providing inputs that contributed to the elaboration of this set of guidelines.[141]

On the other hand, the Working Group, the first thematic mandate that has been operating for the last four decades, has extensive and valuable experience in contributing to the identification of disappeared persons and providing relief for their families. Even today, this mechanism deals with thousands of cases of disappearances still pending clarification, 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,[142] whereby it approved the draft norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights.[143] It was part of the Sub-Commission's work to prepare future instruments, which could be negotiated and adopted by the Commission at a

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141 Committee on Enforced Disappearances, "Guiding principles for the search for disappeared persons", UN Document CED/C/7, 8 May 2019. See also inputs available at: https://bit.ly/3pEMV0m.

142 United Nations Sub-Commission for the Promotion and Protection of Human Rights Resolution 2003/16.

143 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.

later stage. This did not happen 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 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 disagreement as to how 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 considered that it was necessary to do so with a view to addressing abuses committed by multinational corporations in developing countries. As a way of 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 the responsibility of State actors for human rights violations, but at the same time recognized that the 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.[144]

Following the adoption of the first resolution in 2004 in the Commission and a report of the OHCHR,[145] in

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144 United Nations Commission on Human Rights Resolution 2005/69, preambular paragraphs 3-4.

145 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.

2005 the cross-regional group submitted 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"; developing materials and methodologies for undertaking human rights impact assessments of the activities of these companies; and preparing a compendium of best practices of States and companies.

This initiative was adopted by the Commission on Human Rights by 49 votes in favor, 3 against and 1 abstention.[146] John Ruggie was appointed as Special Representative.[147]

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

146 United Nations Commission on Human Rights Resolution 2005/69, operative paragraph 1.

147 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://bit.ly/2Im6dXv.

in line with the 2020 Global Strategy and the UN 2030 Agenda for Sustainable Development.[148]

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. This time, the result was a text adopted by consensus.[149]

In the resolution, the Council highlights that enterprises have to respect human rights, expresses concern about the difficulties of mitigating the consequences of globalization on vulnerable economies and stresses the need to make efforts to address governance gaps in this regard.[150]

The resolution also welcomes the report of the Special Representative, in particular the identification of a framework based on three principles: the State duty to protect all human rights from abuses involving transnational corporations; the responsibility of business enterprises to respect human rights; and the need to have remedies. Moreover, the resolution recognizes the need to implement this framework and welcomes the wide range of consultations

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148 United Nations Global Compact, "Who we are", "Our Governance", available at: https://bit.ly/3loyc6U.

149 Human Rights Council Resolution A/HRC/RES/8/7.

150 Human Rights Council Resolution A/HRC/RES/8/7, preambular paragraphs 5-7.

made by the mandate-holder.[151] Through this resolution, the Council decided to extend the term of the mandate for three years to promote the framework proposed by the mandate-holder.[152]

III.5.5.3 The Guiding Principles on Business and Human Rights

After working on the framework based on three 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' Framework" (Guiding Principles on Business and Human Rights).[153]

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 jurisdiction by third parties, including business enterprises. This responsibility involves the obligation of the State in terms of prevention, investigation, punishment and redress. The second founding principle is the obligation of States to establish the requirement for all business enterprises domiciled in their jurisdiction to respect human rights throughout their work.

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151 Human Rights Council Resolution A/HRC/RES/8/7, operative paragraphs 1-3.

152 Human Rights Council Resolution A/HRC/RES/8/7, operative paragraph 4.

153 "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://bit.ly/2Im6A4l.

These founding principles are accompanied by operational principles to guide measures to be taken by States in order to fulfill their obligations in this regard.[154]

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 enterprises have to 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 respect for the human rights contained in the rights set out in the ILO Declaration on Fundamental Principles and Rights at Work and also in the Universal Declaration, and the 1966 Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights.[155] The second founding principle of the second part resides in the affirmation that the responsibility to respect human rights includes the need to avoid negative impacts on 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.[156] The fourth founding principle is that enterprises should have a policy to respect human rights; establish a human rights due diligence process and should have in place processes to remedy negative 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.[157]

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

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154 Ibid, pages 3-12.
155 Ibid, pages 13-14.
156 Ibid, pages 14-15.
157 Ibid, page 16-26.

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.[158]

III.5.5.4 The establishment of a Working Group 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 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 the issue". Moreover, it commends the Special Representative for his work.[159] In this context, for this new stage, the Council decided to replace the Special Representative by a Working Group on Transnational Corporations and Other Business Enterprises, composed of five experts from 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.[160]

The resolution also establishes a Forum on Business and Human Rights to discuss issues related to the imple-

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158 Ibid, page 27.

159 Human Rights Council Resolution A/HRC/RES/17/4, operative paragraphs 1-4.

160 Human Rights Council Resolution A/HRC/RES/17/4, operative paragraph 6.

mentation of the Guiding Principles. The forum is open to different stakeholders, including enterprises, and holds one two-day session per year.[161] Finally, the resolution requests the Secretary-General to prepare a report on the work of the UN on business and human rights. [162]

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 strategic approach to guarantee 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 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 discussion on business and human rights in the Human Rights Council.

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

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161 Human Rights Council Resolution A/HRC/RES/17/4, operative paragraphs 12-14.

162 Human Rights Council Resolution A/HRC/RES/17/4, operative paragraph 11.

Enterprises. The resolution, like 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.[163]

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 other States including Ecuador, Cuba, Venezuela, Russia and China), 14 against (European countries, and other States including 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).[164]

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 the activities of transnational corporations and other business enterprises in international human rights law. 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

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163 Human Rights Council Resolution A/HRC/RES/26/22.
164 Human Rights Council Resolution A/HRC/RES/26/9.

returned in a sense to the original proposal of the Sub-Commission in this regard.

Irrespective of 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 defining 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 though human rights abuses perpetrated by non-State actors have been recognized in soft law (i.e. resolutions of the Commission and the Council), for the time being this development has not modified 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 six sessions up to mid-2020. The first session was held in July 2015. During that session, the then Deputy 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 general statements, the EU emphasized the importance of the Guiding Principles as well as the need to consider all enterprises, while some other States supported the initiative as it was presented by the main sponsors. There were also expert panels and the participation of the Special Rapporteur on Indigenous Peoples, who supported the idea of developing a treaty.[165] The second session was

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[165] 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.

held in October 2016. It had a segment of general interventions and expert panels on different issues.[166]

The third session was held in October 2017 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 with a view to submitting a draft legal instrument on the issue.[167]

In its fourth session, in October 2018, the President submitted a zero draft of a legally binding instrument and also a draft of an optional protocol which was the basis for discussions.[168] In its fifth session, in October 2019, the Chair of the WG submitted a revised text, which was considered by participants, who made observations and proposals on the text.[169] The last session to date took place recently, in October 2020,[170] and the issue will continue to evolve in the future.

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166 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.

167 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.

168 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/40/48, 2 January 2019.

169 Human Rights Council, "Report on the fifth 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/43/55, 9 January 2020.

170 Information on the sixth and last session to date can be consulted at: https://bit.ly/3mi1DZQ.

III.5.5.6 Latest Human Rights Council resolutions on business and human rights

In parallel to the process initiated towards a binding instrument, the cross-regional group continued its consensus approach in the Council. In 2016, in a resolution adopted without votes, the Council focused on improving accountability and access to remedies in cases of business involvement in human rights abuses.[171]

Indeed, in the 2016 resolution, the Council welcomes the work of OHCHR on 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 on business enterprises to respect the Guiding Principles and to publicly share 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.[172]

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.[173] Later, in 2018, the Council, adopted a new resolution which, among other things, requests the Working Group to analyze the role of

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171 Human Rights Council Resolution A/HRC/RES/32/10.

172 Human Rights Council Resolution A/HRC/RES/32/10, operative paragraphs 1-13.

173 Human Rights Council Resolution A/HRC/RES/35/7, operative paragraph 11.

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.[174] Finally, in 2020, the last resolution adopted by the Council to date on the issue extends the mandate of the Working Group again for three years.[175]

III.5.5.7 Assessment 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 performed by transnational corporations 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.[176]

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174 Human Rights Council Resolution A/HRC/RES/38/13, operative paragraphs 8-9.

175 Human Rights Council Resolution A/HRC/RES/44/15, operative paragraph 15.

176 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.

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 about their clients, which affects their right to privacy.

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 on the part of enterprises to respect human rights. Although the set of 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 had 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 now co-exists with the one advocated by Ecuador and South Africa with respect to elaborating a human rights treaty, still under negotiation, which so far at least 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 on 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 on 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 on 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 in what became an Independent Expert on structural adjustment 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".[177]

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." [178] Among his activities, the expert prepared the Guiding Principles on Debt and Human Rights,[179] which were endorsed by Human Rights Council Resolution 20/10 of June 2012.

Thus, for 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 for the enjoyment of human rights, in particular in developing countries.[180]

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177 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", "About the mandate of the Independent Expert for foreign debt", "Evolution of the mandate", available at: https://bit.ly/3kpKXwO.

178 Human Rights Council Resolution A/HRC/RES/7/4.

179 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.

180 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

Even though 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—[181] a number of Western countries rejected the consideration of the issue in the Council, arguing that it should be dealt with in another forum. The decision to oppose 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, to the detriment of economic, social and cultural rights.[182] 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 is Argentina's contribution 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 of 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 fulfillment of human rights in 2010.[183] In the summary of this report, he affirmed that measures to relieve debt

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Debt", "United Nations concern with foreign debt and human rights", available at: https://bit.ly/3kntepJ.

181 Bantekas, Ilias, *Sovereign debt and human rights*, Oxford University Press, 2018, pages 186-247.

182 Bantekas, Ilias, *Sovereign debt and human rights*, Ibid, pages 171-177.

183 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.

in heavily indebted poor countries (HIPCs) have helped to channel those resources towards 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 for some creditors to affect those efforts and recover the full value of debt through litigation in the courts.

In this context, later in the report, the Independent Expert referred to a specific category of creditors known as "vulture funds". He defined these funds as private entities that buy defaulted or distressed debts in order to achieve high earnings. These funds generally acquire the debts of developing or least developed countries on the secondary market at a price much lower than their real value and, at a later stage, seek repayment of the full amount, in addition to other sums, including interest and legal fees. They do so using different strategies, including political pressure, litigation and seizures. There is no limit to the amount of profits that these funds can obtain in this context.[184]

After describing a few national cases where human rights were severely affected by the activities of vulture funds[185] as well as initiatives taken to mitigate the problem,[186] the mandate-holder concluded that the excessive claims made by vulture funds against poor countries with unsustainable levels of debt affect their capacity to guaran-

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184 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.

185 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.

186 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.

tee economic, social and cultural rights, including the rights to health, education and adequate housing.[187] Among the recommendations, the Independent Expert indicated that there should be legally binding standards related to the debt issue at the international level, including limits on the rights of creditors to assign debt obligations to third parties .[188]

The second activity to highlight in relation to the activities of vulture funds and their impact on 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 dubious lending and policy implemented by the International Monetary Fund (IMF)—and not careful lending from international credit markets—plus a global recession led Argentina to a big default with terrible consequences for its population. Argentina promoted debt restructurings in 2005 and 2010, which significantly reduced its debt and provided some space to guarantee human rights. Indeed, the expert describes how, from 2002 to the moment the report was issued, Argentina recorded significant economic growth, with an increase in social spending. The result was a considerable decrease in the level of poverty and unemployment, although the level of inflation remained high. These achievements commended by the expert were recorded at what was a difficult time for the country, which

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187 Report of the Independent Expert on the effects of foreign debt, UN Document A/HRC/14/21, Ibid, page 20.

188 Ibid, page 21.

faced problems accessing foreign capital markets and a long litigation with vulture funds abroad.[189]

The expert also recalled that much of Argentina's debt was contracted during its last dictatorship and considered that those who lent money to the regime should accept their responsibility and help to cancel the debt. At the same time, the expert called on Argentina to conduct a transparent debt audit to promote accountability in its debt management and strategies to protect human rights.[190]

In the report, Luminas referred to Argentina's challenges on the issue in 2013 and affirmed that, among other factors, as a result of the refusal by a minority of creditors to participate in debt restructurings, Argentina encountered obstacles accessing capital markets. The expert also described a litigation by a group of vulture funds that the South American country was facing at the time in a United States court.[191] In this context, Luminas supported the need to limit the margin of action of unscrupulous investors and to enact legislation following the example of other countries such as the United Kingdom.[192]

Finally, the report concluded with recommendations to Argentina and to the country's international lenders, including the need to promote norms to combat litigation from vulture funds.[193]

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189 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.

190 Ibid, page 2.

191 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.

192 Ibid, page 9.

193 Ibid, page 22.

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 has changed over time. From 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 the activities of vulture funds on the enjoyment of human rights. This initiative was fully in line with the efforts of Argentina at the GA level towards the fair regulation of sovereign debt processes. Indeed, a few resolutions were submitted by the G-77 plus China from 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.[194]

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" and was adopted by vote with the support of a large majority: 33 in favor, 5 against and 9 abstentions.[195]

The main reason put forward by some Western countries during negotiations for opposing the resolution was based on the argument that it was not the right forum in which to discuss it. In any case, in a different forum dealing

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194 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.

195 Human Rights Council Resolution A/HRC/RES/27/30.

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.

The preambular part of the Council resolution recalls international human rights instruments; recalls GA resolution 68/304 related to the framework on the restructuring of sovereign debts; and reaffirms all resolutions on foreign debt and its impact on human rights adopted by the Commission and the Council.[196]

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 affecting the State's right under international law to protect its people; recognizes that States have a sovereign right to restructure their debt; affirms that the payment of foreign debt contributes to hunger and poverty; encourages States and other stakeholders to consider the Guiding Principles on Foreign Debt and Human Rights; notes the lack of regulation on the issue; expresses concerns that vulture funds take advantage of the voluntary nature of debt relief processes; and takes into account that vulture funds, through litigation and other means, affect the capacity of States to comply with their human rights obligations.[197]

The operative part of the resolution condemns the activities of vulture funds for the effect that the repayment to those funds has on human rights obligations of States; reaffirms that vulture funds illustrate some of the problems of the financial system, which affect human rights in debtor countries; promotes the participation of all countries in designing a framework to restructure sovereign debt, which was later agreed in 2015 at the GA level; and requests the

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196 Human Rights Council Resolution A/HRC/RES/27/30, preambular paragraphs 1-5.

197 Human Rights Council Resolution A/HRC/RES/27/30, preambular paragraphs 6-14.

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.[198]

III.5.6.4 The research 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.[199] The research-based progress report echoes the definition of vulture funds provided by then Independent Expert on foreign debt in his thematic report, and elaborates further on these funds. The Advisory Committee also clarifies that these private hedge funds are not lenders; they obtain distressed debt at discounted prices, in secondary markets, 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; have exorbitant profits; and use jurisdictions which allow financial secrecy.[200]

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 towards obtaining exorbitant profits,

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198 Human Rights Council Resolution A/HRC/RES/27/30, operative paragraphs 1-5.

199 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://bit.ly/3nhZD2L.

200 "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.

with African and Latin American countries being those 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 by vulture funds in their jurisdictions.[201]

The report also describes awareness- raising on the problem at the international level and the growing consensus towards 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.[202]

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 measures 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 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

201 Ibid, pages 6-13.
202 Ibid, pages 13-14.

> economic, social and cultural rights should be made systematically […][203]

The Advisory Committee also makes recommendations to the Council, including to keep the issue on the agenda and to study good practices further. It also advises Member States to pass legislation on the issue and to adopt measures to limit disruptive litigation by vulture funds within their jurisdictions. In addition, it refers to the need to adopt measures to guarantee that vulture funds pay taxes and ensure that adjudication bodies make a proper assessment of the *bona fide* in the event of claims by vulture funds.[204]

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 Argentina's contribution 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 long-standing litigation with the remaining creditors, which constituted a minority of the total number of creditors existing at the time of default.[205]

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—[206] addressed the consequences of sovereign debt restructur-

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203 Ibid, page 21.
204 Ibid, pages 21-22.
205 Ibid, pages 8-9.
206 Human Rights Council Resolution A/HRC/RES/34/3.

ings and the role of the investment procedures in two recent reports.[207]

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.[208] By the time this resolution was adopted at the Council, Argentina was an Observer State and, consequently, did not vote. In a thematic resolution adopted by vote in March 2018, the Council took note of the progress report prepared by the Advisory Committee and indicated that it expected the final one for the June session of 2019.[209] In a new thematic resolution on foreign debt and human rights promoted by Cuba, and adopted by the Council by vote in March 2019, there is a new reference taking note of the work of the Advisory Committee on vulture funds and expecting the report to be submitted later that year.[210] In this last resolution, Argentina was again a Member State of the Council but changed its position and voted in abstention on the Cuban initiative.

As expected, in 2019, the Advisory Committee issued its final report on vulture funds in which, among other things, it recommended that the Council follow up and adopt a new resolution on the issue.[211]

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207 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 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.

208 Human Rights Council Resolution A/HRC/RES/34/3, operative paragraph 7.

209 Human Rights Council Resolution A/HRC/RES/37/11, operative paragraph 18.

210 Human Rights Council Resolution A/HRC/RES/40/8, operative paragraph 12.

211 Human Rights Council, "Final Report of the Human Rights Council Advisory Committee on the activities of vulture funds and the impact on human rights", UN Document A/HRC/41/51, 7 May 2019.

In this context, the role of Argentina and Cuba was key to the development of the study on the impact of the activities of vulture funds on the enjoyment of economic, social and cultural rights. In this case, once again, Argentina promoted international standards on an issue of relevance at the domestic level. Since December 2019, there has been a new Administration and Argentina has returned to its previous position and decided to support the renewal of the mandate of the Independent Expert during the HRC 43rd session in June 2020.[212] It remains to be seen if there will be a follow-up on the issue as requested by the Advisory Committee in its report.

III.5.7 Human rights of older persons

III.5.7.1 A growing interest in the issue of older persons at the UN level

The need to protect older persons has been part of the international agenda since at least the 1980s. In 1982, the GA endorsed the Vienna International Plan of Ageing, adopted at the First World Assembly of Ageing.[213] 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.[214] Moreover, in 1991, the GA adopted the UN Principles for Older Persons.[215] In the same direction, since the establishment

212 Human Rights Council Resolution A/HRC/RES/43/10.
213 United Nations General Assembly Resolution A/RES/37/51, operative paragraph 2.
214 United Nations General Assembly Resolution A/RES/57/167, operative paragraph 2.
215 United Nations General Assembly Resolution A/RES/46/91.

of the Human Rights Council, the issue has also been addressed by some Council mechanisms.[216]

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 the human rights of older persons in 2010.[217] The Council adopted a resolution whereby it requests the Special Rapporteur on the right to health to prepare a thematic study on older persons.[218]

Furthermore, in 2012, OHCHR submitted a report on older persons to the ECOSOC.[219] In this report, the High Commissioner affirms that population ageing is one of the most important transformations of the twenty-first century and indicates that, at that time, the world population was approximately 700 million people, 10 percent of whom were over 60 years old. By 2050, this figure is expected to reach 20 percent.[220]

All regions of the world will experience this phenomenon: Africa is expected to grow fast, reaching 215 million people by 2050; 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 2010 to 1.25 billion in 2050, an increment of 14 percent; Latin American and Caribbean countries will increase the number of older persons by 15 percent, reaching 188 million; and Europe will

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216 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://bit.ly/3kls7XL.

217 United Nations General Assembly Resolution A/RES/65/182, operative paragraph 28.

218 Human Rights Council Resolution A/HRC/RES/15/22, operative paragraph 11.

219 United Nations Economic and Social Council, "Report of the United Nations High Commissioner for Human Rights", UN Document E/2012/51, 20 April 2012.

220 Ibid, page 3.

reach 236 million by 2050, with an increase of 34 per cent.[221]

The human rights situation of older persons has not been developed enough either at the national or 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 that States explore the possibility of elaborating a new international instrument, creating a new special procedure of the Human Rights Council and mainstreaming the issue at the UN.[222]

In this context, the Human Rights Council adopted its first thematic resolution related to the human rights of older persons in September 2012.[223] In this document, it refers to the existence of the GA Working Group aimed at strengthening the protection of older persons.[224] It also notes that older persons suffer multiple forms of discrimination when they are part of different vulnerable groups because of their race, disability or other conditions.[225] 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.[226]

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 as well as the presentation by the

221 Ibid, page 3.
222 Ibid, page 17.
223 Human Rights Council Resolution A/HRC/RES/21/23.
224 Ibid, preambular paragraph 1.
225 Ibid, preambular paragraph 7.
226 Ibid, operative paragraphs 9-10.

Argentine Director for Policy on Older Persons in the first panel of challenges for older persons.[227]

The summary concludes that ageing is a universal issue and the group of older persons is growing in all regions. Consequently, action is needed to protect them. Although existing human rights treaties are applicable to them, special needs, including age discrimination, health services, and social protection, require more attention.[228]

III.5.7.2 The establishment of an Independent Expert on older persons. An Argentine-Brazilian initiative

Following the increasing interest in 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.[229] The resolution recognizes the challenges that older persons face when it comes to enjoying their human rights[230] and, among other things, calls upon States to take measures on age discrimination, abuse and violence, social integration and health care for older persons.[231] The resolution also decided to appoint an Independent Expert on older persons, with a mandate to assess the implementation of existing international instruments related to the issue and to search for best

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227 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.
228 Ibid, page 16.
229 Human Rights Council Resolution A/HRC/RES/24/20.
230 Human Rights Council Resolution A/HRC/RES/24/20, operative paragraph 1.
231 Human Rights Council Resolution A/HRC/RES/24/20, operative paragraph 3.

practices and implementation gaps; to take into consideration the views of stakeholders; and to promote awareness of the problems suffered by older persons.[232] The Council requests the Independent Expert to report to the Council on an annual basis and to present a comprehensive report.[233] 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.[234]

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.[235] 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 to 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 on Ageing within the GA.[236]

In this context, the mandate-holder indicates that the absence of a comprehensive instrument has significant

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232 Human Rights Council Resolution A/HRC/RES/24/20, operative paragraph 5.
233 Human Rights Council Resolution A/HRC/RES/24/20, operative paragraph 6.
234 Human Rights Council Resolution A/HRC/RES/24/25, operative paragraph 6.
235 Report of the Independent Expert on the enjoyment of all human rights by older persons, UN Document A/HRC/27/46, 24 July 2014.
236 Ibid, page 7.

implications (i.e. lack of coherence).[237] 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.[238] According to the mandate-holder, autonomy "[…] is the principle or right of individuals or group of individuals to determine their own rules and preferences […]"[239]

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 […]"[240] 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 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.[241]

As for 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. Article 3(a)). 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 other aspects. At the regional level, both the rights to independence and autonomy have been included in the Inter-American Convention on Older

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237 Ibid, pages 7-8.
238 Report of the Independent Expert on the enjoyment of all human rights by older persons, UN Document A/HRC/30/43, 13 August 2015.
239 Ibid, page 9.
240 Ibid, page 13.
241 Ibid, pages 13-16.

Persons, while the Charter of the EU has included the right to independence of older persons.[242]

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, there have also been some developments in this regard, including the Inter American system. [243]

The second report concludes by referring to the importance for States of having a legal, institutional and policy framework on older persons, as well as the importance of adopting specific measures to protect the rights of older persons to be autonomous and to receive care. [244]

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 on Ageing, identifying best and good practices as well as gaps.[245] In this document, the mandate-holder concludes that by 2050, for the very first time at the global level, the number of the older persons will be greater than that of children under the age of fifteen. It is essential to guarantee the rights of older persons. Older people face challenges in the areas of care, work, social security, equality, access to justice, and violence, among others.[246]

The report also recognizes that there are still protection gaps remaining. It recalls that OHCHR had already suggested that the issue requires a special legal instrument of protection and that this same proposal had been

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242 Ibid, page 6.
243 Ibid, pages 7-8.
244 Ibid, pages 16-21.
245 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.
246 Ibid, page 20.

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 this important issue to be addressed.[247]

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 promote the renewal of the mandate on two occasions, in 2016 and in 2019. The work of the mandate-holder has thus continued until the present.[248]

In its preambular part, the resolution adopted in 2016, among other things, 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 the 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; and predicts that by 2030, the number of older persons is expected to increase by 56 per cent.[249]

In its operative part, the resolution recognizes the problems in the enjoyment of human rights by older persons; emphasizes the need for a comprehensive approach to care; recalls the need to fight against the violence that affects older persons; highlights the importance of poverty

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247 Ibid, pages 20-21.

248 Human Rights Council Resolution A/HRC/RES/33/5, operative paragraph 6. See also, Human Rights Council Resolution A/HRC/RES/42/12, operative paragraph 2.

249 See Human Rights Council Resolution A/HRC/RES/33/5, preambular paragraphs 7, 10, 12 and 13.

and lack of income security as major problems; and highlights the importance of consultation with older persons in relation to measures related to their concerns and needs.[250]

In practice, the scope of the work at that stage of the Independent Expert was strengthened. The mandate-holder now has the capacity to 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 so require. The mandate still retains flexible wording, which allows the expert to focus on the best ways and means to promote and protect the rights of older persons. The mandate was renewed once again in 2019, although its scope this time did not expressly refer to communications or capacity building in its operative part.[251]

III.5.7.5 Recent thematic reports of the Independent Expert

After the renewal of the mandate, the Independent Expert issued additional reports. The first report focuses on the impact of automation on the human rights of older persons.[252] In the report, the expert affirms that, undoubtedly, robots and artificial intelligence will bring about 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.[253]

The mandate-holder examines the existing legal framework on the issue and affirms that there is a reference in the Convention on Persons with Disabilities, but no explicit

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250 See Human Rights Council Resolution A/HRC/RES/33/5, operative paragraphs 1-5.
251 Human Rights Council Resolution A/HRC/RES/42/12.
252 Report of the Independent Expert on the enjoyment of all human rights by older persons, UN Document A/HRC/36/48, 21 July 2017.
253 Ibid, pages 4-5.

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 of isolating 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 about his or her personal life is disclosed). Even though technology can enhance privacy (intimate activities such as bathing or dressing), it has the potential to harm users, by misusing the information collected. The Independent Expert also recognizes implications for other rights, such as the right to have 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.[254]

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 warns of 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 from the user about the risks that technology poses; the advisability of including older persons in the design and development of assistive technology; and the need to create appropriate mechanisms of accountability.[255]

The second report of the mandate-holder after the extension of her mandate is related to social exclu-

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254 Ibid, pages 5-17.
255 Ibid, pages 16-18.

sion.[256]According to the expert, this is a complex process because it involves the denial or lack of resources or services as people age, and the inability to participate in specific activities. In the case of older persons, this situation is less likely to change than the social exclusion of younger adults. Many consequences come with social exclusion such as living alone or being very old. The Independent Expert also affirms that one of the barriers to ensuring 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.[257] 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 of developing a comprehensive legal instrument to protect the rights of older persons in order to address many of the challenges faced.[258]

The Independent Expert also submitted reports during 2019 and 2020 on issues such as the human rights of older persons in emergency situations,[259] on the current data gap of older persons,[260] and on the impact of the coronavirus disease (Covid 19) on the enjoyment of human rights by older persons.[261]

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256 Report of the Independent Expert on the enjoyment of all human rights by older persons, UN Document A/HRC/39/50, 10 July 2018.
257 Ibid, pages 6-7.
258 Ibid, page 17.
259 Report of the Independent Expert on the enjoyment of all human rights by older persons, UN Document A/HRC/42/43, 4 July 2019.
260 Report of the Independent Expert on the enjoyment of all human rights by older persons, UN Document A/HRC/45/14, 9 July 2020.
261 Report of the Independent Expert on the enjoyment of all human rights by older persons, UN Document A/75/205, 21 July 2020.

III.5.7.6 Assessment of the work of Argentina and Brazil on the mandate on older persons

The initiative of Argentina and Brazil towards the establishment of a mandate on older persons has proved to be a very valuable tool for advancing 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 has already ratified the instrument, which entered into force in 2017.[262]

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.

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262 Organization of American States, Human Rights Instruments, Older Persons, available at: https://bit.ly/3plUKYr.

III.5.8 The rights of LGBTI persons

III.5.8.1 A long path towards recognition at the United Nations

Although deeply-rooted discrimination, violence, killings, and institutional criminalization against lesbian, gay, bisexual, transgender and intersex (LGBTI) persons are not a new phenomenon, concerns about these human rights violations only started to be raised by United Nations human rights treaty bodies and special procedures in the early 1990s.[263]

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 have 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 such crimes.[264]

In 2003, Brazil unsuccessfully tried to introduce the issue in the agenda of the former Commission. It pushed for a draft resolution which promoted non-discrimination against any person on the basis of his or her sexual orienta-

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263 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://bit.ly/32yBehF.

264 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 have also included the term "gender identity". These inclusions were rejected by many States, 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://bit.ly/32E9jwD.

tion, taking into consideration the human rights contained in the Universal Declaration. The text was not adopted because of the strong opposition of a significant number of States.

The failure 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.

Nor was it 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 orientation or gender identity because there was no consensus. The same happened during the Durban Review Conference in 2009.[265] 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.[266]

From the 2000s on, 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

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265 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.

266 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://bit.ly/3nimD1L.

America to enact legislation recognizing the right of same sex persons to marry and adopt children.[267]

Nevertheless, even today, around 70 countries criminalize same sex relations.[268] These laws come from former British and French colonial systems of justice or from particular interpretations of Sharia or Islamic law.[269] 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, the 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.[270]

III.5.8.2. The first Human Rights Council resolution on LGBTI individuals. The role of South Africa and OHCHR

In June 2011, South Africa (a very significant country because of its tragic past of racial discrimination, its progressive National Constitution, 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

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267 Law No. 26618 "Civil Marriage", available at: https://bit.ly/2UrC0bz.

268 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.

269 Ibid, page 12.

270 US Mission to International Organizations in Geneva, "Over 80 Nations Support Statement at Human Rights Council on LGBT Rights", 22 March 2011, available at: https://bit.ly/2IkZfC1.

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.[271]

The preambular part of the resolution, among other things, recalls the principle of non- discrimination recognized in the Universal Declaration and expresses concern about acts of discrimination and violence against LGBTI persons.[272]

The operative part of the resolution requests OHCHR to prepare a study 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 on the issue.[273]

The response of the then High Commissioner, Navi Pillay, was fast and robust. Her Office issued the requested report in November 2011.[274] The document is comprehensive and starts by emphasizing that in all regions of the world there are people who suffer from violence and discrimination on the basis of their sexual orientation or identity. It also affirms that UN 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 recalls that, in 2010, the then SG Ban Ki Moon emphasized the importance of not discriminating on

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271 Human Rights Council Resolution A/HRC/RES/17/19.

272 A/HRC/RES/17/19, preambular paragraphs 1-4.

273 Human Rights Council Resolution A/HRC/RES/17/19, operative paragraphs 1-4.

274 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.

the basis of sexual orientation or gender identity and asked States to repeal laws criminalizing homosexuality.[275]

In this context, the High Commissioner reiterates that States are obliged to respect and protect the human rights of all persons irrespective of their sexual orientation.[276] The report describes the violence suffered by persons on the basis of their sexual orientation[277] and the discriminatory laws criminalizing same-sexual relations between consenting adults and other laws used to penalize them, including in some cases, with death penalty.[278] The report also describes discriminatory practices in work spaces, health care, education, family and community, restrictions on freedom of association and assembly, denial of the recognition of rights as families, and of the recognition of gender identity.[279]

At the national level, the report recommends investigating killings and other acts of violence and establishing a system to report those crimes; adopting measures to prevent torture and other degrading treatment against LGBTI individuals and prosecute those responsible for those crimes; ensuring the non-return of a person claiming asylum to a country where his or her life is in danger; repealing laws which criminalize same-sex conduct and harmonizing the age of consent between heterosexual and homosexual activities; enacting anti-discrimination legislation; conducting training programs for security officers and supporting public information campaigns; among other measures.[280]

Following the issuance of her report in July 2013, the High Commissioner also launched a global campaign in favor of LGBTI rights at the international level. At the

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275 Ibid, page 3.
276 Ibid, page 4.
277 Ibid, pages 8-13.
278 Ibid, pages 13-15.
279 Ibid, pages 6-22.
280 Ibid, pages 24-25.

time, a press conference was held in South Africa with the High Commissioner, Archbishop Desmond 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.[281]

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 as main sponsor. 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.[282] The adoption of the resolution was not easy. Many Arab countries presented several amendments to it, but many of these proposals did not pass and hence they did not affect the content of the resolution.

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.[283]

As a result, OHCHR issued a second report.[284] This document focuses on recent developments in the fight against discrimination and violence on the basis of sexual

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281 United Nations Free & Equal Campaign for LGBT Equality, "UN Free & Equal Campaign First Year Impact Report 2013-2014", available at: https://bit.ly/3eUIo4w.

282 United Nations Human Rights Council Resolution A/HRC/RES/27/32.

283 United Nations Human Rights Council Resolution A/HRC/RES/27/32, operative paragraphs 1-4.

284 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.

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 gender identity.[285] Nevertheless, the report affirms that LGBTI individuals still face violence, harassment and discrimination.[286]

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 that they 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 have escaped from countries where their sexual orientation or gender identity is criminalized.[287] It is important to mention that the report notes that, since 2011, three countries had decriminalized same sex relationships; fourteen countries had reinforced their laws on hate crimes or discrimination on the basis of sexual orientation; twelve countries had introduced marriages or civil unions for same sex couples; and ten had changed gender recognition laws.[288]

III.5.8.4 A Latin American initiative: the establishment of an Independent Expert on 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 the main promot-

285 Ibid, page 19.
286 Ibid, pages 7-18.
287 Ibid, pages 23-24
288 Ibid, page 3.

ers of the third initiative of the Human Rights Council regarding LGBTI individuals. The proposal needed strong political support because it was difficult to achieve. Fortunately, it ended 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.[289]

Negotiations were tough and the debate before the adoption was extensive. There were numerous proposals for amendments, but the process ended with relatively positive results.

In the process, South Africa, a former supporter of the initiative, abstained because it argued that the proposal by the main sponsors was divisive and confrontational.[290]

The preambular part of the resolution, among other things recognizes the sovereign right of a State to elaborate its own legislation but also the need to respect international human rights recognized at the universal level.[291]

The operative part of the resolution emphasizes the equality of all individuals, condemns acts of violence against LGBTI individuals and establishes the mandate of the Independent Expert, which includes activities such as: assessing the implementation of international human rights instruments to fight against discrimination and violence against LGBTI individuals and at the same time identify best practices and gaps; raising awareness and identifying the root causes of violence and discrimination; providing advisory services, assistance and cooperation to States, among others. The resolution also requests the mandate-

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289 Human Rights Council Resolution A/HRC/RES/32/2.

290 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: https://bit.ly/36rxFLe.

291 Human Rights Council Resolution A/HRC/RES/32/2, preambular paragraphs 6-10.

holder to submit reports to the Council and the GA; asks States, 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.[292]

III.5.8.5 Thematic reports of the Independent Expert

Vivit Muntarbhorn was the first mandate-holder appointed for an important 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 significant number of visits were undertaken, including one to Argentina.[293] Both mandate-holders exercised their mandate to transmit to the States concerned letters of allegations and urgent appeals.[294]

I am going to focus on the relevant aspects of some thematic reports of the Independent Expert to explore how the issue was developed at the universal human rights level. Up to now, there have been eight reports. The first report was published in April 2017 and describes the elements of the mandate.[295] It also gives an overview of the issue, referring to a statement by a dozen UN entities working to end violence against LGBTI persons and recalling that around seventy countries still criminalize same sex relationships. Moreover, it offers a number of reflections emphasizing that the situation of LGBTI persons varies in each country.[296]

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292 Human Rights Council Resolution A/HRC/RES/32/2, operative paragraphs 1-8.

293 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.

294 Office of the United Nations High Commissioner for Human Rights, "Your Human Rights", "Independent Expert on sexual orientation and gender identity", available at: https://bit.ly/3knaIxB.

295 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.

296 Ibid, pages 6-7.

The report also affirms the need to implement existing instruments and to identify good practices and gaps and describes some of them.[297] It also indicates that the principle of non-discrimination contained in many human rights treaties applies to LGBTI persons.[298] 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).[299]

Moreover, the report addresses the root causes of violence and discrimination and indicates that it is necessary to work on a series of underpinnings, including: decriminalization of consensual same sex relationships; effective anti-discrimination measures; legal recognition of gender identity; de-stigmatization; inclusion; and education.[300]

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 majority. As steps forward, the expert mentions that he would follow the issue on the basis of the six underpinnings mentioned above. He makes a number of recommendations, including the following: he 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 encourages more checks and balances between the Executive, Legislative and Judicial branches.[301]

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297 Ibid, pages 7-10.
298 Ibid, page 7.
299 Ibid, pages 8-10.
300 Ibid, pages 11-12.
301 Ibid, pages 18-20.

The second report was issued in July 2017 for the consideration of the GA.[302] On this occasion, the mandate-holder describes the intersectionality between sexual orientation and gender identity, and other issues such as poverty, racism, or disability, which fuel violence and discrimination. Moreover, the expert focuses on the process of decriminalization. According to his findings, 25 countries have decriminalized same sex relationships in the last 20 years.[303]

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.[304] 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 expert indicates that checks and balances between the branches of the State and the role of civil society can help to change legislation.[305] Regarding the second underpinning, he highlights that it is important to adopt laws but also to focus on implementation.[306] The report recommends that States ratify and implement human rights treaties incorporating respect for sexual orientation and gender identity; cooperate with national human rights institutions; protect human rights defenders; and reform laws against LGBTI individuals; among other actions.

The third report was issued in May 2018.[307] It focuses on hate crimes and hate speech as well as on violence

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302 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.
303 Ibid, pages 7, 11.
304 Ibid, pages 17-21.
305 Ibid, page 21.
306 Ibid, page 21.
307 Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, UN Document A/HRC/38/43.

and discrimination based on sexual orientation and gender identity.[308] 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 and employment. This stigma corrodes the social fabric and affects LGBTI persons profoundly. The third is negation and the resulting gap: it is believed 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.[309] In this context, the report focuses on support for effective State measures at different levels, including law reform and access to justice.[310]

This third report recommends adopting laws and other measures by States in accordance with their specific context; repealing laws criminalizing consensual same-sex relationships; avoiding the death penalty as a punishment for consensual same-sex relationships; taking measures to prevent and punish acts of violence, and to develop data collection procedures; establishing specialized prosecutorial units in charge of cases of hate crimes; enacting laws recognizing the rights of trans people; and prohibiting conversion therapies, among other measures.[311]

The fourth report was issued in July 2018.[312] It focuses on gender recognition as a component of identity. It begins by mentioning that the concept of gender identity varies

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308 Ibid, pages 6-11.
309 Ibid, pages 11-15.
310 Ibid, pages 15-17.
311 Ibid, pages 19-20.
312 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.

among countries, but indicates that well established UN and regional documents use the term "trans" to refer to persons who identify as a gender different from the one assigned at birth. This report focuses on one of the underpinnings mentioned in a previous one: depathologization.[313]

In this way, the report describes how 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 on mental disorders. In 2018, the WHO released the eleventh revision of the Classification to be considered during 2019. In the new document, trans categories have been removed from mental disorders and a new category has been included in sexual health called "gender incongruence of adolescence and adulthood". This category is designed to help with 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 aroused controversy, taking into consideration the increasing 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.[314]

The fourth report 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

313 Ibid, pages 3-4.
314 Ibid, pages 5-6.

to work on *de jure* or *de facto* discrimination on the basis of gender identity. [315]

It also addresses measures taken to respect gender identity at different levels: international (a 2016 joint call by 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. work on the depathologization of gender identity by pioneering States such as Argentina, Malta and Denmark)[316] It also recalls that, at least until 2018, only ten States have passed laws adopting a model for gender identity recognition based on self-identification—including Argentina, which was the first in the world to do so in 2010. In many other cases in different regions of the world (e.g. Asia and Africa), the right has been recognized through the Justice system.[317]

The fourth report highlights among 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.[318]

In 2019 and 2020, the Independent Expert continued his work and issued four additional thematic reports on the following issues: social, cultural and economic inclusion; data collection; the impact of Covid 19; and conversion therapies.[319]

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315 Ibid, pages 7-8.
316 Ibid, pages 13-21.
317 Ibid, page 16.
318 Ibid, pages 22-24.
319 Reports of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, UN Documents A/HRC/41/45 (14 May 2019), A/74/181 (17 July 2019), A/HRC/44/53 (1 May 2020) and A/75/258 (28 July 2020).

III.5.8.6 Assessment of the work of Argentina and other Latin American countries 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 has 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 on the part of the former Secretary-General Ban Ki Moon and all High Commissioners from 2011 to date.

Argentina has also made progress on the recognition of LGBTI individuals at the national level. There was extensive debate 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 nation was part of the group of countries that pushed for the initiative from the very beginning. In this sense, 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 developing 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 consensual same-sex adult 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 mea-

sures have been taken, there are still 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 has also joined initiatives promoted by the Common Market of the Southern Cone (MERCOSUR) as main sponsor on different issues, including democracy and racism.[320] 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.[321] The Council has organized, *inter alia*, a panel and has requested reports from OHCHR. One of the initiatives focused on these types of marriages in humanitarian settings. OHCHR elaborated a

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320 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: https://bit.ly/36Jp4E3.

321 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: https://bit.ly/36s4uYp.

series of reports on the issue and also launched a specific webpage.[322]

Furthermore, since 2017, Argentina has also joined the core group that advanced the issue related to the negative impact of corruption on the enjoyment of human rights through various resolutions adopted by the Council from 2012 to the present. This core group has been led from the beginning by Morocco, and it has grown over the years. It is composed of Morocco, Argentina, Austria, Brazil, Ethiopia, Indonesia and the United Kingdom.[323]

So far, among other things, the Council has recognized by consensus the importance of the link between corruption and the enjoyment of human rights; has encouraged States that have not yet done so to ratify the UN Convention against Corruption; and has requested the Advisory Committee to prepare a report in that respect.[324]

Argentina also decided to join a group of countries from different regions which have promoted the protection of cultural rights and of cultural heritage since 2016.[325]

Moreover, Argentina has supported a series of initiatives relating to the abolishment of the death penalty. It forms part of the task force that has submitted the resolution to the GA annually since 2008. The South American country is also part of the International Commission against the death penalty. In the last few years, it joined the EU and Mongolia in a global alliance to end trade in

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322 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://bit.ly/3nmrEpR.

323 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: https://bit.ly/32DTgPx.

324 See for instance, 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, A/HRC/RES/41/9 available at: https://bit.ly/36wfhkm.

325 For more information on this initiative, see Office of the United Nations High Commissioner for Human Rights, "Your Human Rights", "Cultural rights and the protection of cultural heritage", available at: https://bit.ly/38CYJtx.

products used for the death penalty, torture and other cruel, inhuman or degrading treatment. The EU has announced its intention to promote an international convention in this regard in the near future.[326]

Finally, during 2018 and 2019, for the first time since the establishment of the Council, Argentina was a main sponsor of two initiatives regarding country situations together with a group of countries from its own region. 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 in submitting 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 OHCHR; and requests the High Commissioner to prepare a comprehensive report.[327] Once again, Argentina joined as main sponsor in 2019 on the same initiative which, *inter alia*, welcomed OHCHR report 41/18 and established an independent international fact-finding mission for a one year period to investigate a series of human rights violations.[328] In the same session, there was another initiative on Venezuela, whereby, among other things, it welcomed OHCHR report 41/18 and the presence of OHCHR in the country, requested an oral update and a report of OHCHR in successive sessions, but it did not include a specific mechanism such as the fact-finding mission. Argentina voted against this last initiative.[329]

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326 European Union External Action, "Banning the global trade in tools of torture", News Stories, 21 June 2019, available at: https://bit.ly/2GTyzr6.

327 Human Rights Council Resolution A/HRC/RES/39/1.

328 Human Rights Council Resolution A/HRC/RES/42/25, operative paragraph 24.

329 Human Rights Council Resolution A/HRC/RES/42/4.

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 resume its cooperation with OHCHR and to respect human rights in its jurisdiction, in particular the rights to freedom of peaceful assembly, association or expression, as well as guaranteeing the right to justice and reparation for the victims of human rights violations and abuses.[330]

After a change of Administration in Argentina following the December 2019 Presidential elections, the South American country continued to support those initiatives, maintaining its vote in favor but did not join as a main sponsor. This was the case with the 2020 resolutions on the situations of Nicaragua and Venezuela.[331] In the Venezuela case, there were again two resolutions: one which, *inter alia*, decided the renewal of the mandate of the fact-finding commission for two additional years—supported by Argentina, in line with its position in previous initiatives—and another one, which Argentina did not support in 2019, which among other issues, welcomed the presence of OHCHR in the country concerned and asked OHCHR to present an oral update and report to the Council in future sessions. In this case, Argentina changed its position from a vote against to an abstention.[332]

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330 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: https://bit.ly/3lqZxp1.

331 Human Rights Council Resolutions A/HRC/RES/43/2 and A/HRC/RES/45/20.

332 Human Rights Council Resolution A/HRC/RES/45/2.

IV. Human rights in Argentina in the recent past and the impact on 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 the present, Argentina has, for better or worse, 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), during which serious crimes were committed by both violent groups and State officials, a Military Junta took power on 24 March 1976.

This was not an exceptional situation in the country where, since 1930, there had been a succession of military regimes combined with periods of democratic Governments.[1] At the time, the existence of military regimes was not a rare feature in the political scene of Latin America either. During the 1960s, 1970s and 1980s, the vast majority of countries in the region were under military rule or immersed in a civil war, for at least a period of time. There are many examples in South America, including the Paraguayan military dictatorship which began in 1954 and other military regimes established in Ecuador (1963), Brazil (1964), Bolivia (1964), Peru (1968), Chile (1973), Uruguay (1973) and Argentina (1976). In Central America,

1 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.

for instance, there were longstanding military regimes in Nicaragua (1937) and Guatemala (1954) and other military experiences in El Salvador (1961) and Honduras (1963). As in the case of Argentina, a number of these countries have experienced a series of military Governments throughout their history.[2]

In any case, the spread of these regimes throughout several Latin American and Caribbean countries during that period was in part the consequence of 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. Indeed, these regimes were thought to contribute to security in the continent.

Tragically, the last Argentine dictatorship, which extended until 1983, was 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 from poor areas, some professionals from certain disciplines considered suspicious, and friends or acquaintances of these people, among others.[3]

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 the military authorities. They needed to

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2 Skaar, Elin, "Judicial independence and human rights in Latin America", Palgrave MacMillan, 2011, page 2.

3 "Nunca Más", Report of CONADEP (National Commission on the Disappearance of Persons), 1984, Part II, "The Victims." See also, Prologue.

know the truth about what had happened. It was to be a lengthy search and, later, would transform into a long fight for 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

From 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 detention and enforced disappearances. Prior to the dictatorship, there were some human rights organizations such as the Argentine League for the Rights of 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 1975. 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 dictatorship, during the first months of 1976, with members in different provinces of the country.[4] The 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

4 Familiares de desaparecidos y detenidos por razones políticas, "Breve Historia de Familiares", available at: https://bit.ly/2GVUkqp.

persons who disappeared after 1975 and tried to disseminate the information abroad as much as possible.[5]

In 1977, a group of mothers started their difficult and terribly sad journey to discover the fate of their children. To begin with there were only fourteen members, but the group soon grew in number and importance. After unsuccessful meetings with 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 from 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 became 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 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.[6]

Encouraged by the enormous courage and persistence of the Mothers, by the end of 1977, another non-governmental human rights organization of women searching for the truth about their relatives had been established: the Grandmothers of Plaza de Mayo. According to "Nunca Más", the famous report prepared by a commission at the return of democracy, approximately 30 percent of the disappeared were women, and three percent of these women were pregnant at the time they were abducted by

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5 Amnesty International, "The Military Juntas and Human Rights", 1978, pages 2-5, in Bartolomei, Maria Luisa, *Gross and Massive Violations…*, Ibid, pages 94-95.

6 Fisher, Jo., *Mothers of the disappeared*, Zed Books Ltd, London, 1989, pages 52-93.

the military. These grandmothers were looking for their grandchildren, who disappeared with their daughters during the dictatorship.[7]

During the tragic years of the dictatorship, new human rights NGOs were also created, notably the Center for Legal and Social Studies (CELS), which was founded in 1979 and undertook significant work against the crimes committed by the dictatorship, which continues even today.[8]

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 helped to denounce the situation.[9]

In this regard, Amnesty International conducted a mission to the country in 1976 and issued a strong report in 1977.[10] The International Federation of Human Rights also sent a mission in January 1978, and the Lawyers Committee for Human Rights visited the country in April 1979. For 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 was happening in the South American country during that period.[11]

The courageous work of these organizations—particularly the ones that were in Argentina, where the level of repression was terribly high and the threat

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7 CONADEP, *Nunca Más* report, Ibid, Chapter II, "The Victims. The disappeared according to the victims".

8 Centro de Estudios Legales y Sociales, "ESMA IV. Pedimos condenas para los nueve imputados", 11 June 2019, available at: https://bit.ly/3kxwsHu.

9 Bartolomei, Maria Luisa, *Gross and Massive Violations*…, Ibid, page 95.

10 Amnesty International, *Report of an Amnesty International Mission to Argentina. 6-15 November 1976,* Amnesty International Publications, Great Britain, March 1977, available at: https://bit.ly/32VvM8T.

11 See in this regard, Bartolomei, Maria Luisa, *Gross and Massive Violations*…, Ibid, page 95.

to their own lives and integrity was a distinct reality—undoubtedly helped in a significant way to make the situation known at the international level, including in the UN.

Once democracy was restored in 1983, the NGOs continued fighting to ensure truth and justice for the victims of the gross human rights violations committed during the period 1976-1983. 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, 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 early on NGOs 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 the 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 towards 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 such as 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 could eventually be considered in a public setting.[12]

Non-conventional mechanisms of the Commission were soon put to the 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 notorious worldwide even today, and their methods were particularly brutal. These dictatorships justified their actions and their own existence,[13] 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 rather quickly and established one of the first country mandates in history to deal with the human rights situation in a specific country. 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.[14]

In the case of Argentina, the Junta had the chance to learn from its neighbor's experience, and the dictatorship attempted to counteract an international campaign for human rights in the country. It also had a complex and

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12 See in this regard Chapter I.2.1.5 ("The development of non-conventional mechanisms: thematic and country mandates") of the present work.

13 See "Acta de Constitución de la Junta de Gobierno. Decreto Ley Número 1", Santiago de Chile, 11 September 1973, available at: https://bit.ly/3fEYCRQ. 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: https://bit.ly/2R3dwan.

14 Bartolomei, Maria Luisa, *Gross and Massive Violations…*, Ibid, pages 97-98.

strategic political and economic relationship with the Great Powers that worked in its favor. All these factors have been thoroughly and extensively analyzed and exceed the scope of this study.[15]

Maria Luisa Bartolomei conducted an in-depth study of the Argentine case in the 1503 Procedure. She mentions that after the Argentine Coup in 1976, many communications were received by the UN and sent to the former Sub-Commission under the 1503 Procedure. The Sub-Commission expressed its concern quite early on, in 1976, by adopting a resolution in August of that year.[16] Nevertheless, except for a few statements in plenary, 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 pressure from specific countries due to paradigmatic cases of disappeared persons of other nationalities, such as the French nuns, Leonie Duquet and Alice Domon, as well as the murder of the young Argentine-Swede, Dagmar Hagelin.[17] In this context, a number of Argentines were able to 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 key foreign policy, managed to help a few people and also adopted specific measures in relation to Latin American

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15 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.

16 Bartolomei, Maria Luisa, *Gross and Massive Violations…*, Ibid, pages 97-98.

17 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".

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. According to Bartolomei, it was only in 1979 that 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.[18]

Bartolomei also indicated that 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 the gravity of the situation in a confidential manner, decided to keep the cases under review and requested further cooperation from 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. This situation reflected the intense work of Argentina in the Commission during the dictatorship and the political

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18 Bartolomei, Maria Luisa, *Gross and Massive Violations…*, Ibid, pages 98-113.

support provided to the regime by powerful countries.[19] Bartolomei also indicates that 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 President elected in the country since the restoration of democracy, requested that the material on the national case under the 1503 Procedure be published.[20]

The 1503 Procedure proved to be a slow, complex and confidential tool for dealing 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. Upon 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.[21]

I agree with Bartolomei in the sense that 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 on-site information. What is more, the visit and the report helped bring about 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.[22]

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19 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.

20 Bartolomei, Maria Luisa, *Gross and Massive Violations...*, Ibid, pages 137-185.

21 Bartolomei, Maria Luisa, *Gross and Massive Violations…*, Ibid, pages 186-198.

22 Bartolomei, Maria Luisa, *Gross and Massive Violations…*, Ibid, pages 276-280.

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, although 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 indelible mark on 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 in identifying victims, the efforts to search for the 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 victims and NGOs are facts that are widely linked to Argentina at the international level.

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, there were moments of progress and setbacks.

IV.2 The return to democracy and the long path to combat impunity

IV.2.1 The Alfonsín Administration. From CONADEP and the Trial of 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 holding the military accountable for gross human rights violations committed during the regime.[1] 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 made up of representatives from different social sectors, e.g. scientific, religious, juridical, legislative, and literary.

The Commission was created to complement the work of the national courts. Its mandate was specifically limited to receiving complaints and evidence, and referring them to the competent tribunals when appropriate; 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.[2]

As a result of its work, the commission mentions the existence of 340 illegal detention centers in different locations within the country. Due to the size of the investiga-

1 Alfonsín, Raúl, "Democracia y derechos humanos", Síntesis Magazine Nº 29, Fundación Argentina para la Libertad de Información (FUALI)), Buenos Aires, Argentina, December 2003.

2 Decree No. 187/83. See in particular its preambular part and Article 2.

tion, the Commission requested a three-month extension to complete its report. By the end of its work, it had registered 8,961 disappearances, identified 1,300 victims in illegal detention centers and classified the disappeared persons into a series of groups. 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 the Interior with the aim, *inter alia*, 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 changed by Decree 645 and the office of 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 660 of 1996, the Directorship became the Undersecretary for Human and Social Rights. In 1999, it was moved 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.[3]

To strengthen the rule of law, the new Government promoted in Congress the adoption of the Defense of Democracy Act (Law No. 23.,077), whereby Congress established the crime of attacking the constitutional order and democratic life. This law made the rules applicable to such attacks more stringent.

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3 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.

In terms of reparations, the first democratic Administration also took some steps. It passed a series of laws to vindicate the situation of the public officials 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.[4] Also, the first reparation law was adopted in 1986: Law to grant pension to the spouses and children of the disappeared persons as well as other members of the families under specific circumstances (Law No. 23,466).[5] In the early 1990s, Law No. 23,852 was also adopted , 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.

The major issue, however, was to decide what to do about the terrible crimes committed by the dictatorship. One of the first limitations to overcome was the *de facto* Decree-law No. 22,924 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 on how to deal with legislation adopted by a dictatorship was controversial at the time and it had also raised debates before in the context of transition after other *de facto* Governments.[6]

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4 See for instance, Laws No 23.053, 23.238 and 23.278.

5 See in this regard, Guembe, María José, "Economic reparations…", Ibid, pages 25-26.

6 See for instance, Nino, Carlos S, "Una nueva estrategia para el tratamiento de las normas de facto'", La Ley 1983-d, Sec. Doctrina, pg. 935-946, in Sancinetti Marcelo A. "Derechos humanos en la Argentina postdictatorial"; Lerner Editores y asociados, 1988. See also, Sancinetti Marcelo "El derecho penal en la protección de derechos humanos. La protección de los derechos humanos mediante el derecho penal en las transiciones democráticas en Argentina, Editorial Hammurabi SRL, 1999, page 292. See also Enrique

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.[7] Likewise, it decided to criminally prosecute the higher-ranking leaders of rebel organizations, such as Montoneros and Ejército de Revolucionarios del Pueblo (ERP).[8]

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 Article 10 of 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 status of the proceedings.

In the end, the matter was heard by the Federal Criminal Court. The trial started on 22 April 1985, and it was conducted in a remarkably short period, bearing in mind the political necessity of providing 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. 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

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Bacigalupo's position, for instance, in "Algo más sobre la derogación de la legislación de un gobierno 'de facto'", in El Derecho, tomo 49, p. 989.

7 Decree No. 158/83, December 1983.

8 See in this regard: https://bit.ly/3mgInMk.

of the Second Junta, as well as the members of the Third Junta, were acquitted.[9]

The commanders were convicted in their capacities as 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. In the end, a Federal Criminal Court also judged other important high-ranking military officers and senior officers of the security forces including General Ramon Juan Alberto Camps and Miguel Osvaldo Etchecolatz.[10]

The historic Trial of the Juntas received special attention and generated a profound national debate among different sectors of society about its rather limited scope. 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 Branch, only focused on the chief officers, pursuant to the government's general strategy that was designed to avoid prosecuting those who had followed the orders of a superior without exceeding the task with which they had been entrusted 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 Branch, further jurisprudential interpretation by the Judiciary on the basis of Law 23,049 enabled accountability for military agents who had complied with orders. This attribution of responsibility resulted from the statement that no legitimate obedience to a higher-ranking

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9 Federal Criminal Chamber of Buenos Aires, Judgment of 9 December 1985.

10 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.

officer might be accepted in case of the commission of atrocities.

In this context, and after a series of military protests and 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 for bringing 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 into gross human rights violations committed during this period. The second law ended the possibility of incriminating and prosecuting those who committed crimes under the 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 confirmed the validity of the Due Obedience Law. Both aforementioned laws remained in force until they were abrogated in 1998 by Law 24,952, which deprived them of any effects for the future.[11]

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 have been investigated in court proceedings.[12] 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 of identifying genetic information on children separated from their families in the dictatorship or who were born during their mothers' captivity, and who were taken away and

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11 Lorenzetti, Ricardo Luis, *Derechos humanos…*, Ibid, pages 97-98.

12 See for example, Proceedings 10326/96 over the crime of misappropriation of children, related to case "Nicolaides C. and Others".

given new identities by persons associated with the dictatorship. To date, it has been possible to identify with scientific certainty 130 children who had been appropriated and who have been able to see their identity restored. [13] 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. 25,457.

IV.2.2 The Menem Administration. From the pardons to the truth trials and the reparation laws

From 1989, the newly elected President, Carlos Saul Menem (1989-1999), reinforced the impossibility of prosecuting and sanctioning those responsible for gross human rights violations. He issued a series of decrees granting presidential pardons, including in particular, to military officers and rebel groups, and all ongoing criminal procedures were thus terminated.[14] As a result of these decrees, all pending cases 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 not yet convicted. The Supreme Court of Justice settled the matter in the Aquino Mercedes Case by admitting the constitutionality of a decision of this nature.[15]

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13 Diario Infobae, "Las Abuelas de Plaza de Mayo anunciaron la restitución del nieto 130", 10 June 2019, available at: https://bit.ly/2UovAKx.

14 Decrees No. 1002/89, 1004/89, 2741/90, 2745/90 and 2746/90. See also as reference Decrees No. 1003/89, 1005/89, 2742/90, and 2743/90 and 2744/90.

15 Lorenzetti, Ricardo Luis, *Derechos humanos…*, Ibid, page 100.

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 convicted senior officers of the Province of Buenos Aires Police were pardoned. In addition, some decrees benefited other governmental officials.

However, the pardons did not affect the cases relating to the appropriation of children of disappeared persons born in captivity or illegally adopted. As a consequence, since the 1990s, there have been a number of trials and, in 1998, one of the former Presidents during the dictatorship, General Videla, was detained in a case concerning children abducted and subjected to identity change in secret illegal detention centers.[16]

The amnesties and pardons did not discourage relatives of victims and human rights organizations from continuing to fight against impunity in relation to other crimes committed during the dictatorship. In 1995, the public statements by former Lieutenant Commander Adolfo Scilingo that a number of bodies of illegal detainees had been thrown into the sea by the Navy and the Coast Guard caused outrage in 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 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.[17] The plaintiffs asserted their right to the truth about what had happened, which,

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16 Lorenzetti, Ricardo Luis, *Derechos humanos*…, Ibid, pages 104-105.

17 This was the case in relation to Case Nº 761 "Facts that took place within the Navy Mechanic School", National Federal Criminal and Correctional Court of Appeals. See in this regard, CELS. Informe anual 1995, section IV, pages 85-90 available at: https://bit.ly/3sJYiVO.

among other things, included the right to find the remains of their relatives and to mourn their dead.[18]

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 find out 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 appeal, and not under a criminal procedure.[19]

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 resource to reach any clarification about what had happened to the disappeared persons.

The truth trials allowed the continuation of the investigation into the facts surrounding the disappearance of thousands of persons during the last military government. These investigations greatly contributed to the development of the right to the truth in Argentine jurisprudence.

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18 See Cases 450 and 761.

19 See in this regard, Lorenzetti, Ricardo Luis, *Derechos humanos*…, Ibid, pages 114-115.

In 2003, in the Hagelin Case (Sentence 326:3268), the Supreme Court recognized the right to the truth, 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.[20]

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 presidential pardon 1002/89, Argentina had violated the right to justice as set out in the American Convention. As a consequence, it recommended that Argentina provide reparations to the petitioners and take measures to establish the facts and identify those responsible for the perpetration of human rights violations.

This decision strengthened some complaints brought before civil jurisdiction for compensation for the illegal detentions during the violent period of 1970s and 1980s. Judicial decisions, considered on an individual basis, reached 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 office.

It is important to highlight that President Menem himself was a political prisoner between 1976 and 1981 and

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20 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 in this regard Lorenzetti, Ricardo Luis, *Derechos humanos*…, Ibid, pages 115-116.

thus that he had been one of the approximately 10,000 prisoners during the dictatorship and its preceding years.[21] In 1991, President Menem issued Decree 70/91 in response to the petitioners' claims. Decree 70/91 decided to give compensation to those persons who were arrested by the Executive Branch—under a warrant issued by the latter—up to 10 December 1983. As a consequence, the cases brought before the Inter-American Commission were closed following 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 in 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 civilians detained under a military tribunal. Law No. 24,411 was enacted at the end of 1994 to provide reparations in cases of enforced disappearance. It established a benefit for 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.[22] Nonetheless, Law 24,411 proved controversial because some of the victims' relatives considered that they would be accepting money in exchange for the fate of their children. Indeed, the relatives had to recognize that the victim of enforced disappearance was dead in order to be able to receive 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

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21 Guembe, María José, "Economic reparations…", Ibid, page 28.
22 Law No 24,411, Articles 3- 5.

person who, up to 10 December 1983, had disappeared from his/her domicile and/or place of 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.[23]

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 it, 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.[24] Additional reparations laws and measures were also adopted a few years later, during other administrations. [25]

A final remark should be made about a landmark event that took place during Menem's Government and that greatly contributed to the promotion and protection of human rights at the national level: the constitutional reform of 1994. Said reform *inter alia* 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

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23 Guembe, María José, "Economic reparations…", Ibid, page 36-40.
24 Guembe, María José, "Economic reparations…", Ibid, pages 38-39.
25 Guembe, María José, "Economic reparations…", Ibid, page 41.

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 on 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).[26] 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 events that occurred during the last military dictatorship within the national territory and other places subject to national jurisdiction would be dismissed. Those events included, among others, those relating to the enforced disappearances.

This decision was justified 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 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.

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26 Lorenzetti, Ricardo Luis, *Derechos humanos…*, Ibid, pages 124-126.

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 ending 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 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 to how 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 doctrinal positions regarding its validity and legitimacy, as had happened 20 years before.[27]

During the Kirchners' administrations, the Prosecutor General also contributed to the fight against impunity with the decision to create a unit to investigate crimes against humanity during the dictatorship (decision PGN 14-07); and the Executive Branch decided to retire a number of

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27 Rivera, Julio César, *Anulación de leyes por el Congreso*, La Ley 22 August 2003. See also, Gordillo, Agustín, *Decláranse insanablemente nulas las leyes 23492 y 23521*, La Ley 25 August 2003. See also Gil Domínguez, Andrés, *La nulidad de las leyes y el valor epistémico de la democracia,* La ley, 27 August 2003.

army generals, in addition to consulting civil society about the promotion of military officers.[28]

Upon the declaration of the 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 events 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.[29]

The Supreme Court of Justice also decisively contributed to ending impunity, in particular through three judgments identified by Ricardo Lorenzetti.[30] 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 majority vote of the Supreme Court, the principle of legality—that is to say, the possibility of condemning someone for an act 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 existing *jus cogens* norm. The Supreme Court also took into consideration the jurisprudence of the Inter-American Court in

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28 González Ocampo, Ezequiel, *Shifting legal vision. Judicial change and human rights trials in Latin America*, Cambridge University Press, 2016, pages 116-140.

29 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".

30 Lorenzetti, Ricardo Luis, *Derechos humanos…*, Ibid, pages 129-167.

cases such as Barrios Altos and Velazquez Rodriguez.[31] 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 Full Stop and Due Obedience Laws and strengthened the nullity declared by Congress. Applicable 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 the Court to declare the unconstitutionality of the amnesty laws.[32]

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. The main defense of the military officers in the case was the previous declaration of the 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 the 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 domestic legislation, including amnesties, is not applicable in cases of crimes against humanity.[33]

Concerning the Executive Branch, in July 2003, President Kirchner repealed Decree 1581/2001. Indeed, by Decree 420/2003, it established the obligation to process extradition requests under the justice system, as required under Law No. 24,767 on International Cooperation in Criminal Matters, relating to the events that took place in

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31 Lorenzetti, Ricardo Luis, *Derechos humanos*…, Ibid, pages 134-145.
32 Lorenzetti, Ricardo Luis, *Derechos humanos*…, Ibid, pages 145-158.
33 Lorenzetti, Ricardo Luis, *Derechos humanos*…, Ibid, pages 158-167.

the Republic of Argentina between 24 March 1976 and 10 December 1983.

From that moment on, it has been possible for those responsible for human rights violations during the last military dictatorship to be extradited to another State, provided that they have not been prosecuted in the country and other applicable legal conditions are met. Nevertheless, this has not been necessary 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 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 extend reparations established in Laws 24,043 and 24,411 to those persons who were victims of detention, enforced disappearances or died under specific circumstances between 16 June 1955 and 10 December 1983.[34]

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 escaped to save their lives was similar to that of those who were illegally detained and, therefore, they enjoyed the right to reparation. This opened the possibility for persons in exile to ask for compensation.[35]

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34 Argentine Ministry of Justice and Human Rights, "Reparation laws. Financial reparation for victims of State terrorism", available at: https://bit.ly/32Gtgmz.

35 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 of being compensated in case of exile, available at: https://bit.ly/3lvBa9O.

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—now adults—who have refused to contribute to the cases so as to protect their adopted parents from legal prosecution. Not all of them have had the intention of initiating contact with their biological families.[36]

In this context, the jurisprudence regarding the possibility of ordering a DNA test on a compulsory basis changed over time. Following Lorenzetti, one can observe that 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 allow a compulsory blood extraction (Guarino Case). Nevertheless, in 2003, the Supreme Court changed its position and opposed 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.[37] The judicial case, meanwhile, was resolved because the genetic information was taken from Evelyn's belongings, without a compulsory blood test,

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36 Lorenzetti, Ricardo Luis, *Derechos humanos*…, Ibid, pages 107-108.
37 Decree No. 1800/2009, available at: https://bit.ly/2IyWpcD.

and it was proved that she was the daughter of a disappeared woman.[38]

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 DNA tests performed using biological material found in someone's belongings—not through a compulsory blood test—do not affect the victim's right to privacy and are an acceptable way to find the truth without affecting the integrity of any part of the victim's body.[39]

Finally, Law No. 26,549 was adopted, whereby DNA tests could be undertaken using material extracted on a compulsory basis 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.[40] Nevertheless, the issue is still controversial because it clashes with the right to privacy and there was even a proposal to amend this law in 2019.[41]

In 2011, the National Congress passed Law No. 26,679, whereby it adopted the criminal offence of "enforced disappearance". Since that moment on, there has been no need to resort to a multiplicity of related offences to criminalize

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38 Lorenzetti, Ricardo Luis, *Derechos humanos*…, Ibid, pages 110.

39 Lorenzetti, Ricardo Luis, *Derechos humanos*…, Ibid, pages 110-113.

40 Inter-American Commission on Human Rights, Report 160/10, Petition 242-03, Friendly Settlement, *Inocencia Luca de Pegoraro et al. Argentina*, November 1, 2010.

41 Honorable Congreso de la Nación Argentina, "Diputados Argentina", "Proyecto de Ley", 8 March 2019, available at: https://bit.ly/32FECay.

the terrible practice which has made the Argentine military dictatorship known worldwide.

The creation of the National Memory Archive was another important measure adopted during the Kirchners' administrations. It was decided that it would function as a decentralized body under the Secretary for Human Rights.[42] Likewise, the President and the Mayor of the Autonomous City of Buenos Aires signed Agreement Nº 8/04, which ended in the construction of a space for memory and for the promotion and defense of human rights at the Navy Mechanics School (ESMA). Today, the Secretary of Human Rights of the Ministry of Justice has its offices in ESMA.

42 Decree No. 1259/2003, published on 17 December 2003.

IV.3 A positive change in the 21st century

The impact of Argentina on 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 involving progress and setbacks. Through a long and arduous process, Argentina found its own way to successfully deal with its past and fight against impunity, setting 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 Nuremberg Trials of and the trials in Greece in the 1970s—to bring perpetrators of gross human rights violations to justice.

The final judicial decision in the Trial of 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. [1]

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1 Skaar, Elin, *Judicial independence and human rights in Latin America*, Palgrave MacMillan, 2011, page 3.

The amnesty laws adopted in 1986 and 1987 and later the pardon decrees represented a significant setback, 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.[2]

Nonetheless, the Argentine human rights movement contributed both internally and abroad to the 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.

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 some of the victims who had disappeared. The technique was used and developed by the Argentine Forensic Anthropology Team, which set a significant worldwide precedent in the context of gross human rights violations. This team later worked in a significant number of countries around the world.[3]

Since the turn of the century, in 2003, the Executive, Legislative and Judicial Branches all adopted measures that helped 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

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2 González Ocampo, Ezequiel, *Shifting legal vision…*, Ibid, page 3.

3 Argentine Forensic Anthropology Team-Equipo / Argentino de Antropología Forense (EAAF,) available at: https://bit.ly/32Er67c.

law so as to finally hold accountable all those responsible for gross human rights violations. This tendency was replicated in other countries of the region, such as Chile and Peru. Indeed, 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.[4]

In conclusion, at the turn of the century, the South American country was able to make a very significant, successful change that decisively contributed towards combatting impunity for gross human rights violations. It was only then that Argentina had strong international legitimacy and was ready to take on a leading role, helping to set norms and standards on issues closely related to its past but also to its present and future.

4 González Ocampo, Ezequiel, *Shifting legal vision…*, Ibid, pages 6-70.

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 extensively addressed 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 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.[1]

The amended Constitution provides for the possibility of giving constitutional status to other international instruments with the approval of a two-thirds majority of Congress. On this basis, three additional instruments have acquired constitutional status to date: the International Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity,[2] the Interamerican Convention for the Protection of All Persons against Enforced Disappearances,[3] and the International Convention on the Rights of Persons with Disabilities.[4]

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[5] was adopted, among other things, to enable citizens of MERCOSUR countries and migrants from the rest of the world to be able to 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 extensive both in the Latin American region and even at the universal level, at a time when 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

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1 See Argentine National Constitution, Article 75 (22).
2 See Law No. 25,778.
3 See Law No. 24,820.
4 See Law No. 27,044.
5 See Law No. 25,871 and Decree No. 616/2010.

Argentina's lead and have —with different levels of recognition— protected LGBTI couples.

In 2012, the adoption of Law No. 26,743 on Gender Identity represented another significant step towards full respect for the rights of trans persons. This law was the first in the world to require only the self-perception of gender as a condition for being identified as that gender in 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 at the forefront 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 on 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 from the time they are born until they are 18 years old. Since 2011, by Decree 446/2011, there has also been a Universal Allowance for Pregnant Women who, *inter alia*, are unemployed, work on an informal basis, or work as housemaids.

Since 2005, Argentina has also had a national plan against discrimination, which has allowed the identification of all groups that suffer discrimination and the adoption of measures to protect them. 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 universal and regional conventions and have a national State institution with competence in the field—have had an important influence on 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 of age while their mothers work. Moreover, in 2017, the Parliament adopted the Law on gender equality representation in political spaces, which will have an impact on the composition of political parties and Congress.

Politicians from different parties have added their voices to those of new social groups and organizations, which are taking on a leading role in demanding an end to violence against women and in promoting the right of women to free, legal and safe abortion. The Administration of President Macri allowed 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. Nevertheless, only two years later, President Alberto Fernandez decided to re-introduce the issue in Parliament and this time it was adopted on 30 December 2020.

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.[6] 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 involved in effectively protecting the rights of indigenous peoples and it would be desirable to reinforce existing policies both at the national and provincial levels in this regard.

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6 Ministry of Justice and Human Rights of Argentina, "Normativa sobre Pueblos Indígenas y sus comunidades", available at: https://bit.ly/32GJs7l.

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 such as the 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 with some changes, and Argentina changed its position and voted in favor.[7]

7 See High Commissioner for Human Rights, "Las cuestiones indígenas. Los derechos humanos y las cuestiones indígenas. Informe del Grupo de Trabajo establecido de conformidad a la resolución 1995/32 de la Comisión de Derechos Humanos, available at: https://bit.ly/3fCLuwC. See also, United Nations High Commisioner for Human Rights, Declaración sobre los derechos de los pueblos indígenas, available at: https://bit.ly/39EREZc.

IV.5 Argentina in the Human Rights Council

When the Human Rights Council was established in 2006, Argentina had already long embraced the promotion and protection of human rights as a State policy both internally and abroad. Its foreign policy on 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.[1]

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 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.[2]

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 also 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

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1 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://bit.ly/2Un5tUo.

2 In this regard, see Chapter III.4 ("Argentina in the institution building process of the Council in 2006 and in its review in 2011") of the present work.

situations regarding gross human rights violations in countries from different regions of the world.

During the Macri Administration, Argentina, together with other Latin American countries, took the lead in denouncing human rights violations in countries of its own region such as Nicaragua and Venezuela, and with the new Fernandez Administration that started in December 2019, although not as main sponsor, it has continued to support these initiatives.[3] This decision to lead country resolutions—albeit for a limited period of time—was a significant 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 on its own region since the establishment of the Council, except if it was the concerned country itself and its allies which presented a resolution for technical cooperation or technical assistance.

Argentina has also closely cooperated with all the 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.[4] The positive role of Argentina has also been recognized by a prestigious international NGOs such as Human Rights Watch.[5]

The Council was created to avoid politicization and selectiveness. As stated before, this has proven difficult because the Council is composed of States. However, this

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3 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.

4 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://bit.ly/3niCZr5.

5 Human Rights Watch, *Keeping the momentum. One year in the Human Rights Council*, 2011, page 33, available at: https://bit.ly/2K2xvT8.

does not necessarily mean that its work is not valuable, not only in dealing with specific country situations, when it is possible, but also in developing international norms and standards. Indeed, as we already saw in detail in previous chapters, the Council has 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 Argentina's contribution in the field of civil and political rights

The influence of Argentina's past on 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 has made a significant contribution as a single State for three main reasons.

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 in addressing 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.[6]

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6 See Sikkink, K. "From Pariah State to Global Protagonist: Argentina and the Struggle for International Human Rights". *Latin American Politics and Society*, Vol. 50, No. 1 (Spring, 2008), pp. 3-16.

The approach to addressing 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 absence due to 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 legal professionals of an exceptional level.

Thirdly, because even though 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 a consequence, the country had 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 in the region and even other parts of the world.[7] It is not surprising that Argentina had the 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 significant 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

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7 See Sikkink, K. "From Pariah State to Global Protagonist...". Ibid, page 2.

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 the 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 recalling 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 known worldwide and, unfortunately, used in many other cases all around the world.[8] 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 these inclusions.

It could be affirmed that Argentina has exported its own sad experience into international human rights law through the International Convention against Disappearances. Although it is probably one of its main contributions, it has not been the only one. By way of example, long before the creation of the Council, upon the 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 of re-establishing it (Article 8 of the Convention on the Rights of the Child).[9]

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8 In a similar sense, see Sikkink, K. "From Pariah State to Global Protagonist...". Ibid, page 5.

9 See Abuelas de Plaza de Mayo, Convención sobre los derechos del niño, 2 September 2019, available at: https://bit.ly/3fOjJS3. See also, Sikkink, K. "From Pariah State to Global Protagonist...". Ibid, page 14.

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.[10] 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, together with Switzerland, led the process that ended up with the establishment of a new rapporteur on the right to the truth, justice, reparation and guarantees of non-recurrence. 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 has been a close supporter of those States which led initiatives to develop international norms and standards on economic, social and cultural rights.[11] The Cold War had a profound impact on the legal development of civil and political rights, on one side, and economic, social and cultural rights on the

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10 United Nations Working Group on Enforced Disappearances, "General Comment on the Right to the Truth in Relation to Enforced Disappearances", available at: https://bit.ly/3pod1UX.

11 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://bit.ly/38BXXgx.

other. This difference was reduced in the 1990s with several instruments and conferences, which reaffirmed the universality, indivisibility and interdependence of all human rights.[12] Nonetheless, the differences between the two categories of human rights have persisted to some extent until the present.

The level of protection assigned to the 1966 covenants has been quite different: the obligation of States regarding the 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, albeit 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 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 lesser political importance was given 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 of having a communica-

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12 See for instance, the Vienna Declaration and Programme of Action of 1993, 25 June 1993, paragraph 5.

tions 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.[13]

The decision to adopt this instrument, which entered into force in 2013, was a relevant one because it helped to underline the equal importance of all human rights. Argentina also provided political support for 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, and 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. Like any other developing country, Argentina has faced challenges when it comes to effectively protecting 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 in 2014 to submit an initiative on the effects of foreign debt, in particular vulture funds, on the enjoyment 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

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13 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://bit.ly/36qM36u.

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 thus supported the position of the Independent Expert on foreign debt, who had previously referred to the impact of foreign debt and the adjustment programs of international financial institutions and their effect on the enjoyment of economic, social and cultural rights. This position has also been sustained by scholars.[14]

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 on the enjoyment of economic, social and cultural rights such as the right to health, education and food.

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14 Donnelly, Jack, *International human rights…*, Ibid, pages 160-161.

IV.6 Argentina's Contribution 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.

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 individuals 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 country's clear commitment to the issue at the international level. This decision was fully in line with its national context. In the last decade, Argentina has transformed itself into one of the countries with the most progressive laws regarding

equality for LGBTI individuals and gender identity. These laws have been accompanied by a positive cultural change towards respect for 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 people tend to live longer, the issue is unavoidable. The two biggest South American countries joined their efforts to those 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 desirability of considering 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 has 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 a 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: addressing and preventing human rights violations, and promoting and developing international human rights law and standards.

From the beginning, a great deal of expectation from all stakeholders was placed 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 as no surprise that it was not possible to avoid politicization and selectivity in an intergovernmental setting, in particular on a highly-sensitive issue such as human rights. As long as a UN body is composed of States, it will have an eminently 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 in the spotlight, 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 that 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. As of December 2020, there have been 40 regular sessions and 27 special sessions.[1]

In any case, the same problem remained to 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

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1 Human Rights Council, "HRC Sessions", "Special Sessions", available at: https://bit.ly/36v3hzK.

manner, as for example in relation to Darfur.[2] In other cases, the results were more effective, such as in some situations addressed during the so-called Arab Spring.[3] This is because, as with 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 so allow.

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, like its predecessor body, played a significant role in international law-making.

During the Council's lifetime, a number of international human rights treaties have been 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.[4]

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2 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://bit.ly/3lvUZ0I.

3 Rathgeber, Theodor, *New prospects for human rights…*, Ibid, pages 9-14.

4 Human Rights Council, "HRC Bodies", "Open-ended intergovernmental working group on transnational corporations and other business enterpris-

For more than a decade, the Council has also been developing a series of principles, guidelines and other documents which are not binding in nature and could be referred to 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 text. Later, these draft instruments were promoted by one or more Member States of the Council, negotiated and 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.[5]

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 this, such as the 1992 UN Declaration on Enforced Disappearances, which was followed by the adoption of the 2006 UN Convention on Enforced Disappearances.

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

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es with respect to human rights", available at: https://bit.ly/3lmbeNP. See also Human Rights Council Resolution A/HRC/RES/36/11.

5 See for instance, Human Rights Council Resolution 17/4, UN Document A/HRC/17/4, operative paragraph 1.

stakeholders, including NGOs.[6] As international human rights norms and standards evolve with societies, it is clear that this progressive development will continue in the near future.

Even though different stakeholders could help to elaborate or push for the development of norms and standards—including experts, rapporteurs and NGOs—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 for 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 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

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6 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://bit.ly/3pnFRVA.

been able to contribute to developing international standards on 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 successfully "export" to the Council many legal concepts developed at the national level in a creative way and has thus contributed to the progressive development of international human rights law.

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