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THE ORIGIN AND FUNCTIONING OF THE HUMAN RIGHTS COUNCIL AND ITS RELATING MECHANISMS WITHIN THE UNITED NATIONS SYSTEM OF PROMOTION AND PROTECTION OF HUMAN RIGHTS / IL SISTEMA ONUSIANO DI PROTEZIONE E PROMOZIONE DEI DIRITTI UMANI, IN PARTICOLARE IL CONSIGLIO DIRITTI UMANI ED I RELATIVI MECCANISMI

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LIST OF ABBREVIATIONS

ACP:	African, Caribbean and Pacific countries
Advisory Committee:	The Human Rights Council Advisory Committee
AI:	Amnesty International
APRM	African Peer Review Mechanism
CAT:	The UN Convention Against Torture (and the relating UN CAT Committee)
CEDAW:	The UN Convention on the Elimination of all Forms of Discrimination Against Women (and the relating UN CEDAW Committee)
CHR:	The UN Commission on Human Rights (alternatively, below)
Commission:	The United Nations Commission on Human Rights
Council:	The United Nations Human Rights Council (alternatively below under HRC)
CMW:	The UN Convention on Migrant Workers and Their Families (and the relating UN CMW Committee)
CRC:	The UN Convention on the Rights of the Child (and the relating UN CRC Committee)
CRPD:	The International Convention on the Rights of Persons with Disabilities (and the relating UN CRPD Committee)
CSOP:	The Commission to Study the Organization of Peace
DPRK:	The Democratic People's Republic of Korea
DRC:	The Democratic Republic of Congo
ECOSOC:	The United Nations Economic and Social Council
EU	The European Union
FIDH	Federation Internationale de ligues des Droits de l'Homme
FORB:	Freedom of Religion and Belief
FP:	Field Presence
GA:	The United Nations General Assembly
GRULAC:	Group of Latin American and Caribbean Countries
HCHR:	High Commissioner for Human Rights
HRC:	The UN Human Rights Committee
HRC:	The UN Human Rights Council
HRW:	Human Rights Watch
JUSCANZ:	Japan, the United States, Canada, Australia and New Zealand
IB process:	The Institution-building (June 19,2006 through June 18, 2007)
IB Package:	The Institution-building Package
ICC:	The International Coordination Committee (of the NHRIs)
ICC:	The International Criminal Court
ICCPR:	The International Covenant on Civil and Political Rights (and the relating UN Human Rights Committee)
ICERD:	The International Convention on the Elimination of All Forms of Racial Discrimination (and the relating UN CERD Committee)
ICESCR:	The International Covenant on Economic, Social and Cultural Rights (and the relating UN CESCR Committee)
ICJ	The International Commission of Jurists
ICJ:	The International Court of Justice
IDPs:	Internally Displaced Persons

IE:	Independent Expert
ILC:	International Law Commission
ISHR	International Service for Human Rights
LGBT:	Lesbian, Gay, Bisexual and Transgender people
MDGs:	Millennium Development Goals
NAM:	Non-Aligned Movement
NGOs:	Non-Governmental Organizations
NHRIs:	National Human Rights Institutions
NPM:	National Preventive Mechanisms
NSA:	Non-State Actors
OEWG:	Open-ended Working Group
OHCHR:	The Office of the High Commissioner for Human Rights
OIOS:	The UN Office of Internal Oversight Services
OP:	Operative paragraph
OPCAT:	The Optional Protocol to the international Convention Against Torture
OPT:	The Occupied Palestinian Territories
PBI:	Programmed Budgetary Implications
P-5:	The Five Permanent Members of the Security Council
PP:	The so-called “Paris Principles”
PP:	Preambular paragraph
RRI:	Review, Rationalisation and Improvement (of the Special Procedures)
R2P:	Responsibility to Protect
S-G:	The United Nations Secretary-General
SC:	The Security Council
SMP:	Strategic Management Plan of the OHCHR
SPs:	The United Nations Special Procedures of the Human Rights Council
SPMHs:	The United Nations Special Procedures Mandate-Holders
SRSG:	Special Representative of the Secretary-General
SS:	Special Sessions
SuR:	State under Review
TB:	Treaty Bodies
TCP:	Technical Cooperation Projects
ToR:	Terms of Reference
UN:	The United Nations
UNOG:	The United Nations Office in Geneva
UPR:	Universal Periodic Review
VAW:	Violence Against Women
VDPA:	The 1993 Vienna Declaration and Programme of Action
WEOG:	The Western Group
WGAD:	The UN Working Group on Arbitrary Detention
WGAT:	The UN ad hoc Working Group of Experts on Arab Territories
WGC:	The UN ad hoc Working Group on Chile
WGC:	The UN Working Group on Communications
WGED:	The UN Working Group on Enforced Disappearances
WGS:	The UN Working Group on Situations
WGSA:	The UN ad hoc Working Group of Experts on South-Africa
WMD:	Weapons of Mass Destruction

METHODOLOGY AND SYNOPSIS OF THE THESIS

In assessing "the origin and functioning of the Human Rights Council and its relating mechanisms within the United Nations system of promotion and protection of human rights", the present Thesis focuses on the historical process leading to the establishment of the Human Rights Council and its impact on the other relevant mechanisms, namely the System of the Special Procedures, the Advisory Committee replacing the past Sub-Commission for the Promotion and Protection of Human Rights, the newly introduced Universal Periodic Review and the OHCHR (for sake of completeness I also refer, though not extensively, to the human rights Treaty-monitoring Bodies, the so-called conventional monitoring bodies). A specific section has been devoted to the role of civil society entities within the Council. Since the establishment of the Organization of the United Nations (and even before), it has been "recognized" the protection role of both Non-Governmental Organizations and National Human Rights Institutions (See ECOSOC Resolution 9 (II) of June 1946), though it has not been adequately translated yet, within the UN HR machinery. Despite some reluctance by a certain number of States, the UN General Assembly has acknowledged it, by its Resolution 60/251 of March 15, 2006 on the creation the Council on Human Rights, in which it envisages their "participation (See Op.11)" in the Council's framework. In this specific context, NGOs and NHRIs have been denominated: "the other relevant stakeholders (See the IB Package of June 18, 2007)".

Within the UN, the establishment of the Council results in a significant Change (to paraphrase the UN High-Level Panel on Threats, Challenges and Change). This Thesis has been thus developed by following a chronological order of relevant events, to elucidate the evolving relationship, within the Council's framework, between UN Member States and the above mechanisms and entities.

With the aim of describing the functioning of the relevant system, I focussed on the relating practice, which may provide clear indications of the approach of States towards the protection role of the Council, including its relating mechanisms and, more generally, towards the relevant international human rights procedures, mechanisms and standards, primarily the Charter of the United Nations (1945) and the Universal Declaration of Human Rights (1948).

Approximately 65 years after the adoption of the Charter of the United Nations and the Universal Declaration of Human Rights, UN Member States have achieved a

wealth of international human rights standards, which needs to be effectively implemented, translated into the domestic systems and overall protected, whenever UN Member States fail to do so.

By collecting and analyzing UN Documents, including Resolutions, Decisions, Presidential Statements, Recommendations, Declarations, Reports and Press Releases, I have tried to identify the political and overall legal dimension of the UN system of promotion and protection of human rights (though I acknowledge that there are various and differing keys to describing it).

As a matter of fact, the relevant system has changed profoundly and somehow abruptly. This triggers various questions, in particular, on the effectiveness of the system itself, and more generally on the position of human rights within the UN framework.

Notwithstanding the elevated position of the Human Rights Council within the UN, its current framework indicates a tension between the principle of State sovereignty and the purpose of "the promotion of respect for human rights". Provided that States remain the main actors of international law, the practice shows a worrisome trend in which they are reluctant to execute, in good faith, the obligations stemming from the Charter of the United Nations, in particular Articles 55-56.

Beside stressing the divide between the Western Group and the Rest of the world, I therefore focus on the recent normative and procedural development concerning the Human Rights Council, "the system" of the Special Procedures, the newly introduced Universal Periodic Review, the Council's Advisory Committee, the OHCHR, and the "other relevant stakeholders", namely NGOs and NHRIs. Though I am aware that its outcome is "unpredictable", the last Chapter has been devoted to the current Council's review process, to be finalised by 2011.

For a comprehensive overview of the entire System, including its shortcomings and achievements, I thoroughly examined relevant articles, manuals, books and studies of scholars and human rights practitioners.

The purpose of this Research is to establish whether the Council can contribute to ensure the effective protection of human rights, especially when States are unwilling or unable to do so, since it has been mandated "to address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon (Op.3 of GA Resolution 60/251)." To this end, I have considered the work carried out by the past Commission (The choice to abolish it for an elevated Council

could theoretically indicate the strengthening of the third pillar of the UN Organization. *De facto* this expectation has not been met yet) and then analysed the key components of the UN human rights machinery, as "reviewed, rationalized and improved" throughout the period, June 2006 – June 2007 (See Op.6 of GA Res. 60/251).

The establishment of the Human Rights Council, the definition of its tools, as well as the redefinition of the relating mechanisms has been developed within a complex political context. Given the evolving nature of this process, it is not possible to draw any final conclusion but to identify shortcomings, which might be eliminated on the basis of the relevant normative framework.

Synopsis of the present Thesis

As for the content of the Thesis, the **Introduction** provides a brief overview on the historical development of both the principle of State sovereignty and the promotion and protection of human rights within the UN framework. **Chapter I** focuses on the transition from the past Commission on Human Rights to the newly established Human Rights Council on Human Rights. In particular it is aimed at indicating the context within which the foundations of the Council and its relating mechanisms have been laid, through the so-called Institution-Building process (2006-2007). **Chapter II** is devoted to the development of "the Special Procedures system" in light of the above transition: it thus describes both its origin and evolving relationship with UN Member States, within the Council framework. **Chapter III** outlines the newly introduced Universal Periodic *Peer* Review, as defined during the institution-building process, the normative framework upon which it relies, and its potential effectiveness. **Chapter IV** focuses on the role of the past Sub-Commission, including with regard to "the so-called 1503 procedure (See ECOSOC Resolution 1503 (XLVIII) of May 1970)," with the aim of emphasizing the gap between the Advisory Committee of the Council and its predecessor, in terms of work and functioning, including with regard to the new "complaint procedure" (in this regard the present research is not aimed at exhaustively developing a comparative analysis of the different working methods but at stressing the current framework as designed by the Council's members). **Chapter V** focuses on the role of NGOs and NHRIs vis-à-vis the Council, with the aim of underlining the achievements and shortcomings stemming from the new institutional-normative

framework, as updated by GA Res. 60/251 of March 15, 2006 and by the so-called IB Package (Council's Resolution 5/1 and 5/2 of June 18, 2007).

This new framework has also significantly impacted on the OHCHR, whose expertise and advisory services have been increasingly put in the arena of the Council's negotiations. Beside from political evaluations, the OHCHR may result in an effective (if its independence is preserved, in accordance with Article 100 of the Charter of the United Nations) *trait d'union* among all the main components of the UN system of promotion and protection of human rights, in order to assist countries in implementing Articles 55- 56 of the Charter of the United Nations. In the longer term, it can indeed help to narrow the distance between the international and domestic legal dimensions. Last **Chapter VI** is aimed at providing a key to understanding the current review process concerning the status, the work and functioning of the Council (See GA Resolution 60/251 jointly with the IB Package).

Taking into account the complexity of the system under examination and the different "stances behind it", the Chapter on the Conclusion is aimed at offering some reflections on the Council, including its protection role, within the relevant normative framework.

INTRODUCTION

The Origin and Functioning of the Human Rights Council and its Relating Mechanisms, within the United Nations System of Promotion and Protection of Human Rights

INTRODUCTION

A brief overview

"We, the Peoples of the United Nations, determined [..] to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small [..]", from the Preamble to the Charter of the United Nations

"To achieve international co-operation [..] in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion", from Article 1, para.3 of the Charter of the United Nations

"The principle of the protection of human rights is derived from the concept of man as a person and his relationship with society, which cannot be separated from universal human nature. The existence of human rights does not depend on the will of a State; neither internally on its law or any other legislative measure, nor internationally on treaty or custom, in which the express or tacit will of a State constitutes the essential element", International Court of Justice (ICJ) judge Tanaka[1]

The above statement by the ICJ judge Tanaka, released in the year 1966, still reflects one of the main goals to be pursued in the years ahead. Alternatively it might be considered as the expression of an optimal state of implementation of the international system of promotion and protection of human rights.

As mentioned in the last Report[2] of the then Sub-Commission on Promotion and Protection of Human Rights[3]: "The United Nations human rights system should be inspired by faith in the inherent dignity and the equal rights of all human beings, committed to promotion of respect for the ideals and principles proclaimed in the Charter of the United Nations and the Universal Declaration of Human Rights and convinced of the need for development and strengthening of universal standards and rules for the interpretation and implementation in practice of the principles of international human rights law".

When approaching the term, "system", it might be accepted the general definition of "a set of entities connected to each other through reciprocal visible relations[4]". Alternatively, a "system" is made of several components interacting (or in functional relation) so that each part can contribute to achieve a common goal or a target as identified by that given system.

As such, a system is characterized by the overall balance that is created between the different parties constituting it. These components, moving together and thus sharing common purposes (in this case, "the promotion of the respect for human rights" as

[1] See ICJ reports (1966), p 297.
[2] See Para.15 of UN Doc. A/HRC/2/2- A/HRC/Sub.1/58/36, of August 2006.
[3] See Chapter IV .
[4] See the definition available at: http://it.wikipedia.org/wiki/Sistema.

enshrined in Article 1, para.3 of the UN Charter), outline the functioning of the system itself.

In view of the above, what happens to such a system when one of its main components changes?

The UN system of promotion and protection of human rights (alternatively, it might be used the term "the UN human rights machinery") is under consideration by legal scholars and human rights practitioners following the recent transition from the 60-year old Commission on Human Rights (hereinafter, the Commission) to the newly established Human Rights Council (hereinafter, the Council).

The latter, with an elevated status within the UN (See GA Resolution 60/251 of March 15, 2006), has greatly affected all the following components of the above system:

i. The "system of the Special Procedures[5]", which was so defined, at the 1993 Vienna World Conference on Human Rights[6];
ii. The Advisory Committee replacing the former Sub-Commission for the Promotion and Protection of Human Rights[7];
iii. "All the other relevant stakeholders", namely NGOs and NHRIs[8];
iv. The UN Office of the High Commissioner for Human Rights[9].

Considering that the UN human rights machinery, for its inner coherence and nature, embodies a "work in progress", the aim of the present Thesis is to highlight its structural and functional elements and the relating development within the international normative framework, as created since the adoption of the UN Charter (1945) and the Universal Declaration of Human Rights (1948).

1.The principle of State sovereignty within the United Nations framework

[5] As a preliminary remark, with regard to "the system of the Special Procedures", mention has to be made of its evolving relationship with UN Member States. The practice of the last years shows the teleological nexus between its own existence and the willingness of UN Member States. The last Council's Resolutions concerning the Special Procedures seem to indicate that the Special Procedures system has to work "as a subordinate or secondary to a primary system, from which it depends and without which it can operate independently (See Council's Resolutions 5/1 and 5/2 of June 18, 2007, containing the Institution Building of the Human Rights Council and the Code of Conduct for Special Procedures Mandate-Holders, respectively)".
[6] See Chapter II.
[7] See Chapter IV.
[8] See the Annex to Council's Resolution 5/1 of June 18, 2007.
[9] See Chapter V.

"The sovereignty of States must no longer be used as a shield for gross violations of human rights", at the Nobel Prizes Award Ceremony (2001), the former UN Secretary-General, Kofi Annan[10]

"*There exists perhaps no conception the meaning of which is more controversial than that of sovereignty. It is an indisputable fact that this conception, from the moment when it was introduced into political science until the present day, has never had a meaning which was universally agreed upon*[11]"

Since the outset, the Organization of the United Nations has been affected by the evolving differing "distributions of power[12]": bi-polar, during the Cold War era, and towards a mono-polar dimension, from the fall of the Berlin Wall onwards[13]. Accordingly, increasing attention has been paid to the principle of State sovereignty, as enshrined in Article 2, para.1, of the Charter of the United Nations. "The Organization is based on the principle of the sovereign equality of all its Members", which indicates both the respect for the State sovereignty and the equality among States[14].

In the 1960s, the General Assembly adopted the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independent and Sovereignty (See UN Doc. 2131 (XX) 1965). In the 1970s, the above principle was further outlined by the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States, in accordance with the Charter of the United Nations (See UN Doc. GA Resolution 2625 (XXV) of 1970), by which it was reiterated, inter alia, that:

i. States are legally equal;
ii. Each State has the right to territorial integrity and political independence;
iii. "Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State (Op.5 of GA Resolution 2131 (XX)1965)".

Thus State sovereignty entails the supremacy of the State over its territory and its independence in international affairs. That supremacy emerges in international law, as long as States are [the] subjects of international law, although it should be accepted that the extent of that sovereignty evolves according to the degree of involvement of the

[10] available at: htpp://www.nobel.se/peace/laureates/2001/annan-lecture.
[11] Lassa Oppenheim, International Law, Sir Arnold D. McNair 4th ed.,1928, p.66, as quoted by Forsythe (see below note 12) .
[12] Forsythe, David P., The Human Rights in International Relations, Cambridge University Press, 2006, p.5 et ff..
[13] Ramcharan, B. G., Human Rights in the 21st century, in international human rights monitoring mechanisms, Essay in Honour of J.T. Toller, Vol. 35. M. Nijhoff Publishers, 2009, p. 3-8..
[14] Op. cit. in supra note 12.

State in international relations, including through the ratification of international human rights treaties.

As noted, the sovereign equality of States[15] indicates their juridical equality as subjects of international law, regardless of the differences stemming, for instance, from the size of the territory and populations[16].

More specifically[17], over the years, two main schools of thought have developed different views of the principle of State sovereignty and its corollary, the principle of domestic jurisdiction (Article 2, para.7 of the Charter of the United Nations[18]), namely the "legalistic vision" and the "essentialist vision[19]": The former considers that there is a *flexible relationship between State sovereignty and domestic jurisdiction* (and thus, *mutatis mutandis*, between the State and human rights), depending on the development of international relations: "when an international standard governs a certain matter, it shall automatically cease to fall within the domestic jurisdiction of States, as required by the provision in question. The behavior of a State in a given historical moment cannot respond to the view that the international community has in another historic moment." Thus the principle of State sovereignty does not have any-longer an immutable content but it is subject to the evolving moral and legal thought[20]. Prof. Katarshkin[21] argues that "As a fundamental principle of contemporary international law, State sovereignty may not be viewed as being entirely unrestricted or having precedence over all other principles and norms".

On the contrary, the essentialist school of thought is of the opinion that the principle of State sovereignty indicates that certain issues, particularly those of social, political and constitutional scope, do not fall within international law. The principle of

[15] Op.cit, in supra note 12, Forsythe, p.7.
[16] This difference within the international scenario partly explains the divide between the Western Group and the rest of the world..
[17] Teson, F.R., Humanitarian intervention: an inquiry into law and morality, NY, 1988, p.159.
[18] Article 2 of the Charter of the United Nations: The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles. 1.The Organization is based on the principle of the sovereign equality of all its Members. 2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter. 3.All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered. 4.All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations. 5.All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action. 6.The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security. 7.Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter Vll..
[19] Alston, P.,The Security Council and human rights: lessons to be learned from the Iraq-Kuwait crisis and the aftermath" in Austl. YIL, 1992, p.106 et sequitur.
[20] Ibidem (in supra note 19); See also Simma, B., and Alston, P., "The sources of human rights law: custom, jus cogens and general principles", in the Australian Yearbook of International law, Vol. 12, The Australian National University, 1992, p.82 et sequitur; See further Kartarshkin, V. on Human Rights and State Sovereignty, in UN Doc. E/CN.4/Sub.2/2006/7.
[21] Op.cit. in supra note 20 (Kartarshkin V. , p.8.).

domestic jurisdiction seems to be invariable and independent by the progressive development of international law.

During the Cold War, by recalling the Westphalia system, some scholars, mainly from the socialist bloc, stressed the absolute nature of the principle of State sovereignty and that foreign policy was a mean to express it within the international relations framework. It was thus argued[22]: "that a State, in concluding an agreement, does not restrict, but realizes its sovereignty[23]".

Notwithstanding different visions, classical international law is, by definition, based on the principle of State sovereignty and thus on a "State-centric approach[24]". On the other hand, international human rights law is centred on individuals, so that "the very concept of internationally recognized human rights derogates to the above approach (emphasis added)".

International human rights law focuses on individuals and groups of individuals rather than on States. It is thus argued that the development of international human rights law has "eroded somehow the principle of domestic jurisdiction (Article 2, para.7, of the Charter of the United Nations)[25]."

Against this background, it is the UN practice and the development of international human rights law which bring questions in this regard[26]. Over the years, the promotion and protection of human rights within the UN, though being a controversial and divisive issue, has been slowly developed in parallel with, rather than being merely instrumental to, peace and security, and social and economic development (so as to shape an increasing number of UN activities), up to the acknowledgement by the former UN Secretary-General, K.Annan, that human rights, development, peace and security are the main pillars of the United Nations and "go hand in hand"[27]. These preliminary remarks trigger various questions:

[22] Lukashuk, I. as quoted by Kartarshkin, see in supra note 20 (p.7).
[23] Anand, R. International Law and Developing Countries, N. Delhi, 1986, p. 95, as quoted by Katarshkin, see in supra note 20.
[24] Brown, B.S.,"From State-Centric Int'l Law Towards a Positive Int'l Law of Human Rights, Excerpt from The Protection of Human Rights in Disintegrating States: A New Challenge", 68 CHI-Kent L. Review, 203 (1992), p.2.
[25] Ibidem Brown in supra note 24; See also Marchesi, A., Diritti Umani e Nazioni Unite, diritti, obblighi e garanzie, Ed. Franco Angeli, 2007, p.23.
[26] Ibidem in supra note 24, Brown stresses that traditional international law is centred on States. "According to this view, international law is a law by and for states in which the rights of individuals have no place", while "the idea of an international law of human rights refers to the rights of individuals, or groups of individuals rather than those of States (emphasis added)").
[27] UN Doc. A/59/2005, paras.14,16-17, entitled "In Larger Freedom: Towards Development, Security and Human Rights for All, See also his statement before the General Assembly in March 2005, available at: http://www.un.org/largerfreedom/sg-statement.html..

i. What is the current relationship between the principle of State sovereignty and the development of the system of promotion and protection of human rights[28]?

ii. What approach has been applied to the establishment of the Human Rights Council: the "State-centric approach"[29]?

iii. In establishing the Council, has it been prevailing the need for a "purposive" body rather than representative-deliberative ("purposive/*universitas* or not purposive/*societas*")[30]?

As for the first question, it might be sufficient to recall one of the last works initiated (in August 2006) by the then Sub-Commission for the Promotion and Protection of Human Rights, on "Human Rights and State Sovereignty". The then 26 independent experts of the Sub-Commission, following a relevant preliminary working paper (UN Doc. E/CN.4/Sub.2/2006/7), decided to mandate one of them to elaborate an in-depth study on the relationship between State sovereignty and human rights[31]. After the transition from the Sub-Commission to the Advisory Committee, the new body has never continued that study[32]. Despite the nature of both the Sub-Commission and the current Advisory Committee, working as think-tanks, UN Member States never expressed the willingness to debate on "State sovereignty and human rights" (Accordingly the newly established Advisory Committee of the Council has never followed up on that study[33]).

As for the second question, it might be recalled that: "the principle of dialogue and cooperation [among States]" guides GA Resolution 60/251 establishing the UN Human Rights Council. By this Resolution, the General Assembly stipulated: "[PP.10] *Recognizing further* that the promotion and protection of human rights should be based on the principles of cooperation and genuine dialogue and aimed at strengthening the capacity of Member States to comply with their human rights obligations [..]"; [Op.4.] "*Decides further* that the work of the Council shall be guided by the principles of universality, impartiality, objectivity and non-selectivity, constructive international

[28] See the Conclusion to the present Thesis.
[29] "a human rights based-approach", by UNICEF, available at http://www.unicef.org/sowc04/files/AnnexB.pdf).
[30] Oakeshott, M. on Human Conduct , Oxford, Clarendon Press, 1975..
[31] UN Doc, E/CN.4/Sub/RES/2006/106, entitled "Human Rights and State Sovereignty..
[32] "At its 21st meeting, on 24 August 2006, the Sub-Commission on the Promotion and Protection of Human Rights [..] decided to request Mr. Kartarshkin to prepare, without financial implications, an expanded working paper on human rights and State sovereignty that should address, among other things, such issues as State sovereignty and the relationship between international and domestic law in the field of human rights, and to submit it in 2007 to the Sub-Commission or to any future expert advice mechanism. The Sub-Commission also recommends that this topic be included in the agenda of the future expert advice mechanism as a matter of priority"- See Session's Report in UN Doc. A/HRC/2/2- A/HRC/Sub.1/58/36, p.72).
[33] The State sovereignty may be limited by the ratification or the accession to international human rights binding treaties and the Council, which has shifted towards a State-centric approach, though equipped with some protection tools cannot change the vision of States as "right-holders". Only a World Court of Human Rights could really make States' accountable in case of human rights violations (See Nowak, M., The Need for a World Court of Human Rights, in Human Rights Law Review, 2007, 7, 1, Nottingham University, p. 251-259).

dialogue and cooperation, with a view to enhancing the promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development". The choice of this wording indicates the firm political will to control, by dialogue and cooperation among States, the work of this newly established inter-governmental body, in which sovereign States participate in, decide, on equal footing, and act upon relevant human rights issues: they continue to be the right-holders, while human rights continue to be shaped as a result of their decisions (the protection of the individual has not altered the international legal system. Indeed States are duty-bound by human rights obligations stemming from the international human rights binding treaties as they ratify[34]).

As for the last question, the international relations scholar, H. Morgenthau (as quoted in an Essay of the 1950s, by Waltz) argued that modern political thought divides into two schools: "the utopians, with their optimistic philosophies of man and politics"; and "the realists who see that the world is the result of forces which are inherent in human nature". To take either positions, international (social-political) organizations – such as the United Nations - play a crucial role[35]. Along these lines, the school of thought referred to as "constructivism" argue that international social structures can affect how States "construct" their identities and national interest[36]. In this wake, by effectively implementing the "purposes and principles" contained in the Charter (Articles 1-2), the UN Organization may assist Member States in changing their political views[37]. In the longer term, this will result in the "added value" of the Organization of the United Nations. The political issue at stake goes beyond the abilities of the UN and refers to the nature of this Organization, including the new Human Rights Council. Rather than shaping the UN as "a debating club", is it possible to detect its "purposive" nature[38]? This remains a pending question, as long as the response mostly depends on the political will of States.

In parallel with the political dimension, the practice of the work of relevant institutions, such as the Special Procedures Mandate-Holders[39] and the OHCHR[40], shows the ability of the Organization to protect human rights when States fail or neglect

[34] For an overview on State sovereignty, domestic jurisdiction and the international status of the individuals, see Marchesi, op.cit in supra note 25, p.23-26).
[35] Waltz, K.N., Man, the State and War: A theoretical analysis, Columbia University Press, New York, 1959, p.41.
[36] Burnett, M., and Finnemore, M., Rules For The World: International Organizations In Global Politics, Cornell University Press, Ithaca, 2004, p.5-25.
[37] In this regard, the vision of the UN Charter as a standard of "a constitutional rank" is also relevant . For a specific explanation, see Chesterman S, Franck T.M., Malone D.M., The Law and Practice of the UN, Oxford University Press, 2008. p.5et ff.
[38] Op.cit in supra note 30.
[39] See Chapter II.
[40] See Chapter V.

to do so. The extent and the nature of that ability needs to be contextualised, from a legal standpoint.

2. The opposite stances: the State sovereignty and human rights

Approximately sixty-five years after the adoption of the Charter of San Francisco (1945-2010) and the Universal Declaration of Human Rights (1948-2010), it is correct to argue that there is a "table of values", being relevant at both the international and domestic levels[41]. This is the result of a long-standing process which led some years ago to the formal acknowledgement of human rights - alongside peace and security and development - among the main pillars of the United Nations[42].

As broadly argued,[43] the Cold War conditioned the human rights sector and delayed the above acknowledgement.

After the fall of the Berlin Wall, the spread of civil wars greatly contributed to focus on human rights. In the aftermath, the relevant events of the early XXI century (the Twin Towers attacks, the war on terror and the international economic and financial crises) show the complexity of the relationship between States (political will/power) and human rights within the international law framework.

In the 1990s, scholars[44] argued that human rights had impacted on the State-centrism characterizing classical international law. The then UN Secretary-General, B.Boutros Ghali, stated, in his Agenda for Peace (See UN Doc. A/47/277 of June 1992): "the time of absolute and exclusive sovereignty…has passed…It is the task of States leaders, today, to understand this and to find a balance between the needs of good internal governance and the requirement of an even more inter-independent world[45]".

The XXI century started, under the auspices of the Millennium Summit (September 2000) and the general will of UN Member States to commit themselves towards relevant UN Goals (which also included various types of human rights)[46]. On the contrary, the Report by the High Level Panel on "Threats, Challenges and Change[47]" - which was drafted in the aftermath of the 9/11 events – contained proposals for

[41] Flick, G.M., "Ombre ed immagini dei diritti fondamentali. Riflessioni a margine del sessantesimo anniversario della Costituzione e della Dichiarazione Universale, in Rivista di Scienze Giuridiche, Jus 1-2009, eds. Università Cattolica del Sacro Cuore, Milano, 2009, p.7-24.
[42] UN Doc. A/59/2005.
[43] For a general historical overview, see Tolley, H. Jr.,"The UN Commission on Human Rights" Boulder, Westview, NY, 1987.
[44] See Buergenthal, T., The Human Rights Revolution, 23, St. Mary's L.J., 1991, p.31 et sequitur.
[45] As quoted in Roberts-Kingsbury (eds) "United Nations", Divided World, 1993, p. 468.
[46] Cadin, R., Carletti, C., Spatafora, E., Sviluppo e diritti umani nella cooperazione internazionale. Lezioni sulla cooperazione internazionale per lo sviluppo umano, Giappichelli, 2007, p.190 et ff..
[47] UN Doc. A/59/565 of December 2004.

reshaping all the relevant UN sectors, including human rights, in order to better respond to the emerging "Challenges" that the international community was facing.

In that juncture, the UN General Assembly saw it fit to create, on March 15, 2006, the Human Rights Council, yet embodying within it opposite stances between a conservative classical approach and *prima facie*, the upgrading of the UN human rights system.

Beside from political and legal arguments, that Change indicated a sort of positive "frenzy" to update the relevant sector. Accepting the system as centred on the Commission/Council, by proclaiming its extensive degree of development, would risk to neglect important questions relating to the responsibilities of UN Member States.

In 1989, N. Bobbio[48] reported that the big issue in the field of human rights does not refer to either the creation or the promotion; on the contrary the main issue refers to the effective protection of human rights. This remains valid today.

At present, the practice shows a dual dynamic: on the one hand, human rights require an adequate technical and operational support, so as to be effectively implemented and protected, by and through the relevant United Nations human rights machinery when States fail or neglect to do so[49]; on the other hand, the principle of State sovereignty does not want to accept any erosion/reduction in its ability to withstand pressure internally[50] as a result of the ratification of international human rights binding treaties or suffer from any *deminutio* of power, despite the openings forces emerged from the Post-Cold War and, more recently, from the elaboration of the Responsibility to Protect Theory[51].

In this context, some scholars[52] emphasize that the opposition between human rights and State sovereignty is inevitable. By a more disenchanted approach, other scholars[53] argue that States always commit themselves to protecting human rights. According to Forsythe: "a considerable degree of hypocrisy is not unknown in international relations[..] And the notion of human rights has a strong appeal".

It seems that the events occurred, over the last five years, such as the abolition of the Commission on Human Rights (March-June 2006), the subsequent replacement with the Council (June 19, 2006) and the introduction of a new mechanism "The Universal

[48] Bobbio, N., L'età dei diritti, Einaudi, Torino, 1990..
[49] See the Conclusion to the present Thesis.
[50] Op. cit, in supra note, 25, Marchesi, (p.26).
[51] Paras.138-139 of the 2005 World Summit Outcome Document (UN General Assembly Resolution 60/1).
[52] Reiding, H., The Netherlands and the development of international human rights instruments, Antwerp, Intersentia, 2007, p.330.
[53] Forsythe, D.P., The United Nations and Human Rights: 1945-1985, Political Science Quarterly, 100, no.2, 1985, p.249-270.

Periodic *Peer* Review[54]" merely highlight the sovereignty of States in a changed international context where much more needs to be done to appease or deal with the pressure from members of the international community and the UN itself[55].

3. The historical-theoretical development of human rights

As discussed, from both the political and legal standpoints, sovereignty is inherent with the State. However in the contemporary world this principle, like others, should be interpreted in accordance with the purposes of the Charter of the United Nations. To better understand how and if the sovereign power of UN Member States is not absolute in the way it was under classical international law[56], it might be important to recall some theories underlying human rights[57]:

i. The theory affirming the existence of laws of nature or natural laws that transcend human law;
ii. The theory, developed in the XVIII century, by philosophers, such as J. J. Rousseau, based on the concept of the social contract. In this view, individuals enjoy rights from presumed pre-social state of existence as created by others, upon their delegation. The "social contract" is the basis of the political state for security and governance;
iii. The theory, by which human rights stem from religious and moral precepts.

More specifically[58], the social contractual theories tradition was based upon the relationship between the citizens and the State, whereby the latter was intended as a guarantor of individual rights[59].

In the late XVIII century, the relationship between the individual and the State was formally defined by two main Declarations (both documents were precursors of contemporary international human rights instruments), the French and the American Declarations, respectively:

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[54] See Chapter III.
[55] Nowak, M., The Need for a World Court of Human Rights, in Human Rights Law Review, 2007, 7, 1, Nottingham University, p. 251-259.
[56] UN Doc. E/CN.4/Sub.2/2006/7, of August 2006, p.5
[57] Maddex R.L., International Encyclopaedia of human rights, freedoms, abuses and remedies, CQ Press, 2000, p. XXX et sequitur.
[58] Addo, M. K., International Law of Human Rights, eds., 2006, p. xlvi
[59] Locke, J., The second Treatise of Government, in Two Treatises of Government, p. 283 (Peter Laslett ed. Cambridge Univ. Press, 2nd edition, 1967); see also Ruti Teitel, Human Rights Geneology, as cited above in Addo, supra note 58, 1997, in International Law of Human Rights, p.303-317; See further Henkin, L., The Age of Rights, Columbia Press University, 1990 (p.193).

The former (1789), entitled "*Declaration of the Rights of Man and of the Citizen*", defined individual and collective rights. Influenced by the theory of natural rights, it was stressed that the rights of man are universal, valid at all times and in every place. The latter (1791), known as the US Bill of Rights, containing the first ten amendments to the US Constitution, mainly prohibited the US Congress from limiting various freedoms, including the right to freedom of worship, the right to freedom of speech, the right to freedom of press, and the right to freedom of assembly and association.

In that period it also emerged the concept of a peaceful community of Nations, as elaborated by the German philosopher, E. Kant. In his *Perpetual Peace: A Philosophical Sketch* (1795), he outlined the idea of a league of nations that would promote peace between States. On the assumption that each State would respect its citizens and declare itself as a free State, Kant argued that the perpetual peace would be the result of a union of free States promoting a peaceful society[60].

The XIX century was marked by the Hegelian theory of the State, by which the State embodies all the positive values and thus "the realized ethical idea"[61]. That century was also marked by the initial elaboration of International Humanitarian Law[62], on the occasion of two consecutive international conferences, which took place in Geneva, between 1863-1864[63],

Despite the above development, the principle of State sovereignty continued to be prevailing throughout the early XX century. "Until WWII, the system of States was a liberal system of independent, impermeable, monolithic States. Its cardinal principle and its principal value was that States should leave each other alone[64]". The key requirements of any sovereign Staten were a well-defined territory, the population and the effective exercise of the power over that territory and population. The League of Nations (1919-1920)[65] was thus created on the assumption of the absolute nature of the State sovereignty and the relating obligation to respect the territorial integrity of States

[60] In parallel with the development of these theories, the principle of State sovereignty had become a basic foundation of classical international law. As originally elaborated by Emerich de Vattel (See, Le droit des gens ou principes de la loi naturelle appliqués à la conduite et aux affaires des Nations et des Souverains, Londres, 1758), it gained momentum at the end of the Thirty Years War. In 1648, by the Westphalia Treaty, the principles of equality, independence and sovereignty of the States emerged. As also observed, one of the consequences was that States governed their internal affairs without any external interference, particularly in the field of human rights. Thus, that Treaty, was recalled, over the centuries, in the inter-State relations).

[61] See Hegel, Grundlinien der Philosophie des Rechts (Berlin, 1821, para.257).

[62] See the 1863 Resolution of the Geneva International conference, available at: http://www.icrc.org/ihl.nsf/52d68d14de6160e0c12563da005fdb1b/1548c3c0c113ffdfc125641a0059c537; and see also the 1864 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, available at: http://www.icrc.org/ihl.nsf/full/120?opendocument, respectively

[63] As convened by Henri Dunant, who passing by Solferino, saw the terrible conditions of the soldiers, either dead or wounded on the battlefield.

[64] Henkin, L., Human rights and state sovereignty, in Ga. J. INT'L & Comp. L., 1995, p.63,97.

[65] Agarwal, H.O., International Law and Human Rights, Central Law Publications, 2004, p. 702. See also Crawford, N., Argument and change in world politics: Ethics, decolonization and humanitarian intervention, Cambridge, Cambridge University Press, 2002, p. 262-263.

(Article 10 of the Covenant)[66]. Accordingly, the primary goals of the League referred, inter alia, to: the prevention of war through collective security and disarmament; Labor conditions; Just treatment of native inhabitants; Trafficking in persons and drugs; and Arms trade[67].

As shown, the Covenant of the League of Nations did not mention any general provisions referring to the respect for human rights except requesting the Members of the League to endeavour "to secure and maintain fair conditions of labour for men, women, and children" and "to secure just treatment of the native inhabitants of territories under their control (Article 23, lett.a- lett.b of the Covenant)[68]".

From the ashes - or the failures – of the League of Nations and the resulting horrors of WWII, including the Holocaust, it was self-evident the need to broaden the scope and powers of any Organization with a universal character. In 1941, in addressing the American Congress, Pres. F.D. Roosevelt stated his famous Four-Freedoms speech on the fundamental freedoms that people "everywhere in the world" ought to enjoy (freedom of speech and expression, freedom of worship, freedom from want, freedom from fear)[69], from which, scholars recall, it originates the international protection of human rights[70].

Both at the Dumbarton Oaks (1944) and San Francisco (1945) Conferences, it was emphasized the need to secure the non-use of force as a fundamental principle applying to inter-States' relations[71]. Fifty States participated in the San Francisco Conference, from April to June 1945[72]. Despite tough negotiations, in the course of which delegations submitted over 1000 amendments to the draft Charter of the United Nations, the "scourge" of two World wars did not overtly commit States towards human rights[73]. The "human rights pillar" was not considered as a major element of the UN Charter[74] but instrumental to the maintenance of international peace and security[75].

[66] It stipulates that "The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled."
[67] Op.cit. in supra note 12 (Forsythe).
[68] "Subject to and in accordance with the provisions of international conventions existing or hereafter to be agreed upon, the Members of the League: (a) will endeavor to secure and maintain fair and humane conditions of labor for men, women, and children, both in their own countries and in all countries to which their commercial and industrial relations extend, and for that purpose will establish and maintain the necessary international organizations; (b) undertake to secure just treatment of the native inhabitants of territories under their control."
[69] "Development of the United States Foreign Policy: Addresses and Messages of F. D. Roosevelt, 1943, 81-87, on January 6, 1941.
[70] Op. cit. in supra note 25 (Marchesi, p.11).
[71] Schlesinger, S.C., Act of Creation. The founding of the United Nations. A Story of Superpowers, Secret Agents, Wartime Allies and Enemies, and Their Quest for a Peaceful World, Boulder: Westview, 2003.
[72] After the opening for signature ceremony, on June 26, 1945, the Charter of the United Nations entered into force, on October 24, 1945.
[73] Glendon, M.A., A World made new: Eleanor Roosevelt and the Universal Declaration of Human rights. New York, Random House, 2001, p.45 et ff.
[74] Hunt, L., Inventing Human Rights, a History, eds. W.W. Norton, 2007, p. 202-203.
[75] Op. cit. in supra note 25 (Marchesi, p.12 et ff).

During the negotiations, only the US NGOs lobbied for the introduction of references to the realization of human rights in the UN Charter[76]. In particular scholars recall the role played by the Commission to Study the Organization of Peace (acronym, CSOP) that, even before the Roosevelt speech, had put forward the ideas of an international Bill of Rights[77] and a human rights commission[78]. These proposals were later reflected, to some extent, in Article 68 of the UN Charter[79].

Many writers stress that the San Francisco Charter originally had not specifically focussed on human rights[80]. Through a strict interpretation, Pineschi, deemed that the Charter's provisions, including those referring to human rights, were aimed at ensuring international peace and security[81]. Buergenthal strongly emphasized that the Charter's provisions were profoundly conditioned by the scourge of the Holocaust. It was thus more evident its humanitarian component[82].

From the above, it might be inferred that for centuries the idea of human rights has been developed as a force either opposing or differing from the State-power or at least of not immediate international relevance. By the adoption of the Charter of the United Nations and the Universal Declaration of Human Rights, it has been slowly developed the idea of human rights "as a matter of international concern", which does not exclusively fall within the "internal affairs of the States"[83].

4.1. The human rights within the United Nations framework

The issue of human rights is a relatively new, if one considers both the work of relevant UN human rights bodies, in particular of Treaty-monitoring Bodies, and the development of substantive international human rights law, as originating from the

[76] Ibidem Glendon; see also Normand, R. and Zaidi, S., HR at the UN: The political history of universal justice, Indiana University Press, 2008, p. 127 et sequitur.
[77] The International Bill of Human Rights includes the Universal Declaration of Human Rights (1948), the two international Covenants of 1966, namely the International Covenant on Civil and Political Rights and the international Covenant on economic, social and cultural rights.
[78] Mitoma, G.T., Civil Society and International Human Rights: The Commission to Study the Organization of Peace and the Origins of the UN Human Rights Regime, in Human Rights Quarterly, Vol. 30, No.3, 2008, p.607 et sequitur .
[79] "The Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions.".
[80] Marchesi, A., and Palmisano, G., Il sistema di garanzia dei diritti umani delle Nazioni Unite: prospettive di riforma e limiti intrinseci, in www.costituzionalismo.it, 2006., p.3 et ff..
[81] As quoted by Marchesi Palmisano, in supra note 80, p.3.
[82] See Buergenthal, T., The Human Rights Revolution, 23, St. Mary's L.J., 1991, p.31 et ff.; see also Buergenthal, T., The evolving international human rights system. The American Journal of International Law. 100(4), 2006, p.783 et sequitur.
[83] Op. cit in supra note 25 (Marchesi, p. 17).

Charter of the United Nations (1945)[84] and the Universal Declaration of Human Rights (1948)[85].

The implementation of the above two Texts has paved the way to a qualitatively new era of both the international relations and international law as long as human rights has become a matter of international concern[86].

As noted, the Charter of the United Nations enlists, among its principles, the respect for State sovereignty (Article 2, para.1). It also contains provisions impacting on State sovereignty, such as Article 1, para.3, which refers to the promotion of respect for human rights, or limiting it, such as Chapter VII on "The Action with respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression[87]".

Aside from any remarks, the Charter is the basic multilateral agreement, on which UN Member States have built and developed their relations, their *modus vivendi* internationally. It should be thus confirmed that it holds the top level position of the international conventional law hierarchy[88]. The UN Charter may be considered as an international "social contract", by which States have accepted to prevent the scourge of war and promote friendly relations and human rights[89].

4.2.The relevant "constitutional" framework

"The people of the United Nations, determined to save succeeding generations from the scourge of war" collectively confer the United Nations, the authority to act in order to ensure international peace and security[90].

From the first words, it should be self-evident the broad scope of the Charter and its "constitutional" rank[91]. In this regard, scholars tend to support this view[92] since various elements prove its primacy[93]:

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[84] To which the ICJ Statute is annexed. In this regard it is worthy of mention the international law sources as enlisted in Article 38 of the above Statute.

[85] GA Res.217 (III) 1948.

[86] Op. cit. in supra note 24 (Brown, p.4).

[87] "State sovereignty in contemporary international relations is subject to strict limitations, among others: When the State voluntarily assumes certain international obligations; When it becomes a party to a bilateral or multilateral treaty; When it joins any of the international organizations thereby, undertaking the corresponding obligations; When international or regional organizations adopt decisions that have binding force for States; When a State acknowledges the supremacy of international norms over national legislation. State sovereignty is also limited by the principles of *jus cogens* that operate *erga omnes"*.

[88] See Lauterpacht, H., International Law and Human Rights, London, 1950, pp. 145-165, 257; see further op. cit, in supra note 37, Chesterman, Franck, Malone, p.5 et ff..

[89] Ziccardi Capaldo G., "The pillars of global law, Ashgate, 2008, p.7 et ff..

[90] Statement by the former UN Secretary-General, Kofi Annan, at the opening of the 58th session of the UN General Assembly, on September 23, 2003 (UN Doc.A/58/PV.7).

[91] Ibidem (Ziccardi Capaldo); see also Papisca, A., Quod barbari non fecerunt, fecerunt Barberini. L'assalto all'edificio dei diritti umani, Archivio Pace e Diritti Umani, 2/2006, p.7-19; See further op.cit in supra note 37, Chesterman, Franck, Malone, p.5; Bennouna, M., "should the United Nations be changed?", The Global Community Yearbook of International Law and Jurisprudence 2004, 4(I), p. 3-9.

i. First, the Charter does not contain any provisions for States' withdrawal from the Organization;

ii. Article 2, para.6 of the UN Charter – as Chesterman, Franck and Malone[94] recall - extensively indicates that the UN Charter applies also to those States that have not ratified it[95];

iii. Third, Article 103 of the UN Charter stipulates: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail";

iv. Lastly, its rigid nature. Borrowed from constitutional law, in particular from the so-called domestic rigid Constitutions (such as the Italian and Bangladesh Constitutions, respectively)[96], Article 109 of the UN Charter envisages an "aggravated procedure" for whatsoever amendments[97], which does make the Charter almost unchangeable[98].

All the above features do contribute to make the Charter of the United Nations closer to a Constitution. It does embody, as argued by some writers[99], "a global social contract", from which the relevant normative and institutional framework originates.

Although the Charter of the United Nations may be considered as the first international multilateral agreement to set a broad list of "purposes and principles" which guide States and relevant Institutions in the field of international peace and security, development and human rights[100], it has been subject to differing interpretations, mainly due to the evolving international scenario.

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[92] Ibidem, supra note 89; ibidem supra note 91.
[93] Op.cit in supra note 37.
[94] Op.cit., supra note 37.
[95] "The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security."
[96] Martines T. Manuale di Diritto Costituzionale, Giuffré, 2000, p.55 et ff.
[97] Art.109: A General Conference of the Members of the United Nations for the purpose of reviewing the present Charter may be held at a date and place to be fixed by a two-thirds vote of the members of the General Assembly and by a vote of any nine members of the Security Council. Each Member of the United Nations shall have one vote in the conference. Any alteration of the present Charter recommended by a two-thirds vote of the conference shall take effect when ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations including all the permanent members of the Security Council. If such a conference has not been held before the tenth annual session of the General Assembly following the coming into force of the present Charter, the proposal to call such a conference shall be placed on the agenda of that session of the General Assembly, and the conference shall be held if so decided by a majority vote of the members of the General Assembly and by a vote of any seven members of the Security Council).
[98] Chapter VI.
[99] See supra notes 89,91-92..
[100] Op. cit.25, Katarshkin, p.9.

During the Cold War, it dominated the tendency of a narrow interpretation of the Charter, which was to be interpreted, in accordance with the objective meaning of the terms of the Treaty (being based on the normal use of language).

After the fall of the Berlin Wall (1989), the Charter has been interpreted according to a teleological method of interpretation of legal sources, by which the attention has to be drawn to the goals to be achieved[101]. This last approach has contributed to develop an extensive body of "soft law[102]", by which some scholars also argue the constitutional relevance of the Charter[103].

Beside from the different views on its normative rank, the Charter provides the basis for a broader work by relevant human rights Institutions[104]. With specific regard to provisions referring to human rights[105], it outlines both substantive and institutional issues: as for the former, human rights are mentioned in the Preamble and among the substantive "Purposes" of the Organization (Article 1, para.3); as for the latter, various Articles deal with this field, from the Chapter on the General Assembly through the Chapter on the Economic and Social Council[106].

The UN "Basic Law" envisages the establishment of ad hoc bodies to assist, in this endeavour, the "principal organs", in particular the General Assembly and the Economic and Social Council.

In addition to the above-mentioned provisions, Article 13 of the Charter of the United Nations focuses on the General Assembly and its ability "to initiate studies and to make recommendations", including for the purpose of "assisting in the realization of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion". Chapter IX, entitled "International Economic and Social Cooperation", is devoted, inter alia, to the realization of the promotion of the respect for human rights with the aim of creating peaceful and friendly relations among Nations (See Art.55), by joint and separate actions by States (See Art. 56). Article 60 envisages a specific mandate for the Economic and Social Council in the field of the promotion and

[101] To support the later extensive approach, it might be recalled that if there are two or more methods of interpretation, *effet utile* should prevail (See Berlia, G., Contribution à l'interpetation des traités, RdC 114 (1965-I), p.306 et seq.; T. Martines, Manuale di Diritto Costituzionale, 2000, p.55 et ff.).

[102] For an analysis of the International Organizations acts, see Zanghi' C., Manuale di Diritto delle Organizzazioni Internazionali, Giappichelli, Torino, 2001, p.55 et ff.

[103] Op. cit. in supra note 20 (Simma-Alston).

[104] To support such position, the US President, J. Carter, stressed before the GA that there are "strong grounds for arguing that UN Member States have undertaken in good faith the treaty obligations to respect "human rights" (See Vol. 76 Dept. of State (Bull.), p. 332..

[105] Lauren, P.G., "To Preserve and Build on its Achievements and to Redress its Shortcomings: The Journey from the Commission on Human Rights to the Human Rights Council", in Human Rights Quarterly, Vol. 29, No.2, 2007, p. 307 et ff.

[106] Without providing details, the present Thesis will enlist also those UN Charter provisions referring to human rights which de facto are not in force anymore, such as Art.76 -87 of the Charter (See ANNEX I).

protection of human rights, including the establishment of functional Commissions, primarily the Commission on Human Rights (See also Articles 62 jointly with Art. 68).

In this regard scholars argue that, by the joint reading of relevant UN Charter's provisions, UN Member States are obligated to fulfil, in good faith, their obligations, including in the field of the promotion and protection of human rights[107].

To this end, some oother scholars argue,[108] the then Commission on Human Rights significantly contributed. As a matter of fact, the Commission resulted in a driving force for the entire UN human rights machinery and "the standard-setter"[109] of the international law relating to human rights.

Indeed, it was the main intergovernmental body, mandated to advance the two components of human rights, namely the promotion and protection - though to a differing extent[110].

As long as the "inaction doctrine" of the 1950s conditioned the work of the then Commission[111], it has been argued that[112] the protection of human rights still remains "a chapter of legal history, relatively young[113]".

4.3.The practice

The current UN practice shows that the UN HR machinery relies on a broad normative basis, including the Preamble to the Charter, Article 1, para.3, Article 10, Article 13, Article 22, Article 55, Article 56, Article 62, Article 68, Article 71, Articles97-98[114], in addition to the several conventional international law provisions produced by the painstaking work of the then Commission (and more recently by the Human Rights Council).

Within this framework, mention has to be made also of the following elements:

i. The ICJ's *obiter dictum* on the Barcelona Traction case (Second Phase) (ICJ Rep 1970, 3, at paragraph 33), concerning the so-called

[107] It has been argued that Article 1, para.3, Articles 55-56 are "*indissociables*". As a consequence, it has been also argued that (See La Charte des Nations Unies, Commentaire article par article, by Cot, J-P. and Pellet, A., Economica, Bruylant, 1991, p. 58) the above provisions indicate that the State's treatment of its own citizens has become a matter of international concern.
[108] Op.cit. in supra note 89.
[109] Ibidem.
[110] Nowak, M., Introduction to the International human rights regime, Boston-Leiden, 2003, p.104 et sequitur.
[111] Chapter I.
[112] Tomuschat, C., "Human Rights, Between Idealism and Realism", second edition, Oxford University Press, 2008..
[113] See the Conclusion to the present Thesis.
[114] See supra note 106.

obligations *erga omnes* "[..] an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes. [at 34] Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law [..] others are conferred by international instruments of a universal or quasi-universal character";

ii. The Draft Articles on the Responsibilities of States for internationally wrongful acts (See UN Doc. A/CN.4/233 of 1970) as adopted with commentaries in 2001 (See also UN Doc. Report of the ILC on the Work of its Fifty-third Session, UN GAOR, 56th Sess, Supp No 10, p 43, UN Doc A/56/10 (2001)) ("whereby an internationally wrongful act must: be attributable to the State under international law; and constitute a breach of an international obligation of the State. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime. On the basis of the rules of international law in force, an international crime may result, inter alia, from: [..] (b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination);

iii. The Responsibility to Protect Theory, as elaborated in 2001, by the International Commission on Intervention and State Sovereignty[115],

[115] See the Report by ICISS, in 2001, The International Development Research Centre, Ottawa.

on the idea of "sovereignty as responsibility". In 2005 (See UN Doc. A/59/2005, entitled In Larger Freedom: Towards Development, Security and Human Rights for All), the former UN Secretary-General stressed that it is the responsibility of individual States to protect persons within their jurisdiction. This responsibility passes to the international community in the event that the State concerned is unwilling or unable to do so. In the 2005 Outcome Document (See paras. 138-139)[116] Member States made reference to this Theory. The current UN Secretary-General has set it as a priority, by also appointing a Special Adviser with a focus on Responsibility to Protect (Mr. E. Luck). In 2009, he issued a report based upon three pillars: prevention, reaction and rebuilding, by which it has been stressed that: a. Primary responsibility to protect is of States; b. International community is committed to assist in fulfilling this obligation; c. the Community has the responsibility to respond when the State fails to protect its citizens (See UN Doc. A/63/77). The UN General Assembly followed up on it, by a specific Resolution (A/RES/63/308), as adopted without a vote, on October 2009. However, in this regard, many States, including the US, have manifested some resistance to a concept which might undermine the national sovereignty.

4.4. The relevant Institutions and the relating normative/standard-setting activity

Unlike the traditional principle of State sovereignty, the recognition of human rights is thus the result of a long process – still under way - which was initiated by the Charter of the United Nations and particularly by the Universal Declaration of Human Rights (UDHR).

Article 2 of UDHR stipulates: "Everyone is entitled to all the rights and freedoms set forth in this Declaration [..] no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person

[116] See Stahn, C.,The responsibility to Protect: Political Rhetoric or Emerging Legal Norm? in The American Journal of International Law, 101.1, 2007, p. 99-120, also available at: http://www.udel.edu/poscir/intellectualLife/ResponsibilitytoProtect.pdf.

belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty".

This wording has paved the way to an intense standard-setting activity by UN Member States, in particular through the then Commission on Human Rights (Between 1947-1967, the UN developed the International Bill of Human Rights consisting of the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (1967)).

From that activity, it might be inferred that international human rights binding treaties have marked a restriction, though under well-defined boundaries, of the sovereignty of those States that have become parties. From the adoption of ICERD (1965), ICESCR and ICPPR (1966) onwards, States have accepted a form of monitoring on the fulfilment of relevant obligations by the so-called Treaty-monitoring Bodies (acronym, TB)[117]. More than half of the members of the international community have ratified international human rights instruments. An increasing number of States has also ratified the relating Optional Protocols, by which to mainly allow individuals, groups of individuals and NGOs to submit a complaint/communication to TB.[118]

Further, over those years, the Commission developed a parallel (political) procedure, in accordance with ECOSOC Resolution 1235 (1967), by which it dealt with situations (and afterwards also human rights thematic issues) of human rights violations ("situations which reveal a consistent pattern of violations of human rights[119]") when UN Member States fail to protect human rights. The outcome of this procedure was a condemnatory Resolution (a no legally binding act with high moral and political pressure), which usually triggered the creation of ad hoc special procedures (originally working group of experts and afterwards also individual Special Rapporteurs)[120]

In this regard, some writers argue on the limited power of the United Nations - since it does not have the power to take binding decisions except for measures under Chapter VII[121] -, while other scholars deem that the UN General Assembly Resolutions and the international Declarations, such as the Vienna Declaration (1993), are the result

[117] In this wake a further positive development stems from the various Optional Protocols relating to relevant standards which envisage individual complaint procedures, including a specific monitoring by TB).
[118] The present Thesis will not thoroughly deal with the protection role of TB.
[119] See Op.3 of ECOSOC Resolution 1235.
[120] Chapter II.
[121] Op.cit in supra note 53 (Forsythe); See also Schachter, O., International Law in Theory and Practice: General Course in Public International Law, 178 Recueil des Cours 21, V, 1982, p.332 et ff.. By a narrow interpretation of international human rights law, he stresses that human rights cannot emerge for instance from international customary law.

of "a law-making function", by which to affect the customary law-making process and thus develop international customary law.[122]

Indeed over the last two decades (1990-2010) there has been a shift. In the 1990s the UN Security Council included,[123]among those situations falling within Article 39 of the Charter, the intra-state conflicts. It also acknowledged that "the grave humanitarian crisis" might constitute a "threat to regional (international) peace and security (such as the conflicts in Liberia, Central African Republic, Sierra Leone, etc)". Consensus also emerged with regard to other threats to the peace, such as the proliferation of weapons of mass destruction (acronym, WMD), pandemics, terrorism, transnational organised crime, and overall gross violations of human rights.[124]In that period it was also adopted the Vienna Declaration and Programme of Action (June 1993), by which to advance all human rights on equal footing. In particular it was set that the "indivisibility, interdependence and universality" of human rights guide the action of relevant UN bodies (Doc. A/CONF.157/23 of July 12, 1993, para.5)[125].

In this context, the UN also presented for adoption to the GA or other intergovernmental bodies various Reports such as:

i. "An Agenda for Peace[126], 1992 and "Supplement to an Agenda for Peace", by which the then Secretary-General, B. Boutros Ghali, recommended to make full use of the existing norms enshrined in the Charter of the United Nations[127];

ii. The Report of the Panel on the United Nations Peace Operations, known as the 2000 Brahimi Report (UN Doc. A/55/305 of 2000);

iii. The Millennium Report entitled, "We, the peoples: the role of the United Nations in the 21st century (UN Doc. A/54/2000)", by which Secretary-General Kofi Annan defined the most

[122]Op.cit. in supra note 20, Simma-Alston, p.90; see also Ziccardi Capaldo, Nazioni Unite ed Evoluzione dell'Ordinamento Internationale, Paper presented at the Conference on Nazioni Unite e Diritto Internazionale, Napoli, Novembre 1995, in Democratizzazione all'est e diritto internazionale, Giuliana Ziccardi Capaldo, 1998, p.299. For a different view, see Op. cit. in supra note 25, Marchesi, p.24.

[123] Although some precedents dates back to 1960s-1970s.

[124]See Note by the President of the Security Council on January 31, 1992, Doc. S/23500, on non-military causes of threats to security. See also the "comprehensive security concept in Report of the High-Level Panel on Threats, Challenges and Change, A More Secured World: our shared responsibility, Doc. A/59/565, of December 2, 2004, 2 (synopsis). See also S_G. Kofi Annan, "In Larger Freedom. Towards Development, Security and Human Rights for All, Doc. A/59/2005 of March 21, 2005, paras. 76 et seq.) As for the definition of gross violations, some scholars argue that the Commission (currently the Council) never provided a definition for the meaning of "gross violations."

[125] The Vienna Declaration and Programme of Action marked the splitting point with regard to the traditional repartition of human rights, as follows: first-generation human rights, including mainly civil and political rights; second-generation human rights, including mainly economic, social and cultural rights; third-generation rights, including the right to development, the right to peace and, more generally, the so-called collective rights.

[126] As available at: http://www.un.org/Docs/SG/agpeace.html.

[127] The Report is available at:htpp://ods-dds-ny.un.org/doc/UNDOC/GEN/N95/081(N9508095.pdf?OpenElement.

challenging problems of the contemporary world[128]. By this Report, it was also emphasized the need for shifting the focus from the territorial integrity to the protection of the people (Freedom from Fear);

iv. The Millennium Declaration (UN Doc. A/RES/55/2 of September 2000) marked the need to provide a political framework for the work of the Organisation;

v. The Report of the UN Secretary-General (UN Doc. A/57/387 of September 2002), entitled "Strengthening of the UN: An Agenda for Further Change".

Despite the positive flow of decisions, declarations and reports, the current practice indicates a persisting tension between human rights and States, as well as between institutional purposes, such as Article 1, para.3 and Article 55 of the Charter of the United Nations, and relevant international principles, such as the principle of State sovereignty[129]. As a way of example, it might be recalled Op.1 of GA Res. 60/251 of March 15, 2006, by which the UN General Assembly has envisaged a new inter-governmental body, with an elevated status within the UN, focused on human rights, though on a transitional basis. As reported in the following Chapters, between 2005-2006 UN Member States did not embark on a broad reform leading to a new "main organ" of the UN but opted for a Human Rights Council as a subsidiary organ of the General Assembly to be reviewed "within five years" (The UN Member States resolved "to establish the Human Rights Council, based in Geneva, in replacement of the Commission on Human Rights, as a subsidiary organ of the General Assembly; the Assembly shall review the status of the Council within five years").

4.5. The States' approach vis-à-vis relevant Institutions

In the XXI century, numerous challenges have emerged: from the widespread violations of human rights all over the world to an increasing number of weak or failed States in need of an effective institutional apparatus, including in the field of human

[128] As available at :htpp://www.un.org/millennium/declaration/ares552e.pdf.
[129] Chapter I – Chapter II.

rights; from the globalisation to the international economic and financial crises (erupted in 2007-2008); and from the war on terror to the increasing role of Non-States Actors[130].

Among the challenges, it should be considered also the resurgence of the North-South divide. It originally developed in the 1960s[131], within the relevant UN inter-governmental bodies, when the decolonization process affected the institutional working methods of the UN collegial bodies.[132] In 1963 the General Assembly introduced the principle of the equitable geographic distribution, to be applied to all collegial organs, so as to ensure the equal representativeness of all UN Member States (UN Doc. A/RES/1991/1963, XXII session).

Specifically, over the years, this divide has evolved into a divide between the Western Group (acronym, WEOG) and the rest of the world[133]. Events, such as the Danish Mohammad cartoons, the worsening of the situation in the Middle East and the counter-terrorism initiatives, such as the racial profiling issue have contributed to forge or strengthen alliances between the African Group, the OIC (standing for the Organization of the Islamic Conference) and the Non-Aligned Movement[134].

At present, this divide significantly impacts on the work of the Council. Like its predecessor, human rights practitioners argue, it seems that the Council is under the control of a cross-regional bloc of Islamic and African States, backed by China, Cuba and the Russian Federation that protect each other from any effective scrutiny on their human rights records[135].

Since the adoption of the 2000 Millennium Declaration, Western countries have shown openness towards: the Millennium Development Goals (UN Doc. A/RES/55/2)[136], the possibility to eventually draft a "legally binding instrument" on the Right to Development[137] and, more importantly, towards the issue of the justiciability of the economic, social and cultural rights – as shown by the prompt adoption of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (acronym, OPICESCR), on December 10, 2010 (UN Doc.A/RES/63/117). On the contrary, most countries of the African Group and, to some extent, the Russian Federation, China, and Cuba continue with their views to monopolise any debates or

[130] See Chapter V.
[131] Op.cit. in supra note 18, Ramcharan.
[132] Ibidem.
[133] Abebe, M. A., "Of shaming and bargaining African States and the Universal Periodic Review of the United Nations Human Rights Council, in Human Rights Law Review, 2009, Nottingham University, Oxford University Press, p.19
[134] For a concise and useful overview on the so-called "pseudo-organizations", see Zanghì C., Manuale di Diritto delle Organizzazioni Internazionali, Giappichelli, 2001, p.9-10.
[135] Reuters'Article dated December 12, 2008, entitled "The UN chief tells rights body drop rhetoric blocs.
[136] The main Goals are as follows: 1. End poverty and hunger; 2. Universal education; 3. Gender equality; 4. Child health; 5. Maternal health; 6. Combat HIV-Aids, TB and Malaria; 7. Environmental sustainability; 8. Global partnership.
[137] See Council's Resolution 9/3 and UN GA Third Committee Resolution A/C.3/64/L.47, respectively.

decisions on racism-related issues and on economic, social and cultural rights, to the detriment of civil and political rights (despite the principles proclaimed at the Vienna Conference according to which all human rights shall be treated on par). In this regard, it might be anticipated that the differing views on human rights are exemplified by the though negotiations within the Council on the creation or the renewal of thematic Special Procedures[138]. Similarly the African Group continues to dominate the elaboration of "complementary standards" to ICERD, by claiming the alleged inadequacy of the latter to eradicate racial discrimination, particularly the contemporary forms of racism[139]. The African Group and the OIC are also trying to propose a narrow interpretation of the right to freedom of opinion and expression, on the ground that latest episodes of Islamophobia stem from the misuse of relevant provisions contained in Article 19 of the ICCPR. As a further example, it might be recalled the wording of the Outcome Document of the Durban Review Conference (April 2009), which envisages at para.12: "*The Review Conference deplores the global rise and number of incidents of racial or religious intolerance and violence, including Islamophobia, anti-Semitism, Christianophobia and Anti-Arabism manifested in particular by the derogatory stereotyping and stigmatization of persons based on their religion or belief*"[140]. In this case, it emerges as a matter of concern the combination of different concepts, which are traditionally dealt with by separate Resolutions by both the Council and the Third Committee of the GA (As a way of example, mention has to be made of the latest relevant three Council's Resolutions: A/HRC/RES/14/11 on Freedom of Religion, A/HRC/RES/14/16, entitled "From rhetoric to reality: a global call for concrete action against racism, racial discrimination, xenophobia and related intolerance" and A/HRC/RES/13/16 on defamation of religion, respectively. Besides generating confusion among different areas, namely freedom of religion, fight to racism and freedom of expression, Resolution 13/16 – as firmly rejected by the EU – bypasses the mandate of the Special Rapporteur on Freedom of Religion and requests the Special Rapportuer on Racism to carry out ad hoc studies on the situation of the Muslims as victims of violations).

To paraphrase Forsythe, the work of both the Council and the General Assembly indicate "a dangerous game that charts the gap between political behaviour and legal

[138] See Chapter II.
[139] See Lempinen and Scheinin, The New HRC: The First Two Years", Report of the Workshop organized by the European University Institute, Istituto Affari Internazionali, and the Institute for Human Rights at Abo Akademi University, November 7-8, 2007, p-1-32, available at htpps:// www.iue.it/AEL/Projects/PDFs/HRCReport.pdf).
[140] Available at www.un.org/durbanreview2009/pdf/Durban.Review.outcome.document.En.pdf.

theory". This is the framework within which the Council has replaced the over-criticised Commission[141].

The above few elements, though showing the dynamism characterising the contemporary development of human rights, indicate the difficulties of improving the relevant "system", under which the various Institutions, primarily the Council, and all stakeholders should work to achieve common goals (Article 1, para.3 55-56 of the Charter of the United Nations).

4.6. The current UN human rights machinery

In light of the Preamble and "the Purpose" enshrined in Article 1, para.3, the Charter of the United Nations envisages relevant obligations to be fulfilled by UN Member States, such as Article 56 ("to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55"). The Charter also envisages human rights-related functions to be performed by UN organs, such as Article 13, referring to the General Assembly and Article 62, referring to the Economic and Social Council. It further envisages that the United Nations shall: "promote [..] universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion".

Accordingly, from an institutional-standpoint, the current relevant system includes[142]:

i. The Human Rights Treaty-monitoring Bodies, falling within the category of Treaty-based Bodies, alternatively defined as conventional bodies[143], originate from the Universal Declaration of Human Rights, as a primary source for all the following human rights binding treaties[144];

[141] Chetail, V., Conseil des Droits de l'Homme des Nations Unies: l'an premier de la reforme, 2007) Refugee Survey Quarterly, Vo.26, Issue 4, p.105; see also Hampson F.J., An Overview of the Reform of the UN Human Rights Machinery, in Human Rights Law Review, Oxford University Press, 2007, p.10; see further Scannella, P., and Splinter, P., The UN HR Council: A promise to be fulfilled, in Human Rights Law Review, (2007) 7-1, p.45 et ff.

[142] Wille, P.F., The UN HR machinery: developments and challenges, in International Human Rights Monitoring Mechanisms, vol. 35, M. Nijhoff Publishers, 2009, p.9.

[143] Sunga, What Effect If Any Will the UN Human Rights Council Have on Special Procedures, in International Human Rights Monitoring Mechanisms, vol. 35, M. Nijhoff Publishers, 2009, p.174.

[144] As for the treaty-monitoring system, the human rights treaty system is based on nine core human rights treaties, all envisaging Treaty-monitoring Bodies. At present there are 9 Treaty-monitoring bodies plus the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment ("SPT"), with a preventive-related mandate referring to torture and ill-treatment. In 2006 in addition to the existing seven core human rights standards, two new conventions were adopted, namely the Convention on the Rights of Persons with Disabilities and the Convention on Enforced and Involuntary Disappearance -, which set legal standards and create legal obligations for States-Parties that are thus obligated to execute human rights obligations in good faith (See Art.26 of the Vienna Convention on the Law of the Treaties – *pacta servanda est*) Compliance with these standards is monitored by relevant Treaty-monitoring Bodies through several procedures. All Treaty Bodies – though some peculiarities in this regard have been envisaged for the CED (See Art.29 of the International Convention for the Protection of All Persons from

ii. The Human Rights Council, being a new subsidiary organ of the General Assembly and thus defined as a Charter-based Body;

iii. The Universal Periodic *Peer* Review, being a mechanism which originates from, and relates to, the Council;

iv. The Special Procedures, also defined as "unconventional mechanisms[145]". On a preliminary note, it might be recalled that Special Rapporteurs' mandates stem from Council's Resolutions. According to a violation-based approach, they can deal with any countries or any human rights issue, regardless of States consent;

v. The Advisory Committee, as the subsidiary body of the Council, replaces the UN Sub-Commission for the Promotion and Protection of Human Rights;

vi. The OHCHR falling within the UN Secretariat;

vii. The other "relevant stakeholders", namely NGOs and NHRIs[146];

viii. The UN GA Third Committee, whose mandate is wider than the Council's (there is the concrete risk of duplication and overlapping: the question of the relationship between the Council and the Third Committee remains pending):

ix. Last but not least, the General Assembly as the new parent body of the Council whereas the Commission was under the authority of the ECOSOC[147].

From a functional standpoint[148], the above System has developed four methods to deal with thematic and geographic human rights issues, violations and situations:

i. Promoting human rights through education, and new human rights instruments;

ii. Providing advice and technical assistance;

iii. Examining, investigating and reporting on States' observance of relevant human rights standards, including in the event of human rights violations;

Enforced Disappearance) - consider periodic reports from States-Parties. By the practice TB have been recognized as quasi-judicial organs. The Council finalised in 2007 the Optional Protocol to ICESCR, as later adopted by the General Assembly, on a consensual basis, on December 10, 2008. At the time of the writing, it is worthy of mention that the HRC is elaborating the draft Third Optional Protocol to the UN Convention on the Rights of the Child allowing individual complaints before the CRC Committee).

[145] Op. cit. in supra note 143.

[146] GA Res. 60/251 of March 15, 2006.

[147] The present Thesis will focus on the Human Rights Council and its relating mechanisms, as the main UN Forum on Human Rights, without thoroughly covering either TB or the UN GA Third Committee.

[148] Op.cit. in supra note 57 (Maddex).

iv. Deciding on human rights complaints.

However neither the then Commission nor the Council have been equipped with an international enforcement procedure: "Although Institutions have been established to monitor, report and advice, States remain reluctant to institutionalize enforcement procedures[149]". The political will/State sovereignty, as legal scholars[150] argue, remains central. In this wake, what can be procedurally developed and effectively achieved refers to follow-up mechanisms, as a possible intermediate step towards a future enforcement procedure. For instance, to different extent, relevant expert bodies and mechanisms, including SPs, the UPR[151] and OHCHR have put in place some forms of follow-up procedures, though in need either to be standardized (see for instance the different practice within the Special Procedures under which some forms of follow-up have been developed by the WGAD, WGED, SR on Torture and on Summary Executions) or to be implemented (See paras.33-38 of the Annex to Council Resolution 5/1), such as the follow-up to the UPR.[152]

Conclusion –

The questions arising from the establishment of the Council on Human Rights

Some legal scholars argue that the unfruitful campaign to reform the Security Council drew the attention of world leaders, gathered in New York at the September 2005 World Summit, to the UN human rights machinery, as a way "to achieve some results". For various reasons, mainly of a geopolitical nature, it was deemed that the Commission on Human Rights could best suit whatsoever reform[153].

The establishment of the Human Rights Council was decided, in a very short lapse of time (September 2005 through March 15, 2006), on a transitional basis (Op.1 of GA Resolution 60/251) as long as the UN General Assembly has to review the Council's status "within five years (namely by 2011)".

[149] Op.cit, in supra note 80 (Marchesi-Palmisano).
[150] Op. cit. supra in note 105, Lauren, p.312-318; see also Lempinen, M., Challenges facing the system of Special Procedures of the United Nations Commission on Human Rights, Abo, Finland, Institute for Human Rights, Abo Akademi University, 2001, p.5 et sequitur.

[151] As for the UPR, it should be recalled that the second cycle is supposed to be built upon the implementation of agreed recommendations. The cases of non compliance will be further monitored by the Council. However this remains a pending issues falling within the 2011 Council Review.
[152] See Chapter III.
[153] Op. cit, in supra note 139 (Hampson, p.9).

This choice poses questions on the position of the Council within the UN system[154], its ability to protect human rights, its efficacy, including vis-à-vis the other mechanisms within the UN system for the promotion and protection of human rights, and, more generally, on the effectiveness of relevant international Institutions[155].

The provisional status of the Council raises concerns as it might be indicative of an action without a *télos*[156]. It also raises concerns with regard to the ability of the Council to perform its mandate[157]. In particular, scholars and practitioners question the effective Council's ability to: prevent and overall address human rights violations; ensure the effective implementation of its resolutions, including the UPR Outcome Decisions; strengthen the role of its "eyes and hears", namely the Special Procedures; deal with emerging human rights issues in a timely and result-oriented manner; contribute to further develop, if possible, the concept of the responsibility to protect, and eventually perform its mission in coordination with the High Commission of Human Rights[158].

In view of the above, the first Chapter (Chapter I) will focus on "The transition from the UN Commission on Human Rights to UN Human Rights Council as the main forum of the UN system of promotion and protection of human rights"; the second Chapter will consider (Chapter II) "The eyes and ears of the Council: The role of the Special Procedures vis-à-vis the Human Rights Council"; the third Chapter (Chapter III) will tackle the newly introduced mechanism, namely "The Universal Periodic *Peer* Review Mechanism"; the fourth Chapter (Chapter IV) will be dedicated to the think-tank at the direction of the Council: The Advisory Committee of the Council: an "Expert Advice"?; the fifth Chapter (Chapter V) will be devoted to "The role of NGOs, NHRIs, and the OHCHR"; lastly, the sixth Chapter (Chapter VI) will focus on The Review - not a reform - of the Council, "within five years".

[154] See Chapter VI.
[155] Op. cit. supra in note 25 (Marchesi, p.9).
[156] Chapter VI. See Klabbers, J, 2002 An introduction to international institutional law, Cambridge, Cambridge University Press, p. 34-41, for the list of theories relating to the powers of the Organization from the theory of the implied powers to the doctrine of the functional necessity and the doctrine of the attributed powers.
[157] See GA Res. 60/251 by which the Council: "should address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon". The GA also mandated the Council: "to contribute, through dialogue and cooperation, towards the prevention of human rights violations and respond promptly to human rights emergencies."
[158] Op. cit in supra note 13, Ramcharan; See also Müller, L. (ed.), The First 365 days of the United Nations Human Rights Council, 2007, p. 30 et ff.

CHAPTER I

An overview: The transition from the UN Commission on Human Rights to the Human Rights Council, as the main Forum of the UN system of promotion and protection of human rights

INTRODUCTION

The 1990s witnessed a major shift in the international relations scenario, when the emerging new world order required joint and individual efforts to maintain peace and security[1]. States faced the end of the stability originating from the Cold War.[2] In the course of their search for a new international equilibrium, the US, the only Super-Power, was attacked, on September 9, 2001.[3]

In that juncture, the international community was compelled to face challenges, such as the so-called "war on terror", the effects of globalisation, pandemics such as Hiv-AIDS, Tuberculosis, and Malaria, extreme poverty and increased flows of migrants, including asylum-seekers and "hunger refugees[4]".

All the above-mentioned issues impacted on the work of the UN Commission on Human Rights:

i. Thematic debates and resolutions increasingly focused on the linkage between terrorism, poverty, migration and racism as well as on defamation of religion, racism and freedom of expression;[5]

ii. Several UN Member States, that were also Members of the Commission, exacerbated and hindered any effective debate on relevant geographic human rights situations and, to some extent, on outstanding thematic issues (The practice of the no-action motion flourished in those years).[6]

In 2003, Libya chaired the annual session of the Commission despite the general recognition that it was a "not free State"[7]. In the following year (2004), countries such as Zimbabwe and the Sudan were elected to Commission[8]. In the course of that session

[1] See Fukuyama F., The End of History and the Last Man, London, Hamish Hamilton Ed. 1992)
[2] Forsythe, David P.:, Human Rights in International Relations, Cambridge: Cambridge University Press, 2006, p.8-43, 79, et ff.
[3] For an general overview on the relevant events and the reaction by the international community, see de Guttry A, - Pagani F. "Sfida all'ordine mondiale: l'11 settembre e la risposta della Comunità internazionale, Donzelli Editore, Roma, p.23.
[4] See the last Report (UN Doc. A/HRC/4/30 (paras.47-67)) of the Special Rapporteur on the Right to Food, J. Ziegler, on the classification of the various categories of migrants.
[5] See UN Doc. A/61/583, entitled "delivering as one" which explores, inter alia, the principal challenges for the UN work in the fields of development, humanitarian assistance and the environment.
[6] See paragraph 6.3.
[7] On the situation of human rights in Libya, the 2010 Freedom House Survey scores it, as a "not free State", with the worst evaluation in terms of civil liberties: 7 out of 7. Available at:
http://www.freedomhouse.org/template.cfm?page=22&year=2010&country=7862)
[8] As for the situation in the Darfur, following to mass killings, by Security Council Resolution 1564 of September 18, 2004 it was decided to establish a Commission of Enquiry, whose recommendations were later endorsed by Security Council Resolution 1593 of March 31, 2005. By this Resolution the Security Council decided to defer the question to the Prosecutor of the International Criminal Court.

(59th session of the Commission on Human Rights), the African Group members initiated to claim the need for dialogue and cooperation rather than accusation[9]. From that session onwards, they overtly initiated to move to other Agenda's Items those country situations where allegedly gross violations of human rights had been committeed: situations deserving a specific examination under Agenda's Item 9 entitled "Question on the violations of human rights and fundamental freedoms in any part of the world", from which geographic Special Rapporteurs originated, in accordance with ECOSOC Resolution 1235 (XLII) of 1967. [10] The practice shows that situations, such as the human rights in the Sudan and in Afghanistan were moved to either organizational Items, such as Item 3 ("organization of the work of the Commission"), or to Item 19 ("on advisory services and technical cooperation in the field of human rights").

The most important UN Forum on human rights became the target of an international "finger-pointing activity", based on accusations of: partiality; lack of effectiveness; excessive politicization; double standards; polarization between the Western Group and the rest of the world; a divisive approach to human rights issues, unequal treatment of human rights and unbalanced responses to human rights situations.[11]

The idea of the Council did take shape in a multi-faceted context, characterized by the new stances stemming from the Post-Cold War era and the "Threats, Challenges and Change" detected in the UN Report, entitled "A more secure world: our shared responsibility (UN Doc. A/59/565 of December 2004)" of the UN High-level Panel, convened by the former UN Secretary-General, K. Annan.

At the 2005 World Summit, world leaders agreed to replace the much-criticized Commission with a new subsidiary organ of the General Assembly, the Human Rights Council (hereinafter, the Council) as the herald of a new era of the system of promotion and protection of human rights (UN Doc. A/RES/60/1, para.157). Its creation was perceived as the only way out or, alternatively, a "topical development" in the law and practice of international Organizations[12].

[9] See UN Press Release: http://www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=3197&LangID=F; see also Commission's Report E/2004/23- E/CN.4/2004/127.
[10] See Chapter II.
[11] See Suisse, Permanent Mission, Summary Report on "The open-ended seminar on the review of the Human Rights Council", Montreux, April 20, 2010, p. 1-12, available at: www2.ohchr.org/english/bodies/hrcouncil/docs/RapportMontreuxFinal.pdf. For an indication of the one sidedness of the Commission, see Franck, T.M., Of gnats and Camels: Is there a double standard in the United Nations? in American Journal of International Law 78, 1984, p.818-833.
[12] See Cofelice, A. Consiglio Diritti Umani delle Nazioni Unite: tendenze e prospettive del cantiere di riforme sulle procedure e sui meccanismi di promozione e protezione dei diritti umani, in Pace Diritti Umani, 2, Marsilio Editore, 2007, p.19. See also Alston, P., The UN's HR record: from San Francisco to Vienna and beyond, in HR Quarterly 16, 1994, p.375 et ff.

1.1. The origin of the UN Commission on Human Rights

The UN Member States envisaged the establishment of the Commission, in accordance with Article 68 of the Charter of the United Nations: "the Economic and Social Council shall set up commissions in economic and social fields and for the protection of human rights"[13].

In late 1945, during the London negotiations on the definition of the work of the various UN organs, the focus was placed on the following activities:

i. Drafting an international Bill of Rights;
ii. Drafting recommendations for an international declaration or convention concerning the status of women and freedom of expression;
iii. Protection of minorities;
iv. Prevention of discrimination;
v. and any matters within the field of human rights, considered likely to impair the general welfare or friendly relations among nations[14].

At that time, Mrs. Eleanor Roosevelt, the most committed US delegation's member to the UN, engaged in the definition of a clear forward-looking role for the Commission to be forged[15]. The aim was to ensure a highly-qualified Commission, composed of skilled experts, with the ability to extensively deal with human rights-related issues.

On the other hand, most other States' delegates opposed the idea of such "interference" and proposed a limited promotion role for the Commission, which in its early years would be translated into an intense standard-setting activity[16].

Most Great Powers were not in a position to support a strong role for the Commission, particularly in the field of the protection of human rights[17]. Neither the US nor the UK could actively commit themselves, due to their policies relating to racial

[13] See Lauren, P.G., To Preserve and Build on its Achievements and to Redress its Shortcomings: The Journey from the Commission on Human Rights to the Human Rights Council, in Human Rights Quarterly, Vol. 29, No.2, 2007, p. 307-330; see also Oberleitner, G., (2008), Global Human Rights Institutions, between remedy and ritual, Polity Press Eds., 2008, p.41; see further Alston, P., The international dimension of human rights, ed. Vasak, K, Publisher Greenwood Press, Westport, Conn. and Paris, France, p.85-110.
[14] See Report of the Preparatory Commission of the UN, PC/20, Chap. 3, sect. 4, paras.14-16 (1945).
[15] As one of the functional Commission of the Economic and Social Council (and through this, being answerable to the General Assembly).
[16] See Glendon, M.A., A World made new: Eleanor Roosevelt and the universal declaration of human rights. New York, Random House, 2001, p.45 et ff.; see also Nifosi, I. The UN Special Procedures in the Field of Human Rights. Institutional History, Practice and conceptual framework, in Yearbook on Humanitarian Action and Human Rights, 2005, p. 131 et sequitur.
[17] Ibidem, Nifosi; see also Forsythe, D.P., The United Nations and Human Rights: 1945-1985, Political Science Quarterly, 100, No.2, 1985, p.250-255.

segregation and colonialism, respectively. The Soviet Union was governed by a totalitarian regime[18].

Generally, UN Member States were not aiming at an independent and neutral Commission[19], at all. The Commission itself debated its own composition: whether to consist of experts or States' delegates. It was argued that the Commission should not be a mere transposition of the delegations being admitted to the General Assembly. Mrs. E. Roosevelt reiterated the idea of an independent expertise on the ground that States' representatives were already sitting in the GA and in the parent body of the Commission, i.e. the Economic and Social Council (hereinafter, ECOSOC)[20]. It would be preferable, she argued, to ensure a specific expertise[21]. In response, the Great Powers, in particular the Soviet Union, engaged in setting up a Commission on Human Rights, to be driven by States so as to preserve their national interests.

As a compromise, the Commission recommended the ECOSOC that all members might serve, on a personal capacity, as appointed by the ECOSOC itself from a list of candidates submitted by UN Member States[22] and that the UN Secretary-General should consult with those Governments elected to the Commission, before their representatives "are finally nominated[23]". The practice shows that this modality was promptly reduced to a mere formality;[24] and the admission procedure was developed in such a way that the Great Powers had nearly permanent seats.[25]

The same approach applied to the debate about the mandate of the Commission. Mrs. E. Roosevelt made outstanding efforts to ensure a role for the Commission closer to Security Council's, in the event that violations of human rights might amount to a "threat to international peace and security". Accordingly, the Nuclear Commission on Human Rights (from which the Commission on Human Rights would originate) proposed that the Commission should be authorized to assist the ECOSOC, the General Assembly (hereinafter, the GA) and the Security Council[26].

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[18] See Arendt, H., The Origins of Totalitarianism, 1968, New York; see also President Truman Speech in Nolde B., Possible Functions of the Commission on Human Rights, Annals of the American Academy of Political and Social Science (1946) p.246, as quoted by NIfosi, I, op.cit in supra note 17.

[19] See Evans, T., The US hegemony and the project of universal human rights, Palgrave McMillan Press, London, 1996, p.57-66; see also Schlesinger, S.C., Act of Creation. The founding of the United Nations. A Story of Superpowers, Secret Agents, Wartime Allies and Enemies, and Their Quest for a Peaceful World, Boulder, Westview, 2003.

[20] See Tolley, H. Jr., The UN Commission on Human Rights, Boulder, Westview, NY, 1987, p.10.

[21] An issue which was resumed during the institution-building of the Council, between 2006-2007.

[22] See the CHR's second report of May 1946, E/38/Rev.1, Page 8, as available at: http://www.un.org/depts/dhl/udhr/meetings_1946_2nd_esc.shtml)

[23] ECOSOC Res. 9 (II) (1946).

[24] See Alston, P., The United Nations and Human Rights: A Critical Appraisal, Oxford, Clarendon Pres, (1992(a), 1992, p. 126-210.

[25] See Ronzitti, N., The Report of the High-Level Panel on Threats, Challenges and Change: The Use of Force and the Reform of the United Nations, Italian Yearbook of International Law, Volume XIV, 2004, Ed. M. Nijhoff Publishers, p. 3 et sequitur.

[26] See E/38/Rev.1, 1946, at p.7.

After lengthy negotiations, from February through June 1946[27], the ECOSOC defined the size, composition and mandate of the Commission and its subsidiary body, namely the then Sub-Commission on Prevention of Discrimination and Protection of Minorities, by its Resolutions 5 (I) and 9 (II), respectively.

Since its inception, the Commission was mandated to carry out a specific standard-setting activity[28], despite the attempts by the Chairperson, Mrs. Roosevelt and by other Commission's members, to broaden the scope of the Commission's mandate. From the Report of the second session of the Commission[29], by referring to the Terms of Reference (acronym, ToR) of the Commission's mandate: "it was generally felt that item: (a), namely, an international Bill of Rights, might cover substantially items (b), (c) and (d)". Attention was drawn to the fact that "item (e) of the terns of reference - any matters within the field of human rights considered likely to impair the general welfare or friendly relations among nations - as reconsidered in the Report (Page 36, Paragraph 16) of the Preparatory Commission was not included under the Terms of Reference drafted by the ECOSOC". "The Commission [thus] agreed to request the [Economic and Social] Council to consider the desirability of adding a clause, substantially along the lines of the original item (e), so as to deal with any matters not covered by items (a), (b), (c), and (d), such as the eventual punishment of certain crimes which must be considered as international, as they constitute an offence against all mankind[30]".

Notwithstanding this willingness, the Commission immediately faced the limits of the Cold War. In the early 1950s, some scholars already argued that the Commission was "a political body without effectiveness[31]".

In 1947, the Commission decided that it had "no power to take action in regard to any complaints concerning human rights[32]". By Resolution 75(V) of August 1947, the ECOSOC endorsed that decision; and envisaged that the Commission would be informed, on a confidential basis, of the relevant communications, as received by the UN Secretariat and compiled by the Secretary-General in a list, to be submitted to Commission's members without any indications of the sources.

Great Powers decided that the Commission would:

i. Be informed about individual communications;

[27] Op. cit in supra note 20, p.4-13.
[28] Op. cit. in supra note 20 (Tolley); also op.cit. in supra note 20 (Alston p.127).
[29] See supra in note 22.
[30] Ibidem.
[31] See Lauterpacht, H. International Law and Human Rights, 1950, p. 257.
[32] See Cassin, R., La declaration universelle et la mise en oeuvre des droits de l'homme, 79 Receuil des Cours, 1951, p. 241-263.

ii. Propose and promote international standards.

The then Secretary-General, Trygve Lie, questioned the above choice in his Report on "The present situation with regard to Communications concerning Human Rights (See E/CN.4/165 (1949), 6 June 1948)[33]", on the ground that such a decision could endanger the work of the Organization.

In that juncture, under the initial chairmanship[34] of Mrs. Roosevelt[35], the Commission engaged in drafting the Universal Declaration of Human Rights and the two Covenants on civil and political rights and on economic, social and cultural rights, respectively[36]. Given the general inaction that the Cold War had determined, according to some scholars[37], this standard-setting activity was the best and most viable option.

Referring to that period, which lasted approximately twenty-years (up to the introduction of ECOSOC Resolution 1235, in 1967), scholars are used to recall that the Commission adopted the so-called "no power doctrine[38]", alternatively indicated by the terms, "abdication of power[39]", "non interference period[40]" or "declaration of impotence[41]". In 1969, referring to those years, Mr. Humphrey, the first Director of the UN Human Rights Division, from 1946 to 1965, wrote that "there is some truth in the proposition that the Commission has been little more than a drafting committee for the General Assembly".

To reduce the negative impact of the above decision, mainly dictated by the Great Powers, the UN introduced, in the 1950s, a programme of advisory services[42]. As early as 1955, the Commission adopted a US-backed Action Plan on educational and promotion-related activities, by which to develop, inter alia, advisory services, fellowships, seminars, studies and annual country reports[43].

In that juncture, an additional factor impacted on the Commission's work: its size. Initially, the Commission consisted of eighteen Member States, mainly from the

[33] Op. cit in supra note 17 (Nifosi).
[34] Six-year long.
[35] The last years of her chairmanship were complicated by her resistance to endorse the Truman Administration's policy in the field of human rights (See Glendon, op. cit., in supra note 16, p.50).
[36] The material which was not included in the UDHR became the basis for the two 1966 Covenants, namely the ICCPR and ICESCR.
[37] See Boyle, K., The United Nations Human Rights Council: Origins, Antecedents and Prospects, 2009, p.12 et sequitur, in New Institutions for Human Rights Protection, Oxford, Oxford University Press, 2009, Collected Courses of the Academy of European Law, XVIII/2, 2009
[38] See Ramcharan B.G. The Concept and Present Status of the International Protection of Human Rights: forty years after the UDHR. Dordrecht; M. Nijhoff Publishers, 1989, p.520.
[39] Op.cit in supra note 24 (Alston)
[40] Op.cit in supra note 17 (Nifosi)
[41] Op. cit. in supra note 20 (Tolley, p.16)
[42] See Marquez Carrasco, C., and Nifosi-Sutton, I., 2008, The UN Human Rights Council: Reviewing its First Year, in Yearbook on Humanitarian Action and Human Rights, University of Deusto and Pedro Arrupe Institute of Human Rights, p.102.
[43] That advisory programme was re-launched in 1987 when a UN Voluntary Fund on Advisory Services and Technical Cooperation in the field of human rights was established. This area currently falls within the tasks of the Office of the High Commissioner for Human Rights being currently engaged in enhancing and improving relevant activities which can undertake upon request by the state concerned or by mandate of the Council of Human Rights; Op. cit in supra note 20 (Tolley, p.32-54).

Western Group, that were reluctant[44] to deal with issues related to economic, social and cultural rights (the so-called second generation's rights).

On the contrary, in the late 1950s[45], the decolonization process determined the enlargement of the UN membership and the emergence of new stances from independent States, relating to the fight against apartheid and the promotion of second generation's rights (namely economic, social and cultural rights). All UN collegial bodies, including the Commission, were enlarged accordingly.

The Commission initially consisted of 18 Member States (in 1946). Subsequently the ECOSOC decided to increase the membership of the Commission, as follows: 21 Member States in 1962; 32 Member States in 1967; 43 Member States in 1979; and 53 Member States, in 1992. At the time of the abolition (2006), the Commission counted 53 States (one less than the ECOSOC). On each of the above occasions, the rationale was to ensure a more equitable geographic balance[46].

With the new size of the 1960s, the Commission entered the stage of its initial action-oriented activities. Developing countries claimed a more proactive role for the Commission, in order to deal with gross violations of human rights[47] "as exemplified by the apartheid policy in South Africa[48]". In that juncture, the Commission introduced the public procedure, under which to debate on situations of gross/large-scale violations of human rights, including policies of racial discrimination[49] and to eventually appoint ad hoc monitoring mechanisms. Further to specific allegations made public by the then Sub-Commission, most developing countries put forward the proposal of reshaping the 1959 communication procedure to deal with specific allegations of gross violations of human rights, in a confidential setting. Accordingly, the Commission was authorized, by ECOSOC Resolution 1503 (XLVIII) of May 1970, to receive communications, referring to alleged gross and systematic violations of human rights and to act upon, accordingly, though in a confidential setting.[50]

[44] As argued by some scholars, op. cit. in supra note 24 (Alston).
[45] General Assembly Resolution 1514 (XV) of December 1960, entitled "Declaration on the granting of independence to colonial countries and peoples" as later supplemented, among others, by GA Resolution 2649 (XXV) entitled The importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights".
[46] Op. cit. in supra note 19.
[47] Op. cit. in supra note 12.
[48] See ECOSOC Resolution 1235 (XLII) of June 1967.
[49] As for the definition of gross violations of human rights, scholars argue that there is not yet a common definition. Commission's Resolutions refer to either gross violations or serious and systematic violations of human rights (See Marchesi, A., Diritti Umani e Nazioni Unite, diritti, obblighi e garanzie, Ed. Franco Angeli, 2007, p.73).
[50] See Rodley, N., The United Nations Human Rights Council, Its Special Procedures and Their relationship with the Treaty Bodies – Complementarity or Competition?, 2009, Oxford University Press, in New Institutions for Human Rights Protection, Oxford University Press), pp.49.75.

Scholars[51] argue that the so-called 1235 public procedure laid the foundations of the system of the Special Procedures (formally recognized as such by the 1993 Vienna Declaration and Programme of Action[52]), while ECOSOC Resolution 1503 introduced the so-called "1503 confidential procedure", aimed at monitoring the situation of human rights in the States concerned, without the immediate visibility of a public debate[53]. In this regard, Prof. Weissbrodt, a former Sub-Commission expert, argues that: "the 1503 process is painfully slow, complex, secret, and vulnerable to political influence at many junctures" but it had the merit to increase pressure on governments.[54]

As discussed, any development in this sector was conditioned by the enlargement of the UN Membership. By ECOSOC Resolution 1979/36 of May 1979, it was decided to increase the Commission's membership, from 32 to 43 members. It was also decided that the Commission would assist the Economic and Social Council in the coordination of all UN human rights activities, as follows: "[Op.3] [..] to add the following provisions to the Terms of Reference of the Commission on Human Rights set forth in Council Resolution 5 (I) and amended by Council Resolution 9 (II): "The Commission shall assist the Economic and Social Council in the coordination of activities concerning human rights in the United Nations system; [Op.4, lett.a] Authorizes an extension in the membership of the Commission on Human Rights to forty-three members, equitable geographical distribution being maintained."

Scholars argue that the enhancement of the Commission's activities in the late 1970s was the result of a specific engagement, mainly by developing countries, that aimed at an effective investigation and monitoring on country situations, including through thematic procedures. The first thematic procedure was the Working Group on Enforced Disappearance (WGED)[55].

The 1980s witnessed the proliferation of both thematic and geographic Special Procedures. By contrast the 1503 confidential procedure continued to be applied, though without an immediate or evident impact on the country concerned, due to the limited use of independent expertise and its prevailing political nature[56].

[51] Op.cit in supra note 17.
[52] See Chapter II.
[53] See Chapter III.
[54] Newman, F., and Weissbrodt, D., International Human Rights: Law, Policy and Process, Anderson Pub., 1990, p.123.
[55] See Sunga, L., The Special Procedures of the UN Commission on Human Rights: Should they be scrapped?, International Human Rights Monitoring Mechanisms, Vol.7, M. Nijhoff Pub. 2001, p. 233-235.

[56] See Chapter III.

After the fall of the Berlin Wall, the new international scenario scaled up the advancement of human rights, at both the substantive law and institutional levels. It might be sufficient to recall:

i. That, between 1989 and 1992, the rate of the Security Council's Resolutions increased 210%;
ii. The 1993 Vienna World Conference on Human Rights by which States agreed upon, inter alia, the principle of "universality, inter-relatedness and indivisibility of human rights";
iii. The enlargement of the Commission, up to 53 members.
iv. The creation of the Organization on Security and Cooperation in Europe from the Conference on Security and Cooperation in Europe dating back to the 1970s.

In that juncture, given the evolving international scenario, being also characterised by the spread of civil wars, the Commission introduced the practice of emergency sessions, if requested by the majority of its Members[57].

Despite the increasing acknowledgment of the need to promote and protect human rights, the practice shows the reluctance of States vis-à-vis the work of the Special Procedures. In the early 1990s the then Special Rapporteur on the Great Lakes Region, justice Wako, had denounced the mass killings occurring in Rwanda[58] and somehow predicted the Rwandan genocide but his indications were ignored[59]. Scholars recall that UN Members, such as Egypt[60] initiated to question the working modalities of the Special Procedures.

From the outset of his tenure, the former Secretary-General, Kofi Annan, envisaged a profound reform of the UN, inter alia, to mainstream human rights throughout the UN system[61].

The Commission approved, by consensus, a Chairman Statement establishing an inter-sessional Open-ended Working Group (acronym, OEWG) on "enhancing the effectiveness" of its own mechanisms which produced the so-called Selebi Report[62],

[57] Which may be considered as the forerunner of the special sessions' tool of the Council.
[58] UN Doc. E/CN.4/1992/30, paras. 461 to 467.
[59] UN Doc. E/CN.4/1994/7/Add.1 of August 1993; see also UN Doc. A/49/508/Add.1, S/1994/1157/Add.1 of November 1994.
[60] Op. cit in supra note 38 (Ramcharan).
[61] See Tistounet, E., From the Commission on Human Rights to the Human Rights Council: Itinerary of a Reform Process, in International Law, Conflict and Development, by Kalin, W., Kolb, R., Spenlé, C.A., Voyame, M.D., M. Nijhoff Pub., Leiden/Boston , 2010, p.325 330; see also Nowak, M., Introduction to the International human rights regime, Boston-Leiden 2003, p.106 et ff..
[62] See UN Doc. E/CN.4/2000/112.

dealing, inter alia, with the Special Procedures system, the 1503 procedure and the work of the then Sub-Commission. That Report was promptly endorsed by Commission's Decision 2000/109[63]. The main recommendations of the Selebi Report referred to:

i. The strengthening and the rationalisation of the system of the Special Procedures, including the maintenance of a roster of potential candidates by the OHCHR (as subsequently introduced by the Council IB Package);

ii. The improvement of the Special Procedures' Interactive Dialogue with UN Member States (as per practice initiated in 2003, the interactive dialogue with Special Procedures take place on a regular basis);

iii. The better functioning of the 1503 confidential procedure to be developed in a two-stage process, involving both the Sub-Commission – though with a reduced mandate - and the Commission (On June 16, 2000, the ECOSOC adopted Resolution 2000/3 by which it eliminated the phase before the plenary of the Sub-Commission[64]);

v. The Sub-Commission was requested not to adopt any longer country resolutions[65].

The transition to the new century marked the tension between the human rights mainstreaming stances by the UN Secretary-General[66] and the *de facto* resistance of UN Member States. The Commission was targeted and accused of politicization. According to some scholars[67] that criticism was an attempt to bring the Commission back to the 1950s inaction doctrine. Some other scholars[68] argue that the turning point was determined by the US that was not re-elected to the Commission, on the occasion of the 2001 elections.[69]

[63] It has been reconsidered in the course of the RRI process within the newly established Council.
[64] See Chapters II- IV.
[65] See Chapter IV.
[66] In 1997, the then Secretary-General of the UN published his report, entitled "Renewing the United Nations: A Programme for Reform (A/51/950)", as approved by GA resolution 52/12 (of December 19, 1997), in which the UN Secretary-General put on the Agenda the question of the UN reform and suggested a framework for its implementation. In 1999, by his report (See UN Doc. A/54/1) on the work of the Organization (published on August 31, 1999), the Secretary-General indicated the linkage between peace, development and human rights, and also stressed "…if we lose sight of this fundamental truth [the centrality of the respect for human rights], all else will fail". In 2002, the Secretary-General followed up with another report on the "Strengthening of the United Nations. An Agenda for further change (A/57/387)", which was published two years after the Millennium Summit (September 2000)
[67] Op. cit. supra in note 24 (Alston).
[68] Op. cit. supra in note 37 (Boyle).
[69] See Alston, P., Re-conceiving the UN human rights regime: Challenges confronting the new UN Human Rights Council. Melbourne Journal of International Law, 7, 2006, p. 185 et ff..

In 2003, the Commission sent out conflicting signals: on one hand, it positively reviewed its working methods in line with the Selebi Report[70]; on the other it accepted that Libya, one of the so-called top offenders,[71] could chair it for one year. With the return of the US among the Commission's members[72], many countries and NGOs condemned the "war on terror", by challenging the legal basis of the Guantanamo Base. In this regard Cuba and China put forward, in 2004, a draft Resolution (UN Doc. E/CN.4/2004/L.88/Rev.2) on "the question of detention at the Guantanamo Base" which was withdrawn by its drafters, from the floor, at the very last minute, prior to the possible adoption by the Commission (para. 633 of that session's Report - E/2004/23-E/CN.4/2004/127).

The practice shows that the Commission's membership fostered the misperception of the work of the Commission. States with poor human rights records, such as Cuba, China, Libya, the Russian Federation, and the Sudan, could *de facto* determine the course of action on both many geographic situations and important thematic issues, such as the human rights in China, in Chechnya, in Iran, death penalty, non discrimination and sexual orientation.

In those years, the use of the so-called no action motions became a common practice to avoid decisions on specific country situations. At the thematic level, despite the EU and Brazilian requests to either publicly debate or to introduce an ad hoc draft Resolution on sexual orientation (UN Doc. E/CN.4/2003/L.92), the Islamic Group hindered any discussion on this issue[73]. In parallel with this approach, they started claiming the need for a binding international convention on defamation of religion.

Going through these last events, there is the risk to misunderstand the added value of the Commission. Therefore, it seems important to us to enlist some of the Commission's achievements.

1.2. The achievements of the past Commission

[70] See UN Doc. E/CN.4/RES/2002/91.
[71] See the 2010 Freedom House Survey, available at: www.freedomhouse.org. See also Sachs, S., Sins of Commmission: Repressive Regimes and the U.N. Commission on Human Rights, 2003, at www.steve sachs.com/papers/paper_hrc.html.
[72] Permanent Representative of the US to the United Nations, Jean Kirkpatrick, "The UN human rights panel needs some entry standards", International Herald Tribune, May 14, 2003.
[73] See Commission's Decision 2003/118. "Postponement of consideration of draft resolution E/CN.4/2003/L.92 and the proposed amendments thereto (E/CN.4/2003/L.106-110", by which the Commission decided, with a recorded vote, to postpone consideration of draft Resolution E/CN.4/2003/L.92 entitled "Human rights and sexual orientation" and the proposed amendments thereto (E/CN.4/2003/L.106-110) until its sixtieth session, under the same agenda item. [See chap. XVII.]; See also 2003 Commission's Report, UN Doc. E/2003/23 - E/CN.4/2003/135)

The Commission achieved outstanding results with regard to standard-setting activities and the creation of monitoring and protection mechanism, such as the Special Procedures[74]. As for the former, according to Buergenthal[75], the Commission played "the role of an International Law Commission for human rights". During its existence, "the Commission did establish what was necessary for the human dignity[76]". Since the adoption of the Universal Declaration of Human Rights (1948), the Commission produced over twenty-five relevant standards, including binding treaties and "soft law" declarations (which in some cases have been the basis for binding treaties)[77]. For sake of correctness, the following documents may be recalled:

i. The UN Declaration on the Rights of the Child, of November 20, 1959;
ii. The United Nations Declaration on the Elimination of All Forms of Racial Discrimination, of November 20, 1963;
iii. The International Convention on the Elimination of All Forms of Racial Discrimination, of December 21, 1965;
iv. The International Covenant on Economic, Social and Cultural Rights, of December 16, 1966;
v. The International Covenant on Civil and Political Rights, of December 16, 1966;
vi. The Optional Protocol to the International Covenant on Civil and Political Rights, of December 16, 1966;
vii. The international Declaration on the Elimination of Discrimination against Women, of November 7, 1967;
viii. The International Convention on the Suppression and Punishment of the Crime of Apartheid, of November 30, 1973;
ix. The International Declaration on the Protection of All Persons from Being subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, of December 9, 1975;
x. The International Convention on the Elimination of All Forms of Discrimination against Women, of December 18, 1979;
xi. The Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion and Belief, of November 25, 1981;

[74] Op. cit in supra note 25.
[75] See Buergenthal, T., The evolving international human rights system. The American Journal of International Law. 100(4), 2006, p..791.
[76] See Donnelly, J., Universal human rights in theory and practice (2nd ed.), Ithaca:, Cornell University Press. 2006, p.10-20.
[77] Op. cit. in supra note 61 (Tistounet).

xii. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, of December 10, 1984;

xiii. The International Declaration on the Right to Development, of December 4, 1986;

xiv. The UN Convention on the Rights of the Child, November 20, 1989;

xv. The Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, of December 15, 1989;

xvi. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, of December 18, 1990;

xvii. The International Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, of December 18, 1992;

xviii. The UN Declaration on the Protection of All Persons from Enforced Disappearances, of December 18, 1992;

xix. The International Declaration on the Right and Responsibility of Individuals, Groups, and Organs of the Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, of December 9, 1998 (namely the human rights defenders);

xx. The Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, of December 10, 1999;

xxi. The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, of May 25, 2000;

xxii. The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, of May 25, 2000;

xxiii. The Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, of December 18, 2002;

xxiv. The International Convention on the Protection of All Persons from Enforced Disappearance, of December 20, 2006 (whose drafting was commenced by the Commission);

xxv. The International Declaration on the Rights of Indigenous Peoples, of September 2007 (whose drafting was commenced by the Commission);

xxvi. The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, of December 2008 (whose drafting was commenced by the Commission)[78].

Both the Commission and the Sub-Commission on the Promotion and Protection of Human Rights may be considered as the main standard-setters of the *corpus iuris* of international human rights law.

As for the latter, the Commission created the system of Special Procedures though without a clear initial *telòs*, as well as supported, inter alia, the work of specific working groups set within the Sub-Commission's framework, such as the Social Forum.

However with specific regard to the Commission's monitoring and protection tasks, this remains a controversial issue. Most scholars[79] deem that these activities were initially lame due to the Cold War and afterwards due to the North-South divide.[80]However if one considers the degree of technicalities contained in the annotated Agenda of the Commission (made of 19 Items and 19 Sub-Items), it can be easily inferred that the Commission played an instrumental role in establishing a strong operational framework for both promotion and protection-related activities while advancing human rights from a substantive legal standpoint.

In the 1970s, dictatorship (particularly in Latin America) and genocide (Cambodia) became central issues on the Agenda of the Commission. It also dealt with the situation of human rights, among others, in Israel/OPT, Guatemala, South Africa, Equatorial Guinea and Chile (though failing to deal with other situations meriting attention, such as the human rights in Uganda, the pre-perestroika Russia, Iraq, Tiananmen)[81].

The need to monitor and, if possible, to provide advisory services was translated in a broader Agenda and a relating incremental number of resolutions during the 1980s.

Notwithstanding the above activities, scholars argue[82] that the Commission did not have either the power or the authority to "move beyond the words [..]. It could

[78] For sake of correctness, the following documents are under elaborations, though stemming from specific resolutions of the then Commission: xxx) Draft Convention on Human Rights Education and Training, to be adopted by the General Assembly, in December 2011, xxxi) Establishment of an OEWG on the drafting of the third Optional Protocol to the Convention on the Rights of the Child, concerning individual complaints (A/HRC/13/L.5). This standard-setting framework does not allow any comparison with the relevant work of the Council, being still in its "infanthood/childhood" stage.
[79] See Zoller, T., North-South Tension and Human Rights, 8 Human Rights Monitor 3 , p.25-26, 1990.
[80] Op.cit in supra note 75 (Buergenthal).
[81] See Cardenas, S., Conflict and compliance: State responses to international human rights pressures, Philadelphia Penn Press, 2007, p.10 et sequitur; see further op.cit.in supra note 42 (p.110).
[82] Op.cit in supra note 2 (Forsythe).

criticise but it could not impose any sanctions – whether diplomatic or economic". Further the Commission could not threaten or deploy military force. Coercive measures might be only adopted by the Security Council under Chapter VII of the Charter of the U – which is a matter of fact.

Beside from differing views, it should be acknowledged that the Commission started playing a specific protection role, although subsidiary to the domestic systems, through both the public and confidential procedures wherever serious or gross violations of human rights occurred[83].

On a more specific note, through a step-by-step process, the Commission had the great merit to develop a monitoring activity, both at the thematic and geographic levels, by appointing Special Procedures Mandate-Holders (acronym, SPMH). By developing and improving their working modalities so that the latter became, in some cases, the movers of new binding instruments[84] (To this end, mention has to be made of the Working Group on Involuntary or Enforced Disappearance that firmly supported the drafting of the International Convention for the Protection of All Persons from Enforced Disappearance (UN Doc.A/61/488 of December 20, 2006).

2. The transition to the Council

As discussed, the 9/11 events marked an irreversible shift in the perception of new "threats and challenges[85]." At that time, it has been argued, there were different visions of the world, ranging from the idea of multilateral cooperation to the so-called "Bush doctrine" (alternatively defined "the US pre-emptive doctrine of national security"), the latter being aimed at maintaining the balance, from a military standpoint, among the most powerful States.[86] These differing views impacted on the international scenario and, more specifically, on the UN system which swiftly called for a wide reform.

[83] See Marchesi, A., and Palmisano, G., Il sistema di garanzia dei diritti umani delle Nazioni Unite, in www.costituzionalismo.it, 2006, p..12 et ff. As for the principle of subsidiarity vis-à-vis the principle of State sovereignty in international human rights law, see Carozza, P.G., Subsidiarity as a Structural Principle of International Human Rights Law, p.55 et ff., in American Journal of International Law, Vol.97/38, 2003, p. 40-70, available at: www.asil.org/ajil/carozza.pdf.

[84] See Chapter II.

[85] See Ramcharan, B. G., Human Rights in the 21st century, 2009 in international human rights monitoring mechanisms, Essay in Honour of J.T. Toller, vol. 35, M. Nijhoff Publishers, p. 4; See also Simpson, G., "Great Powers and outlaw States: unequal Sovereigns in the international legal order", Cambridge University Press, 2004, p.169, 352, 359; see also Weiss, T.G., Forsythe, D.P., Coate, R.A. & Peasse, K., The United Nations and changing world politics, 4th ed., Westview Press, 2004, p.47,93,169.

[86] See Thomas, L.,International Law, International Relations Theory and Pre-emptive War: The Vitality of Sovereign Equality Today, in Law and Contemporary Problems, vol. 67, No.4, 2004, p. 147-150. For an overview of the geopolitics dynamics, see Bussani, M., Il Diritto dell'Occidente, Geopolitica delle Regole Globali, ed. Einaudi, 2010, p.. 175 – 212.

In September 2003, the former Secretary-General, in addressing the General Assembly, stressed[87] that the international Community had come to a: "fork in the road: This may be a moment no less decisive than 1945 itself when the UN was founded. At that time, the allies against the Nazi-fascism, led and inspired by the US President Franklin D. Roosevelt, were determined to make the second half of the twentieth century different from the first half. They saw that the human race had only one world to live in, and that unless it managed its affairs prudently, all human beings may perish. So they drew up rules to govern international behaviour, and founded a network of Institutions, with the United Nations at its centre, in which the peoples of the World could work together for the common good".

To translate it into reality, the former UN Secretary-General appointed, in late 2003, an High Level Panel (acronym, HLP) of sixteen eminent persons, mandated to assess "current threats to peace and security", existing policies and Institutions, and to make recommendations for strengthening the UN (Note by UN Secretary-General, A/59/565, December 2, 2004, para.3)[88].

In particular the Panel was entrusted with:

i. Examining global security threats and challenges to international peace and security;
ii. Identifying how the collective action can address these challenges;
iii. Recommending the changes, including a possible review of the work and agenda of the principal organs of the UN[89]

The HLP published, in 2004, the well-know report, "A More Secure World: Our Shared Responsibility[90]", to which the UN Secretary-General replied with his own Report, entitled "In Larger Freedom: Towards Security, Development and Human Rights for All[91]".

Without addressing issues referring to the international political scenario, the sixteen sages' work had the added value to indicate the emerging threats after the 9/11 events, such as the WMD, terrorism, international organized crime, extreme poverty,

[87] See UN Secretary-General address to the GA, New York, September 23, 2003, available at: www.un.org/apps/sg/sgstats.asp?nid=517)
[88] See Rotfeld, A.D., Towards the UN Reform – New Threats, New Responses, Eds. ROTFELD, Warsaw, 2004, p.34, available at http://www.msz.gov.pl/docs/88/The%20Warsaw%20Report.pdf; See also UN Doc. A/Res/58/16 of December 3, 2003, by which the UN General Assembly "encourages the United Nations…to continue efforts towards establishing a comprehensive and effective strategy for responding to global threats and challenges" and "welcomes the establishment by the Secretary-General of the High-Level Panel on Threats, Challenges and Change, to make recommendations for the elements of a collective action".
[89] See Terms of Reference, available at http://www.un.org/News/dh/hlpanel/terms-of-reference-re-hl-panel.pdf).
[90] See UN Doc. A/59/565.
[91] See UN Doc. A/59/2005.

food insecurity, civil wars, climate change. They also analysed the main areas in need of reform within the UN, primarily the Security Council.

Thus the transition to the Council took place in a very complex international scenario within which the long-debated reform "to change" the UN, in particular the UN Security Council, was not flying.

Then most UN Member States did agree to focus on human rights.[92] Both the above UN Reports contained institutional reform proposals, including the replacement of the Commission with a new Human Rights Council.

In particular the HLP proposed for the new Council, to be a Charter-based body, functioning alongside the Security Council. This Panel also proposed the establishment of a smaller advisory committee of approx. fifteen independent experts, to replace the much-criticised Sub-Commission for the promotion and protection of human rights[93]. However, considering the complexity of such a change, the Panel indicated as a preliminary step towards the broader reform to further enlarge the Commission's membership and to strengthen the Office of the High Commissioner for Human Rights[94].

More radically, Annan proposed a new body of equal standing with the other main organs of the United Nations. By his Report "In Larger Freedom", he called for a smaller Council, to be either a principal organ of the United Nations or to be created under the General Assembly umbrella. In both cases, Members of the Council would be elected by a two-thirds majority of the GA and should undertake to abide by the highest human rights standards[95].

In an Addendum to his Report, the former Secretary-General provided the details of his proposals[96]. In particular, as for the status, he proposed that the Council should be established as a principal organ of the UN, together with the Security Council and ECOSOC, so that peace and security, development and human rights are treated, on par. The Council should maintain the mandate of the Commission, though supplemented by a peer review mechanism. It should work with the other components of the human rights machinery, including TB and OHCHR, while ensuring that both

[92] See Hampson F.J., An Overview of the Reform of the UN Human Rights Machinery, in Human Rights Law Review, Oxford University Press, 2007, p.15 et sequitur.
[93] It is worth recalling that the study by Prof. Weissbrodt on Draft Principles on the Responsibility of TNCs and Human Rights was severely attacked by a cross-regional group, led by the UK and Indonesia, between 2004-2005. It would be correct to argue that it marked the turning point for the relationship between the UN Membership and the then Sub-Commission. See Commission's Decision 2004/116, by which it stressed that "Affirm that document E/CN.4/Sub.2/2003/12/Rev.2 has not been requested by the Commission and, as a draft proposal, has no legal standing, and that the Sub-Commission should not perform any monitoring function in this regard."
[94] See paras. 282 -293 of the Report A/59/565 of the HLP on Threats, Challenges and Change.
[95] See Buhrer, J., L'ONU contre le droits de l'homme?, in Politique internationale, Vol. 117, 2007, p.23 et sequitur.
[96] See UN Doc. A/59/2005/Add.1.

NGOs and NHRIs maintain their *acquis*. In addition to regular sessions, the Council could also call for special sessions.

In response to the Annan's Report, the African Union reached (Addis Ababa, March 2005)[97], after long internal negotiations, a common position: The so-called Enzulwini consensus, by which it stressed, inter alia, that measures were necessary to address the selectivity and the politicisation of the Agenda of the Commission and that any new body should pay equal attention to the two main categories of human rights, namely civil and political rights, and economic, social and cultural rights. It also argued that the proposal to introduce a body with universal membership was not realistic, since the Commission was created as a subsidiary organ of the ECOSOC, with a rotating small membership. As a fall-back position, the African Union agreed to propose that the new body could maintain the same location (Geneva) and composition of the Commission[98].

As recalled, on the occasion of the September 2005 World Summit, both the reports under reference were considered, even though only four paragraphs of the 2005 Outcome Document were devoted to the Human Rights Council.[99] The World Summit endorsed Annan's proposal (See UN Doc. A/RES/60/1) but left "the relating details[100]" – namely the definition of the new body - in the hands of the General Assembly, provided that it should act upon "as soon as possible and possibly at the sixtieth session[101]".

The 2005 World Summit Outcome[102] thus contained an agreement on the creation of a Human Rights Council with care not to deal with any of the following issues: the mandate, modalities, functions, size, composition, membership, working methods and procedures (paras. 157-60 of UN Doc. A/RES/60/1 of 2005)[103]. World leaders merely indicated "the road": "We reaffirm that the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and

[97] See Scanlon, H., A Dialogue of the Deaf: Essays on Africa and the United Nations, ed. A.Adebajo and H. Scanlon, Centre for Conflict Resolution, 2009, p. 131-146.
[98] At that time, the African Group envisaged only slight changes which will later significantly impact on the functioning and the Agenda of the Council.
[99] See Burci, G., "The UN Human Rights Council", in the Italian Yearbook of International Law, Vol. XV, 2005, p. 28.
[100] See World Summit Outcome Document, A/RES/60/1 of September 16, 2005, para.160.
[101] See Schrijver, N.J..,The Future of the Charter of the United, in von Bogdandy, A., and Wolfrum, R., MAX PLANCK YEARBOOK OF UNITED NATIONS LAW, Vol.10, Eds. M. Nijhoff, 2006, p.26.
[102] See Hilpold, P., The Duty to Protect" and the Reform of the United Nations – A new Step in the Development of International Law? in von Bogdandy, A., and Wolfrum, R., MAX PLANCK YEARBOOK OF UNITED NATIONS LAW, VoL.10, 2006, Eds. M. Nijhoff, p. 38.
[103] Besides no feasibility or impact assessment study was undertaken, internationally before determining the type of body to be set up save the study by Prof.Kalin. Among his proposals, he supported the replacement of the Commission with a smaller Council. The Kalin's Report, "Towards a Human Rights Council: Options and Perspectives (August 2004)" was thus commented throughout 2005. See also Kalin, W., Jimenez, C., Reform of the UN Commission on Human Rights, COHOM Doc., séance 358 of August 10, 2003, Institute of Public Law, University of Bern, 2003. See further Traub, J. "The best intentions: Kofi Annan and the UN in the era of American Power, Eds.Farrar, Strauss, Giroux, 2006, p.167 et sequitur.

security (..)". Pursuant to our commitment to further strengthen the United Nations human rights machinery, we resolve to create a Human Rights Council (para.157)."

The then Secretary-General stressed that it was "a once-in-a-generation opportunity[104]", to set the framework for reforming the Organization, on the occasion of its 60th anniversary (1945-2005)[105]. By recalling the Roosevelt's Four Freedoms speech, Annan urged leaders to have "the courage to fulfil responsibilities in an admittedly imperfect world[106]".

Amb. J. Bolton, US Permanent Representative to the UN, often stressed the lack of confidence of his Government in any reform, including of the UN HR machinery[107].

As expected, while proposals of reform of the Security Council failed, UN Member States agreed to set up two new inter-governmental bodies: the Human Rights Council and the Peace-Building Commission, respectively.

Some scholars argue that any institutional reform, to be effective, should address the political difficulties which the UN faces[108]. During those months UN States missed the opportunity to overcome the tension between two different visions of international Organizations, divided between effective *universitas* and debating clubs/*societas*. As recalled in the Introduction, the philosopher M. Oakeshott developed and elaborated the theory by which it should be acknowledged that, in the field of international Organisations, there is a tension between effectiveness and representativeness, purposive and non purposive associations.

Within any contemporary institutional reform process, the debate should thus focus on how to ensure the effectiveness of the new organs. If this question is not posed *ab initio*, the outcome of any relevant process will risk to be either lame or a mixed bag or - worse - a "medical aesthetic exercise (This expression was routinely used by EU Member States during the institution-building process of the Council – file with the author)".

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[104] See UN Doc.A760/692 of March 7, 2006.

[105] Reform discussions have been held within and outside the UN HQs in NY over the last decades. However scepticism has been the leitmotiv due to the Organisation's results in Rwanda, the Former Yugoslavia, and Darfur.
See Schrijver, N.J., "UN Reform: A Once-In-A-Generation Opportunity?", IOLR 2 (2005), p.271 et seq;See also paras 297 et seq. of the UN report entitled "A More Secure World", and paras. 216 et seq. of the UN report In Larger Freedom.

[106] By his report In Larger Freedom, he called for freedom from want and from fear, and to live in dignity (the latter resulting from the combination of the two more freedoms outlined by Roosevelt: freedom of speech and of worship)

[107] See his speech at the adoption of the GA Resolution establishing the Council, March 15, 2006, available at: http://www.nd.edu/~sobrien2/Amb_%20Bolton%20Explanation%20of%20Vote.htm.

[108] See Luck, E.C. "How not to reform the UN", Global Governance 11, 2005, p. 412 et sequitur.; see also Oakeshott, on Human Conduct, Oxford: Clarendon Press, 1975, p.202-212.

In this wake, despite the HLP proposal of developing a Human Rights Council in the longer term (para.291 of UN Doc. A/59/565), UN Member States swiftly opted for replacing the Commission with a new Council (A/RES/60/1).

3. The negotiations within the UN General Assembly on draft Resolution 60/251

In light of the Ping Compilation (from the name of the Gabon Ambassador in charge of the preparation, in September 2005, of the draft World Summit Outcome Document)[109], the UN General Assembly President, Amb. J. Eliasson (Sweden), with the support by Amb. Dumisani Kumalo (South Africa) and Amb. Ricardo Alberto Arias (Panama) - who led the relevant negotiations -, compiled all the outstanding proposals, as put forward in the course of relevant bilateral and multilateral negotiations.

For about six months (October 2005-March 2006), Member States intensively[110] engaged in bilateral and multilateral negotiations on the main elements of the future Human Rights Council.

Among the most contentious issues, the following questions arose: whether the Council would be a main organ of the United Nations (while the Commission was a subsidiary organ of the Economic and Social Council); the frequency of the sessions (while the Commission gathered once a year, for six weeks); the size, the election procedure and the admission criteria; how the Council would address country-specific situations; whether all States would be subject to a periodic human rights review; and overall the role of the Special Procedures. Negotiations took place between "retentionists and abolitionists", the latter being those who supported the UPR in lieu of the Special Procedures[111].

After months of Plenary and bilateral consultations within which NGOs participated by lobbying and proposing ad hoc elements, such as those contained in the Letter from 33 NGOs to Member States of the Convening Group of the UN Democracy Caucus as well as the Letter from 160 NGOs to foreign Ministers of UN Member States[112], the GA President presented, in late February 2006, a compromise text

[109] See Scannella, P., and Splinter, P., The UN HR Council: A promise to be fulfilled, in Human Rights Law Review, 7-1, 2007, p.44.
[110] See Amnesty International under "Meetings the Challenge: Transforming the Commission on Human Rights into a Human Rights Council, April 2005, IOR40/008/2005, and "UN: Ten-Point Program for the Creation of An Authoritative and effective Human Rights Council, November 2005, IOR 41/067/2005.
[111] See, A/RES/60/1, paras.121-132 and paras.156-160.
[112] Available at: http://www.hrw.org/legacy/english/docs/2006/01/24/global12527_txt.htm; www.globalpolicy.org/reform/topics/hrc/2006/0119elements.htm; see also Nanda, V.. P., The global challenges of protecting human rights: promising

containing both the preambular and operative paragraphs of a possible draft GA Resolution on the establishment of the Human Rights Council[113].

At the presentation of this draft Resolution, the then US Permanent Representative to the UN, Amb. J. Bolton reiterated the US resistance[114]. In March 2006, during the final negotiation rounds, the crucial issues referred to the admission criteria and the election procedure. Nearly all the US proposals to ensure the adequate composition of the Council were rejected. For instance, the US requested a two-third majority rule for the election to the Council (namely 128 votes in favour for those States to be elected to the Council) and the non participation in the elections rounds for those States under Chapter VII's coercive measures.

The final voting majority formula was set at 96 votes in favour (UN Doc. A/INF/60/6, March 30, 2006). To match the US request, it was accepted only that those Members found liable for "gross violations of human rights" during their membership to the Council might be suspended by a two-thirds majority of GA members present and voting (Op.8 of GA Res. 60/251).

As for "gross violations of human rights", it is intended the "serious and systematic violations of human rights[115]" so as to distinguish the gross violations of human rights from "the ordinary" violations of human rights which fall within the domestic jurisdiction[116]. However it has been argued[117] that after the fall of the Berlin Wall the above distinction has been weakened. To some extent, the UN human rights mechanisms interact with Member States in all areas, including in the event of systematic or individual human rights violations.

The rationale behind that proposal was to reflect the aim of most Western Group countries, including the US, to create a "club of the clean", composed of those States matching relevant criteria[118].

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new developments, in Denver Journal of International Law and Policy, Vol.34, No.1, 2006, p.10; see further Alston, P., Re-conceiving the UN human rights regime: Challenges confronting the new UN Human Rights Council, Melbourne Journal of International Law, 7, 2006, p. 188.

[113] See The New York Times' Article entitled "Principles Defeat Politics at the UN", dated March 5, 2006, within which various prominent human rights advocates voiced concern, such as the 2003 Iranian Nobel Peace Prize Laureate, S. Ebadi.

[114] Op.cit in supra note 103 (Traub).

[115] See Conforti, B., Manuale di Diritto Internazionale, ESI, 2005, p.197.

[116] See Treves, as quoted by Marchesi, A., and Palmisano, G., Il sistema di garanzia dei diritti umani delle Nazioni Unite: prospettive di riforma e limiti intrinseci, in www.costituzionalismo.it, 2006, p.4.

[117] See Lebovic, J.H., & Voeten, E., The politics of Shame: The condemnation of country human rights practices in the UNCHR. International Studies Quarterly, 2006, p. 867; See also Chesterman S, Franck T.M., Malone D.M., The Law and Practice of the UN, Oxford University Press, 2008. p.150 et ff.; See further Op cit. in supra note 75; Henkin, L., International Law, Politics and Values, Human rights and State sovereignty, in Ga. J. INT'L & Comp. L., M.Nijhoff Publishers, 1995, p.63, 97.

[118] Brysk, A., and Shafir, G., (Eds), National insecurity and human rights: democracies debate counter-terrorism, Berkeley, University of California Press, 2007, p.13 et ff.

Human Rights Watch, an international US-based NGO, proposed that the admission to that Club would be only for those States ratifying or acceding to the seven core international human rights instruments:

i. The International Convention on the Elimination of All Forms of Racial Discrimination (acronym, ICERD) dated 1965;
ii. The International Covenant on Civil and Political Rights (1966) (acronym, ICCPR);
iii. The International Covenant on Economic, Social and Cultural Rights (acronym, ICESCR) dated 1996;
iv. The International Convention for the Elimination of All Forms of Discrimination Against Women (acronym, CEDAW) dated 1979;
v. The International Convention Against Torture (acronym, CAT) dated 1984;
vi. The International Convention on the Rights of the Child (acronym, CRC) dated 1989;
vii. And the International Convention on Migrant Workers and Their Families (CMW) dated 1990.

Should this approach be followed, many countries would have been excluded, such as the US - that has not ratified yet the International Covenant on Economic, Social and Cultural Rights -, China - that has not ratified yet the International Covenant on Civil and Political Rights - and Italy - that, together with all EU partners, - has not ratified yet the Convention on Migrant Workers and their Families (acronym, CMW).

This and other proposals were opposed by the G-77, the developing countries gathered in this Group during the era of decolonization[119], on the ground that the US-backed proposal would result in a new form of "neo-colonialism".

With the aim of reducing the number of sessions per year, limiting the country-resolutions, and abolishing the suspension clause, NAM/G-77 Members put forward various amendments[120].

Due to the US objections, the GA could not adopt the relevant Resolution on the establishment of the Council, by consensus.

[119] For an overview on the relevant groupings, see Zanghì, Diritto delle Organizzazioni Internazionali, Giappichelli, Torino, 2001, p.9 et ff..
[120] See UN Press Release GA/10449.

On March 15, 2006, by recognizing both the achievements and shortcomings of the Commission on Human Rights, the General Assembly resolved "to create a new Human Rights Council". GA Resolution 60/251 was adopted by a vote of 170 States in favour, four against (Israel, the Marshall Islands, Palau and the US), and three abstentions (Belarus, Iran and Venezuela).

The US, one of the founders of the Commission on Human Rights, voted against GA Resolution 60/251, on the ground that the Council was not matching its expectations[121]. It[122] did decide not to seek for election but pledged to work constructively with the Council[123].

During the General Statements' stage, after the vote, Pakistan took note with regret that the tradition to adopt the General Assembly President's initiatives by consensus had failed. The Permanent Representative recalled and emphasized the approach of the cross-regional group, known as "Uniting for Consensus", to adopt, on a consensual basis, all the UN Reform-related Texts.

Shortly after the adoption of GA Resolution 60/251, on March 15, 2006, both the former Secretary-General and the High Commissioner for Human Rights deemed that by this decision the UN would achieve a two-fold goal: crowning the process launched in the 1990s to mainstream human rights throughout the UN system; and confirming the inner coherence of a system based on the respect for human dignity and the universality of human rights.

Beside from political views, by GA Resolution 60/251, the Commission was dismissed after six decades of fruitful work. At the final Session (CHR62), on March 27, 2006, the Commission merely decided to refer "all reports to the Human Rights Council for consideration during its first Session, to be commenced on June 19, 2006"[124].

On June 19, 2006, the newly established Human Rights Council initiated its activities with the general support by the entire UN membership. All eminent participants - like in a chorus - emphasized that this new body would represent a "new start"[125].

[121] See UN News Centre, In "Historic Vote, General Assembly Creates New Human Rights Council", March 16, 2006, available at www.un.org.
[122] Under the Bush Administration, the US did not run for election either in 2007 or 2008, while it was re-admitted in 2009 at the beginning of the Obama's Administration.
[123] Op. cit. in supra note 99; See the Explanation of vote by Amb. J. Bolton, US permanent Representative to the UN, available at : htpp: www.state.gov/p/io/rls/rm/63143.htm and Press Release, April 6 2006 available at www.state.gov/t/pa/prs/ps/2006. Iin terms of political background, see also op.cit in supra note 13 (Lauren).
[124] It might be recalled that despite the criticism at the last regular session of the Commission, in 2005, there were approximately 3000 delegates)
[125] Forsythe D.P., Turbulent Transition: From the UN HRC to the Council, in "The United Nations, Past, Present and Future, Proceeding of the 2007 Francis Marion University – UN Symposium, Global Political Studies Series, Nova ed., 2007.

4.1. The content of General Assembly Resolution 60/251 (UN Doc. A/RES/60/251): a general overview

The UN Member States decided *in primis* that (See OP.1 of GA Resolution 60/251) the subsidiary body of the Economic and Social Council should be elevated to "a subsidiary organ" of the General Assembly, in accordance with Article 22 of the Charter of the United Nations[126]: "The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions".

When it is set up a subsidiary body[127], the parent body defines the main features, such as membership, structure and terms of reference, to be changed by or under its authority. The General Assembly did determine the functions, the specific tasks and scope of the Council's work, besides maintaining organizational control over it[128]. In this regard it was argued that the Council would be accountable to the entire UN membership without being filtered any longer by the ECOSOC[129].

The preambular and operative paragraphs of this Resolution provide guidance on: the normative basis of the Council, its terms of reference, and, more specifically, the conduct its work[130].

By reaffirming the core international standards, primarily the "Purposes and Principles" of the UN Charter, the Universal Declaration of Human Rights and the Vienna Declaration and Programme of Action (preambular paragraphs 1-2), the General Assembly reiterated: "[..] that all human rights are universal, indivisible, interrelated, interdependent and mutually reinforcing (preambular paragraph 3). In light of this wording, G-77 Members claimed that the right to development should be dealt with the other human rights. Accordingly Item 3 of Council's Agenda refers to "all human rights, including the right to development[131]".

In light of the UN Secretary-General Report, "In Larger Freedom[132]", the General Assembly acknowledged in preambular paragraph 6: "that peace and security,

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[126] Op.cit. supra in note 42.

[127] See Ramcharan B.G, Lacunae in the law of international organizations: the relations between subsidiary and parent organs with particular reference to the Commission and the Sub-Commission on Human Rights, in Nowak M., Steurer D., and Tretter H., Fortschritt in Mewubtsein der Grund-und Menschenrechte, Progress in the Spirit of Human Rights, HRSG/Editors, 1989, p.37-49.

[128] Khan D.E., Article 22, in Simma, B. (ed.), The UN Charter: A Commentary, Oxford University Press, Oxford 2002, p. 421 et ff.
As reported in Chapter VI, within the 2011 review of the Council, the General Assembly will only decide whether to upgrade the Council in a main organ of the UN, or not. The status of the Council is currently negotiated in New York, while all the other features are under definition by the Council itself (See Op.1 of GA Res. 60/251.

[129] See "A Comparison between the old Commission on Human Rights (CHR) and the new Human Rights Council (HRC)", as of 8 June 2006, available at, www.ohchr.org.

[130] See Ramcharan, B. G., Human Rights in the 21st century, in international human rights monitoring mechanisms, Essay in Honor of J.T. Toller, Vol. 35, M. Nijhoff Publishers, 2009, p.5.

[131] For the linkage between human rights and the right to development as inferred from paragraph 74 of VDPA, see Cadin, R., Carletti, C., Spatafora, E., "Sviluppo e diritti umani nella cooperazione internazionale. Lezioni sulla cooperazione internazionale per lo sviluppo umano", Giappichelli, 2007, p.190 et ff.

[132] UN Doc. A/59/2005 of March 2005.

development and human rights are the pillars of the United Nations system [..]". In particular, the General Assembly recognized "that the promotion and protection of human rights should be based on the principles of cooperation and genuine dialogue and aimed at strengthening the capacity of Member States to comply with their human rights obligations for the benefit of all human beings (See Preambular paragraph 10)".

In light of this paragraph, most UN Member States, particularly from the G-77, that are also members of the Council. are used to claim: i. The ownership of geographic resolutions dealing with countries from their respective regional groups; ii. The preference for new advisory services and cooperation mandates rather than monitoring exercises to be carried out by country Special Rapporteurs.

In terms of functions inherited from the past Commission, operative paragraphs 2-4 of GA Resolution 60/251 indicate as follows:

i. "To promote universal respect for the protection of human rights without any distinction (operative paragraph 2);
ii. To [broadly] address situations of violations of human rights, including [and not limited to] gross violations, and make recommendations thereon (Operative paragraph 3);
iii. To also promote the effective coordination and mainstreaming of human rights within the United Nations system (Operative paragraph 4)".

As for the nearly daily tasks, to be performed by the Council[133], the following operative paragraph (Operative paragraph 5) contain a specific list of ten duties, focussed on: cooperation, mainly among States (letts. e, f, h); promotion, particularly of thematic issues on all human rights (See lett.b) and, to some extent, prevention-related activities (letts. a, d, f).

"(*a*) Promote human rights education and learning as well as advisory services, technical assistance and capacity-building, to be provided in consultation with and with the consent of Member States concerned;

(*b*) Serve as a forum for dialogue on thematic issues on all human rights;

(*c*) Make recommendations to the General Assembly for the further development of international law in the field of human rights;

[133] This is correct if one considers the workload originating from the UPR and the annual number of regular sessions, "for no fewer than 10 weeks", in addition to possible special sessions to be promptly convened throughout the year.

(*d*) Promote the full implementation of human rights obligations undertaken by States and follow-up to the goals and commitments related to the promotion and protection of human rights emanating from United Nations conferences and summits [for the first time, it has been acknowledged the impact of relevant UN conferences and Summit on the relevant system];

(*e*) Undertake a universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States; the review shall be a cooperative mechanism, based on an interactive dialogue, with the full involvement of the country concerned and with consideration given to its capacity-building needs; such a mechanism shall complement and not duplicate the work of treaty bodies; the Council shall develop the modalities and necessary time allocation for the universal periodic review mechanism within one year after the holding of its first session;

(*f*) Contribute, through dialogue and cooperation, towards the prevention of human rights violations and respond promptly to human rights emergencies;

(*g*) Assume the role and responsibilities of the Commission on Human Rights relating to the work of the Office of the United Nations High Commissioner for Human Rights, as decided by the General Assembly in its Resolution 48/141 of 20 December 1993;

(*h*) Work in close cooperation in the field of human rights with Governments, regional organizations, national human rights institutions and civil society;

(*i*) Make recommendations with regard to the promotion and protection of human rights;

(*j*) Submit an annual report to the General Assembly".

Prima facie, it seems that this above long list reflects the past Commission. However s much of the *acquis* of the Commission, as set by past Resolutions of both the ECOSOC and the Commission itself, was not formally included in.

The General Assembly did not mention at all both ECOSOC Resolutions 1235 and 1530[134], while it accepted, under operative paragraph 11, the reference to the

[134] While Item 9 of the Agenda of the Commission was entitled: "Question of the violation of human rights and fundamental freedoms in any part of the world, including: (a) Question of human rights in Cyprus; (b) Procedure established in accordance with Economic and Social Council resolutions 1503 (XLVIII) and 2000/3."

ECOSOC Resolution 1996/31 defining the rules of procedure for the accreditation of NGOs in consultative status with ECOSOC[135].

The very novelty refers to the Universal Periodic Review mechanism, whereby the Council scrutinizes the fulfilment of human rights obligations and commitments by each UN Member State (operative paragraph, 5 lett.e). This was the only paragraph about which the General Assembly weighed and dictated each element[136], in order to ensure that States might strictly control the entire process without any effective interference by other stakeholders[137].

On a more specific note, by jointly reading the above operative paragraphs 3-5, it has been argued[138] that the Council continues to carry out promotion-related activities along the lines of the Commission's work whereas it might seem that the protection area has been broadened. Indeed operative paragraph 5 shows new elements, such as the UPR process, by which a protection task might be envisaged with regard to "the follow-up activities to the UPR". On the contrary, by a more disenchanted view, some scholars[139] argue that no new activity has been introduced apart from the peer review. Other scholars[140] argue that GA Resolution 60/251 barely includes generic references to the role and the work of the Commission, as inferred by preambular paragraph 8: "R*ecognizing* the work undertaken by the Commission on Human Rights and the need to preserve and build on its achievements and to redress its shortcomings". It seems that UN Member States have decided not to capitalize on the monitoring activity developed by the Commission, since Op.3 does not mention any discussion, study or public examination but "address human rights violations." The above provisions indicate that UN Member States intend to preserve a leading role, without adequately considering either the mainstreaming role of the High Commissioner for Human Rights (See GA Resolution 48/141 of December 1993) or the expertise provided by Treaty-monitoring Bodies, the system of Special Procedures and the Sub-Commission for the promotion and protection of human rights. It has been argued that these provisions indicate a lack of engagement vis-à-vis the other components of the UN HR machinery[141].

[135] See Upton H. The HR Council: First Impressions and Future Challenges, in HR Law Review, 2007, p.35.

[136] Op. cit supra in note 109 (Scannella)

[137] Considering the methods of interpretation of criminal law's sources, it is taught that (See Manuale di Diritto Penale, Antolisei, Napoli, 1996) the more one specifies the elements of a crime, the more it will be difficult that the concrete case can fall within that specific conduct. Mutatis mutandis, the more one defines the basic elements of the Council's mandate, the more one reduces the marge of manoeuvres of the Council in extending the range and scope of its activities.

[138] Op. cit, in supra note 37 (Boyle).

[139] Op.cit.supra in note 99 (Burci).

[140] Papisca, A., Quod barbari non fecerunt, fecerunt Barberini. L'assalto all'edificio dei diritti umani, Archivio Pace e Diritti Umani, 2/2006, p.10 et ff.

[141] See Tardu, M., Le nouveau Conseil des Droits de l'Homme aux Nations Unies: decadence ou resurrection?, Revue Trimestrielle des Droits de l'Homme, No.72, 2007, p. 982.

On a more general note, when negotiating draft resolutions, any draft resolution, one of the basic rules refers to the need to trace the legal basis, by "recalling" or "reaffirming", at least, those rules previously codified. As for GA Resolution 60/251, aside the initial preambular paras., UN Member States decided not to mention the most important ECOSOC and Commission Resolutions, such as those referring to the public scrutiny of relevant geographic situations, the confidential procedure or the ad hoc provisions adopted in 2005 by the Commission referring to the NHRIs' participation[142]. In this regard it has been argued[143] that the "lack of even theoretical reference to the Economic and Social Council" indicates a dangerous will of denying the results achieved so far. Alternatively it might indicate the lack of political will for the search of a better definition of the Machinery, being capable of closing the knowledge, capacity and protection gaps existing in the field of human rights[144] and specifically for a Council being able to protect human rights, though on a subsidiary basis.

As discussed, there is a strong connection between the membership of whatsoever body, including the Council, and the outcome of its work.

On March 15, 2006, many delegations put much emphasis on the admission criteria[145]. The US delegation emphasized the need to ensure that States under Security Council sanctions or with very poor records in the field of human rights shall not be admitted[146]. On the contrary, Pakistan[147] expressed its disappointment that States should be ineligible for membership on the Council in the event of human rights abuses: "The presumption that a country is a violator of human rights is very subjective. If you want to create criteria [..] that exclude certain countries, why not those who do not support trade liberalization or those who do not implement foreign aid targets? The knife cuts both ways[148]".

GA Resolution 60/251 stipulates that membership is open to all Member States (See Operative paragraph 8) and that seats should be covered by those States "upholding the highest human rights standards (See operative paragraph 9)". The joint reading of these paragraphs warrants a specific clarification on the meaning of the contribution of candidates - seeking for election - to the promotion and protection of human rights. It is not yet clear the meaning of "the highest human rights standards

[142] See Chapter V.
[143] Op. cit. supra in note 140 (Papisca, p.16).
[144] In this regard, see the OHCHR Plan of Action 2005 (UN Doc. A/59/2005/Add.2).
[145] The EU (See UN Press Release GA/10449).
[146] The US assured Mr. Eliasson that that country would work with the Council and seek to support and strengthen it (See UN press conference of 15 March 2006 by General Assembly President, available at: www.un.org, at the media centre link).
[147] The US and Pakistan (See UN Press Release - GA/10449).
[148] The idea that countries under Security Council sanction should be barred from membership was rejected (Besides, it would have affected only seven out of 192 U.N. Member States).

(Op.9)". To this end in an attempt to raise the threshold for the admission to the Council, the GA vaguely mentions a sort of supervision of the candidates seeking for election: "Member States shall take into account the contribution of candidates to the promotion and protection of human rights and their voluntary pledges and commitments made thereto (Op.8)". The General Assembly also decides that "by a two-thirds majority of the members, present and voting, it may suspend the rights of membership in the Council of a member of the Council that commits gross and systematic violations of human rights". The above wording has not prevented countries, such as Cuba and China[149] from being elected. The Council does not result in an exception to the rule of "Group alliances[150]".

At the operational level, the UN General Assembly called for the first election of Council Members, "on May 9th, 2006 (Op.15)". The Bush Administration decided not to run while all the other permanent Members did. China and the Russian Federation were admitted in 2009[151]. As discussed, serious human rights violators, such as Saudi Arabia, were elected in 2006. If one considers the following election rounds, it is evident that there has been no serious change in the attitude. In 2007, General Assembly elected Tunisia. Sri Lanka was elected in 2008 and afterwards was the subject of the 11th special session (May 2009).

GA Resolution 60/251 also envisages that "members will serve for a period of three years and will not be eligible for immediate re-election after two consecutive terms (Operative Para.7)". *Prima facie*, it might be argued that this adjustment will prevent *de-facto* permanent membership. However some scholars[152] already note that the above wording does not avoid the blocs' policy. Even those States that are not members of the Council can affect the decision of the Council Members. In this regard, it is sufficient to recall the negotiations practice within the EU. Those EU States that are also Members of the Council are free to vote as they deem appropriate. However their decisions are usually the result of - or at least affected by – long complex EU internal negotiation with the entire EU membership.

[149] For a comparison on human rights records, see the 2010 Freedom House Survey.
[150] See Abebe, M. A., "Of shaming and bargaining African States and the Universal Periodic Review of the United Nations Human Rights Council, in Human Rights Law Review, 2009, Nottingham University, Oxford University Press, p.2.
[151] On a positive note, it has been argued that for the first time, within the UN system, the admission criteria have been put under magnifying lens. By recalling the wish of the US President, Wilson, who argued that only nations committed to democracy should be members of the League of Nations, it has been decided that only those States with adequate human rights records can be eligible to the Council (As previously recalled, membership in the Commission was restricted to Governments. The history of the Commission shows that what was perceived, as its main feature, the governmental nature does not reflect the expectations of the founding members of the 1946 Commission chaired by E. Roosevelt. It might be useful to recall that the Nuclear Commission on Human Rights of 1947 consisted of eighteen members, participating in their personal capacity) See Humphrey, J.P., Human rights and the United Nations: A great adventure, Dobbs Ferry, NY, Transnational Publishers, 1984, p. 170-174; See also Kennedy, P., The Parliament of Men, The Past, Present and Future of the UN, Random House, NY, 2006, p. 13; see further op. cit. in supra note 13 (Oberleitner p.44).
[152] Op. cit. supra in note 92 (Hampson).

With specific regard to all the other relevant stakeholders (Operative Paras.7-8-9, 11,14-15), the Council shall: "Work in close cooperation in the field of human rights with Governments, regional organizations, national human rights institutions and civil society"; "the participation of and consultation with observers, including States that are not members of the Council, the specialized agencies, other intergovernmental organizations and national human rights institutions, as well as non-governmental organizations, shall be based on arrangements, including Economic and Social Council Resolution 1996/31 of 25 July 1996 and practices observed by the Commission on Human Rights, while ensuring the most effective contribution of these entities".

Within the Commission on Human Rights, NGOs' participation was governed by ECOSOC rules, as outlined in ECOSOC Resolution 1996/31. NGOs with consultative status were allowed to "participate (See Chapter V).[153]"In particular they gained a prominent role within the framework of the Sub-Commission for the Promotion and Protection of Human Rights[154].

While maintaining NGO participation according to the above Resolution, the Council requires that "the most effective contribution" be ensured (Operative Para.11). The practical definition of their role is still ongoing[155]. A concrete example is provided by the evolving modalities of the Interactive Dialogue with country rapporteurs, as long as during the regular sessions of the Council, time-consuming activities move relevant Dialogues from a meeting to another, making it impossible for NGOs, in particular small NGOs to participate in. This procedural (and also substantial) issue emerged, when Cuba, supported by Egypt on behalf of the African Group, and Pakistan, on behalf of the OIC, raised "a cascade of points of order in relation to the participation of NGOs in the discussion on geographic situations (March -June 2008)". On this issue the Council decided that NGOs can intervene in the General Debate after the Interactive Dialogue between the country Special Rapporteur and UN Member States.

Similarly, there is no Agenda's Item devoted to National Human Rights Institutions (acronym, NHRIs), particularly those with A status[156], despite their

[153] It is noteworthy that in this regard, on March 15, 2006, many delegations put much emphasis on the admission criteria. The US delegation emphasized the need to ensure that States under Security Council sanctions or with very poor records in the field of human rights shall not be admitted. On the contrary, Pakistan expressed its disappointment that States should be ineligible for membership on the Council in the event of human rights abuses: "The presumption that a country is a violator of human rights is very subjective. If you want to create criteria[..]that exclude certain countries, why not those who do not support trade liberalization or those who do not implement foreign aid targets? The knife cuts both ways."

[154] It might be recalled the contribution of indigenous populations representatives to the Stevenhangen's studies, from which the International Declaration on Indigenous Peoples originates; It might be also recalled the contribution of trade unions and labour-related associations to Weissbrodt's study on TNCs.

[155] Op.cit supra in note 109 (Scannella, p.60).

[156] See Chapter V.

incremental participation in the work of the Council[157]. GA Resolution 60/251 does not recall Commission's Resolution 2005/74, by which the Commission formally envisaged that NHRIs with A status could address and intervene under any Agenda's Item.

On a positive note, no new formal stricter rule has been introduced for the above two stakeholders.

The Institution-Building Package (acronym, IB), adopted on June 18, 2007, mentions the above Commission's Resolution and repeats the guidelines, already set out by GA Resolution 60/251. The result is that the rules and practices of the then Commission remain in place, though time-constraints and points of order have significantly reduced the ability, especially of NGOs, to take the floor before the Plenary of the Council.

4.2. General Assembly Resolution 60/251 (UN Doc. A/RES/60/251): specific issues

The UN membership opted for a smaller Council, consisting of forty-seven Member States (while the past Commission counted 53 members), to be elected directly and individually by secret ballot by the majority of the members of the General Assembly.

As above noted, the choice to reduce the size of the Council's membership has not resolved any of the problems relating to impartial voting and manipulations of resolutions, particularly of country resolutions[158]. The reduced number of Members and the proportionate repartition of seats according to the principle of equitable geographic distribution do not ensure a comprehensive and impartial representation of all the views of the UN membership. By invoking the legitimate principle of equitable geographic distribution, the General Assembly has altered the possibility to reflect within the Council's work the thinking of the universal membership of the UN.

While formally responding to a mathematic rule, this new seats framework does not reflect the complex material geometry of the universal membership of the UN and overall does not allow a fair decision-making process. Operative paragraph 7 of GA Resolution 60/251 provides for the following regional distribution:

[157] While the past Commission dedicated an entire sub-item to NHRIs (See Item 18 of the Commission's Agenda).
[158] See Chapter II.

i. Thirteen seats to the African Group, corresponding to 28% of the seats (fifteen, under the Commission, corresponding to 28% of the seats);
ii. Thirteen seats to the Asian Group, corresponding to 28% of the seats (twelve, under the Commission, corresponding to 23%);
iii. Six seats to the Eastern Europe Group, corresponding to 13% of the seats (five, under the Commission, corresponding to 9% of the seats);
iv. Eight seats to the Latin America and Caribbean Group, corresponding to 17% of the seats (eleven, under the Commission, corresponding to 21% of the seats);
v. Seven seats to the Western Europe and Others, corresponding to 15% of the seats (ten, under the Commission, corresponding to 19% of the seats);
vi. Membership temporal limits of no more that two consecutive terms; Human rights pledges to be upheld;
vii. Suspension from the Council by a two-thirds majority of votes by GA Member States if Members of the Council commit gross violations of human rights.

If one compares the new distribution of seats with the past, *prima facie* it might result in a slight change as determined by the new reduced size of the Council: 47 members (while the Commission was made of 53 States). In this regard some scholars[159]argue that the above decision has created "a regional breakdown" in the Council.

Some scholars[160] argue that by the above provision it has been ensured "an automatic majority" for the African and Asian Groups that can reach the absolute majority within the Council.

The new repartition of seats has had an enormous impact on the Council's work. The seats gained by the Asian and Eastern Groups at the expense, in particular, of the GRULAC and the WEOG *de facto* prevent the latter from proposing resolutions on contentious issues. The Western Group is able to table and pass measures only with the support by other Groups[161].

[159] Op.cit. supra in note 99 (Burci p.32); see also Stewart, Ngozi, F., The International Protection of Human Rights, The United Nations System, in International Journal of Human Rights, Vol. 12, No.1, 2008, p. 89 et sequitur.

[160] See Bahrer, P.R., Non-Governmental Human Rights Organizations in International Relations, Palgrave, 2009, p. 24; See also Terlingen, Y., The HRC: a new era in UN HR work 2007, 21, Ethics and International Affairs,.p.161 et sequitur, as quoted in Abraham, M., Building the New HRC Outcome and analysis of the institution-building year, occasional Paper 31, the Geneva Office, Ed. F. E. Stiftung , 2007, p. 12; see also Smith, K.M., R., Smith, K.M., R., The United Nations Human Rights system, in International Human Rights Law: Sixty years after the UDHR and beyond, edited by Mashood Baderin and Manisuli Ssenyonjo, 2010, p.215-235.

[161] Since the Western Group has decreased its seats from ten to seven. Op. cit in supra note 125 (Forsythe).

The new size of the Council has *de facto* led to "a substantial influence by developing countries on the work of the Council", so that the Council currently focuses on racism, economic, social and cultural rights and the right to development (mainly second and third generation's rights) to the detriment of violations relating to civil and political rights. In this regard it might be recalled that, under the Portuguese Presidency of the EU (2007), the traditional EU Resolution on freedom of religion was postponed twice as long as G-77 members were contrary to the renewal of the mandate of the relating Special Rapporteur (See Chapter II). The same evaluation applies to geographic resolutions. Apart from the joint EU/Japanese initiative on the situation of human rights in Myanmar and the EU initiative on DPRK, all the other geographic Resolutions under Item 4 of the Council's Agenda have to be tabled with the initial support by other Groups[162].

As noted by the Council of the EU and the European Commission, the reduced representation of the EU results in a serious challenge to "the integration of the EU position in the work of the HRC". In the past Commission's framework, the EU was used to table several initiatives, both thematically and geographically. As a way of example it might be worthy of mention that half of the Resolutions under the Commission's framework were facilitated by the EU members, while, at the fourteen session of the Council (June 2010), the EU facilitated only four out of twenty-two Council's resolutions.

More generally, the current work of the Council is conditioned[163] by the divide between the West (WEOG) and the rest of the world.

Throughout the institution-building process (2006-2007), there was a divisive atmosphere reminding the North-South divide[164]. Former colonies and/or authoritarian governments of the South, mainly members of the African Group, firmly rejected any effective supervision by the Western Group, by claiming the ownership of geographic resolutions dealing with country situations falling within their domain/regional group.

The choice of reducing the size of the Council has profoundly affected the current management and development of the Council's work, as inferred, inter alia, by the use of the "special sessions" tool.

In operative paragraph 10, the UN General Assembly has decided "that the Council [..] shall be able to hold special sessions, when needed, at the request of a

[162] See Chapter II.
[163] See Gutter, J., Special Procedures and the Human Rights Council: Achievements and Challenges ahead, in Human Rights law review, 2007, p.104.
[164] Op. cit. supra in note 42.

member of the Council with the support of one third of the membership of the Council". It might be sufficient to recall that seven special sessions out of 15 (including the special sitting of June 2010, held in the course of the 14th regular session of the Council, in June 2010) referred to Israel's conduct (See paragraph 6.4. below).

The General Assembly has also decided that the work of the Council shall be (Operative paragraph 4) guided by "the principles of universality, impartiality, objectivity, and non–selectivity, [again] constructive international dialogue and cooperation with a view to enhancing promotion and protection of all human rights".

By jointly reading PP4 and OP4, the General Assembly affirms the need for "all States" to continue international efforts to enhance "dialogue and cooperation", with the aim of strengthening the capacity of Member States to comply with human rights obligations. It also reaffirms that all States, regardless of their political, economic and social situation, have a duty to promote and protect all human rights, save "the national and regional particularities (Preambular paragraph 4)". The reference to "national and regional particularities" may embody the attempt of most countries, such as Iran and the Russian Federation (that usually submit Resolution on this issue to the GA), to preserve their domestic interest and attenuate the application of relevant principles such as the universality of human rights. Some scholars[165] argue that by recalling both "the principle of dialogue and cooperation" and "national and regional particularities", States have stressed the primary role of the principle of State sovereignty. Indeed there is this strong component, in addition to the reference to human rights obligations to be fulfilled by Member States.

GA Resolution stipulates that the Council should eliminate double standards and politicization (Preambular paragraph 9). By jointly reading Op.5 lett. (e) and Op.9, it may be argued that UN Member States have considered the Universal Periodic Review as an effective solution to overcome the politicization of the Commission and the criticism moved against Special Procedures. In this regard it has been recently re-proposed to abolish the Special Procedures since UPR can ensure universal coverage[166].

By operative paragraph 6, the General Assembly resumed the old considerations contained in the Selebi Report (1999) and stressed the need to launch the review, rationalisation and improvement process (acronym, RRI) of the Commission's relating mechanisms, namely the Special Procedures, the Sub-Commission for the

[165] Op. cit. supra in note 135 (Upton, p.34).
[166] See the position of Bangladesh, among others, at HRC 13 session of March 2010 that argued about the replacement of the special procedures with the UPR

promotion and protection of human rights[167] and the confidential procedure (namely the so-called "1503" procedure).

By Op.6, the General Assembly decided that "The Council shall assume, review and, where necessary, improve and rationalize all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights in order to maintain a system of special procedures, expert advice and a complaint procedure; the Council shall complete this review within one year after the holding of its first session". This wording indicates a certain distance from the acknowledgement of the need to strengthen "the system of Special Procedures", as contained in the Vienna Declaration and Programme of Action (UN Doc. A/CONF.157/23, para.95). Similarly there is a generic reference to "a complaint procedure." It has not been maintained the reference to the 1503 confidential procedure (whose title was even confirmed in 2000, despite the substantial change in the proceeding, by ECOSOC Resolution 2000/3). Regrettably, the "expert advice" has been meant to replace the Sub-Commission that, for nearly 60 years, contributed to advance the work of the Commission.[168]

From the above, the very contentious issue refers to "the address of human rights violations", which fuelled much critic on the Commission. In this regard, any consideration of the geographic situations, under both regular and special sessions, will always face the limits determined by the size and the composition of the Council.

Some scholars argue that despite some new elements, it has been set up a body being not so different from its predecessor[169], while others[170], being even more sceptical, stress its shortcomings.

5.1. Towards the definition of the Council's architecture

As scheduled by GA Resolution 60/251 (Op.10), after three rounds of secret voting, the General Assembly elected to the Council, on May 9, 2006, the following countries: *Algeria, Argentina, Azerbaijan, Bahrain, Bangladesh, Brazil, Cameroon, Canada,* China, *Cuba, Czech Republic, Djibouti, Ecuador, Finland, France, Gabon, Germany, Ghana, Guatemala, India, Indonesia, Japan, Jordan, Malaysia, Mali, Mauritius, Mexico, Morocco, Netherlands, Nigeria, Pakistan, Peru, Philippines,*

[167] GA Members decided not to even mention the Sub-Commission and just opted for an immediate reference to a new"expert advice".
[168] See Chapter IV.
[169] Op. cit. in supra note 13 (Oberleitner, p.44); See also Chetail, V. Conseil des Droits de l'Homme des Nations Unies: l'an premier de la reforme, Refugee Survey Quarterly, Vol.26, Issue 4, 2007, p.105.
[170] Op. cit in supra note 140.

Poland, Republic of Korea, Romania, the Russian Federation, Saudi Arabia, Senegal, South Africa, Sri Lanka, *Switzerland, Tunisia, Ukraine, United Kingdom, Uruguay and Zambia*.

After completing the first election round, the UN General Assembly decided, in accordance with Op.14 of GA Res.60/251 that the terms of the membership shall be staggered between a one-year term, a two-year term and a three-year term, and that such decision shall be taken by the drawing of lots, taking into consideration equitable geographical distribution.

In early June 2006, before the first session of the Council, there was a general fear that protection gaps might emerge. There was a general opinion that it would materialize as a standstill in terms of substantive work, a significant regression in the level of participation of non-State participants, and a general mistrust in terms of the ability of the Council to deal with country-situations.

The inaugural meeting of the new body took place in Geneva on June 19, 2006. Soon negotiations started to decide the modalities and the issues to be dealt with during the institution-building process.

To avoid any protection gap during the transitional period, the Council adopted Decision 1/102 of June 30, 2006 and Decision 2/102 of October 6, 2006, by which it envisaged the extension of all relevant mandates for one year and requested the Secretary-General and the High Commissioner for Human Rights, to continue with the fulfilment of their activities, in accordance with all previous decisions adopted by the past Commission and to update the relevant reports and studies, respectively.

At the first session of the Council (June 2006), Amb. de Alba (Mexico) was selected as the first President of the Human Rights Council. The Council also agreed that the Bureau of the Council would include four vice-presidents, of whom one would serve as rapporteur.

During the first year (2006-2007), the Council managed to lay its foundations. The institution-building process was carried out through three Working Groups. The results of such process is contained in the so-called de Alba Package, alternatively called "the IB Package", which includes Council's Resolutions 5/1 and 5/2 of June 18, 2007[171].

[171] See op.cit. in supra note 37 (p.41); See also Suisse, Permanent Mission, Summary Report on "The open-ended seminar on the review of the Human Rights Council", Montreux, April 20, 2010, p.3. It has been recently acknowledged that throughout the one-year long process of institutions-building, the following positive results emerged: An atmosphere of mutual respect and cooperation; willingness to compromise and to work towards consensus; effective division of labour between the work of the facilitators and the fine-tuning by the President of the Human Rights Council; negotiations in cross-regional settings. Among the less positive elements, that process missed a major involvement of both NHRIs and Special Procedures, and did not provide any indications on the relationship between the Human Rights Council and the General Assembly).

5.2. The procedural development of the institution-building process: The institution-building Working Groups and the de Alba Package

i. The institution-building Working Groups on RRI (standing for Review, Rationalisation and Improvement)

By Resolution 60/251, the General Assembly decided that "the Council shall assume, review and, where necessary, improve and rationalize all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights in order to maintain a system of special procedures, expert advice and a complaint procedure". The Council shall complete this review within one year after the holding of its first session (Operative para.6).

By Decision 1/104 (of June 2006), the Council decided to establish inter-governmental Working Groups "to formulate concrete recommendations on the issue of reviewing and, where necessary, improving and rationalizing all mandates, mechanisms, functions and responsibilities in order to maintain a system of special procedures [..] in conformity with General Assembly Resolution 60/251, through open-ended, intersessional, transparent, well-scheduled and inclusive consultations", with the participation of all stakeholders, including Non-State actors.

By the same decision, the Council also indicated that "the Working Group shall have at its disposal 20 days (or 40 three-hour meetings) of fully serviced meetings and that it shall allow sufficient time and flexibility for the fulfilment of its mandate".

The relevant Working Group held three sessions in the period 13 to 24 November 2006; 5 to 16 February 2007; and 10 to 26 April 2007 on the review of mandates, expert advice, and a complaint procedure, respectively.

The Council requested the Working Group to report to it regularly on progress made "to allow for the completion of the review, as requested in paragraph 6 of General Assembly Resolution 60/251".

At the first meeting[172], the RRI Working Group promptly focused on the Special Procedures System, by envisaging the review of 44 Commission's mechanisms and of twelve mechanisms created by the Sub-Commission on the promotion and protection of human rights.[173]

[172] See Annex to Council Decision 1/102 of June 30, 2006.

[173] See Hannum H., Reforming the Special Procedures and Mechanisms of the Commission on Human Rights, in Human Rights Law Review, 2007, p.74.; see also Müller, L. (ed.), The First 365 days of the United Nations Human Rights Council, United Nations, Publ., 2007, p. 30 et ff.

In September 2006, by Resolution 2/1, the Council requested the Working Group "to draft a Code of Conduct regulating the work of the Special Procedures, taking into account, inter alia, the suggestions made by the members of the Council during the discussions at the second session (September-October 2006) on the reports of the SPMHs", as well as at the previous formal and informal sessions of the RRI Working Group.

By Resolution 4/3 (March 2007), the Council requested the Working Group to present, at the fifth session of the Council (June 2007), the outcome of the Group's deliberations on the draft Code (See Chapter II)

On April 20, 2007, the Algerian Ambassador, on behalf of the African Group, backed by Cuba, China, Pakistan, on behalf of the OIC, Venezuela and Sri Lanka, submitted to the relevant Working Group a draft Code of Conduct for Special Procedures Mandate-Holders, indicating that the WG would submit it at the fifth session of the Council (June 2007). To better understand the rationale, the cosponsors of the relevant draft Resolution (Council's Resolution 5/2) stressed the necessity to end "the morally unacceptable conduct by many Special Procedures".

The EU, New Zealand, Switzerland and Australia declared, by a cooperative approach, their openness provided that the draft Code indicates the obligation of cooperation with the Special Procedures[174]. Under operative paragraph 1 of HRC resolution 5/2, the obligation was reduced to a mere exhortation: "Urges all State to cooperate with [..]".

ii. The institutional-building Working Group on the Universal Periodic Review

By Resolution 60/251, the UN General Assembly decided (operative paragraph 5, lett. e), that the Council shall, inter alia, undertake a Universal Periodic Review, based "on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States".

It was envisaged that the review "shall be a cooperative mechanism, based on an interactive dialogue, with the full involvement of the country concerned and with consideration given to its capacity-building needs; such a mechanism shall complement

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[174] International Service for Human Rights, The Council Institution-building work, the end of a long process, N.. 65, Human Rights Monitor, 2007, available at www.ishr.ch .

and not duplicate the work of treaty bodies". "The Council shall develop the modalities and necessary "time allocation for the universal periodic review mechanism within one year after the holding of its first session".

Accordingly, at the Council's first session, by Decision 1/103, the Council established an inter-sessional inter-governmental Working Group to develop the modalities of the Universal Periodic Review mechanism. The Council also requested it to regularly report, starting in September 2006, on progress made in the development of modalities and the necessary time allocation for the universal periodic review. The Council also decided that the Working Group shall have at its disposal 10 days (or 20 three-hour meetings) of fully serviced meetings and that it shall allow sufficient time and flexibility for the development of the universal periodic review mechanism.

The Working Group on the Universal Periodic Review, under the chairmanship of the Ambassador of Morocco, Mr. Loulichki, held three sessions, from 13 to 24 November 2006, from 12 to 15 February 2007, and from 10 to 26 April 2007, respectively.

iii. The institution-building Working Group on the Agenda, Annual Programme of Work, Methods of Work and Rules of Procedures

By Resolution 60/251, the UN General Assembly decided that "the methods of work of the Human Rights Council shall be transparent, fair and impartial and shall enable genuine dialogue, be result-oriented, allow for subsequent follow-up discussions to recommendations and their implementation and also allow for substantive interaction with special procedures and mechanisms". By Council's Resolution 3/4, the Council decided to establish an open-ended inter-governmental inter-sessional Working Group to formulate concrete recommendations on the Agenda, the annual Programme of Work, methods of work, as well as the Rules of Procedure, in accordance with General Assembly Resolution 60/251, and to undertake transparent, well-scheduled and inclusive consultations, with the participation "of all stakeholders".

The Council also decided that the Working Group shall have at its disposal 10 days of fully serviced meetings, half of them to be scheduled before the fourth session of the Council and half of them before its fifth session. The Council requested the Working Group, to report to the Council at its fourth session (March 2007) on progress made thereon. The Working Group held two sessions, (15 to 19 January 2007, and 10 to 26

April 2007) on the agenda and annual programme of work and on the methods of work and rules of procedure, respectively.

By Decision 4/101 of March 2007, the Council decided to convene its fifth session from 11 to 18 June 2007, in order to consider and assess the institution-building process.

Following the final session of all the Working Groups, held in the period from 10 to 26 April 2007, the President of the Council (Ambassador de Alba) took over the institution-building process from the facilitators, to finalise the draft IB Package.

In accordance with the provisions of General Assembly Resolution 60/251 relating to institution-building, the Council completed this process at its fifth session by adopting, on June 18, 2007, the so-called de Alba Package, namely Council's Resolution 5/1 and Council's Resolution 5/2, respectively.

The former deals with the following issues: the Universal Periodic Review Mechanism; the Special Procedures; the complaint procedure; the Agenda of the Council, Methods of Work, and Rules of Procedure; the latter contains references to: purpose and status of the Code of Conduct; status of the mandate-holders; prerogatives and observance of the code of conduct; source of information; letters of allegations; urgent appeals; field visits; public nature of the mandate; recommendations and conclusions; communications with Governments; and accountability to the Council.

iv. The adoption of the de Alba Package

In June 2007, it was agreed upon a package of measures, the so-called de Alba Package (See Council's Resolution A/HRC/5/1), underlying the foundations of the Council's future work, with emphasis on the role and activities of the Special Procedures (See Council's resolution A/HRC/RES/5/2), as well as on the country resolutions ("address of country situations").

On June 18, 2007, after a full year of institution-building exercise, despite some setbacks, the Council reached an agreement on its architecture.

The process leading to the adoption of the IB Package, on June 18, 2007, showed the general approach towards the Council. China introduced, from the floor, few hours before the deadline for the adoption of the Package, the proposal to envisage a two-thirds majority of votes to take action on specific country-situations. President de

Alba adjourned the meeting for relevant negotiations and resumed it just minutes before the midnight deadline, so as to ensure the adoption of his compromise Package[175].

To accommodate the Chinese's request, it was agreed to include a new non-binding language, under the section, "Working culture", urging States that propose country-resolutions, to "secure the broadest possible support (preferably 15 members) for their initiatives".

Despite the complaint by Canada on the modalities to adopt this Package, Resolutions 5/1 and Resolution 5/2 passed, without a vote, at midnight, on June 18, 2007.[176]

6.1. The outcome of the institution-building work: The implementation of operative paragraph 6 of General Assembly Resolution 60/251 and "the improvement" of mandates

As discussed, the past Commission adopted in 2000, the Report of the Inter-sessional Open-Ended Working Group (OEWG) on "enhancing the effectiveness of the mechanisms of the Commission", the so-called Selebi Report (See E/CN.4/2000/112), which has been used as a basis for the Council's RRI (standing for "Review, Rationalisation and Improvement") process.

Since the early 1960s, to respond to the increasing request of newly admitted UN Member States, special mechanisms or tools have been created by the United Nations to monitor and examine specific country situations or human rights issues (See for instance the 1963 October UN fact-finding mission in Southern Vietnam, headed by the then UN Human Rights Director, J. Humphrey, following the persecution of the Buddhist minority).

The then Commission created, in 1967, the first country procedure, the Ad Hoc Working Group of Experts on Southern Africa, to report on the situation of human rights in South Africa under the Apartheid regime (as later endorsed by the ECOSOC).

[175] At some point, during the negotiations, it was raised the issue of the deadline to complete the work of institution/building in accordance with GA Resolution 60/251. Thus, one of the problems was whether the 'year' was from the beginning of the Council's first session until 365 days later (i.e. 19 June 2006 to 18 June 2007) or whether the 'year' ran until the end of June or until 31 December. The UN Legal Counsel ruled that 18 June was the deadline. This led South Africa to propose a future 'alignment' of the Council's year with the calendar year. The President requested the UN Office of Legal Affairs to prepare a study on this issue.

[176] On June 19, 2007, Canada challenged how the de Alba Text had been adopted. The new President (Ambassador Doru Romulus Costea of Romania) ruled that the Council had voted it. Afterwards Canada challenged his ruling by putting it to vote: his ruling was endorsed by 46 of the 47 Council members, with no abstentions and only Canada against. It is thus likely that this issue will be raised again at the General Assembly level. However, it has to be recalled that Canada wished to call for a vote on the whole Package because of the Council's Agenda which includes a separate item on "Human Rights situation in Palestine and other occupied Arab territories", while all other human rights situations will be covered by generic Agenda's items. "It was deemed unrealistic to expect otherwise (See Brett, R., "Neither Mountain nor Molehill, by Rachel Brett at Quakers United Nations Office, available at http://www.quno.org/geneva/pdf/humanrights/NeitherMountainNorMolehill200707.pdf, 1-18, 2007)".

The Commission created the first thematic mechanism, the Working Group on Enforced or Involuntary Disappearances (acronym, WGED), in 1980. Some scholars[177] observe that it had the merit "to pioneer" the functions characterizing the following Special Procedures in their efforts to respond effectively to allegations of violations of human rights[178]. Over the years, the Commission mandated experts to examine specific human rights issues, geographically or thematically. In 1993, World leaders gathered in Vienna, on the occasion of the World Conference on Human Rights, acknowledged the role of the United Nations System of Special Procedures.

Special Procedures mandate-holders, despite their different titles, fall within the category "experts on mission", in accordance with the 1946 UN Convention on Privileges and Immunities, defining their status within the UN.

The Special Procedures, in particular the Special Rapporteurs have proved to be an outstanding protection tool of the UN HR machinery.[179]

Within the framework of the Council's establishment, the General Assembly decided that the Council "shall assume, review and, where necessary, improve and rationalise all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights, in order to maintain a system of special procedures, expert advice and a complaint procedure;[180] the Council shall complete this review within one year after the holding of its first session (Operative para. 6 of GA Resolution 60/251)".

In the course of the Council's negotiations, four separate issues emerged:

i. The selection of mandate-holders;
ii. The review, rationalisation and improvement of thematic mandates;
iii. The review, retention or abolition of country-mandates;
iv. The drafting of a Code of Conduct for Mandate-Holders.

The RRI exercise was formally launched with the aim of improving and strengthening the System of the Special Procedures[181]. By Decision 1/102 of 30 June 2006, the Council decided to extend exceptionally for one year the mandates and the mandate-holders of the Special Procedures of the Commission on Human Rights, of the

[177] Op. cit in supra note 130.
[178] See Chapter II.
[179] From the Annual Report of the UN Secretary-General on the work of the Organization (See UN Doc. A/58/1 of August 2003).
[180] "The World Conference on Human Rights underlines the importance of preserving and strengthening the system of special procedures (SP), rapporteurs, representatives, experts and working groups …in order to enable them to carry out their mandates in all countries throughout the world, providing them with the necessary human and financial resources…All states are asked to cooperate fully with these procedures and mechanisms". Vienna Declaration and Programme of Action, June 1993.
[181] See UN Doc. A/HRC/3/CRP.2.

Sub-Commission for the Promotion and Protection of Human Rights, as well as the procedure under ECOSOC Resolution 1503(XLVIII) of 27 May 1970.

As discussed, by Decision 1/104 of 30 June 2006, the Council established the Open-ended Inter-governmental Working Group tasked with formulating recommendations on the issue of the review, and possibly the enhancement and rationalisation of all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights, in order to maintain a system of Special Procedures, in accordance with operative paragraph 6 of the General Assembly Resolution 60/251" (Further, by Resolution 2/1 of 27 November 2006, the Council requested the RRI Working Group to "draft a code of conduct" regulating the work of Special Procedures (see below).

At an initial stage, the RRI Working Group managed to elaborate (as of November 2006) the principles of this process, as well as the objectives and structure, and to engage in a substantive and fruitful dialogue with States' delegations and Special Procedures Mandate-Holders. It was stressed the need to further strengthen and enhance the Special Procedures, in order to improve the human rights protection system within a coherent human rights machinery.

In the course of the negotiations, the first question referred to the modalities of designation of Special Procedures: whether to appoint or elect mandate-holders:

i. Some delegations expressed the view that the High Commissioner for Human Rights should appoint the mandate-holders, based on objective and reliable information criteria and suitability for the mandate in question, since direct elections of Special Procedures, by the Council would not be an effective way to ensure that the best possible candidate be appointed to a given mandate[182].

ii. Other delegations argued that the Council should directly elect mandate-holders in the manner that members of the Treaty Bodies are elected, as this was the responsibility of the Council (The Russian Federation, the Organisation of the Islamic Conference, Bangladesh, Mexico, Tunisia, Nigeria, Malaysia, Sri Lanka, and Iran[183]).

iv. Some others envisaged that to ensure the effectiveness of the mechanism, Special Procedures should be distanced as much as

[182] The EU statement of 5 December 2006, then Uruguay, Switzerland, and Canada (HR/HRC/06/81).
[183] Various NGOs (UN WATCH, HR WATCH, ISHR, AI) on December 5, 2006 underlined the importance not to resort to the election of SP, in order to minimise the risk of politicization.

possible from any type of external influence, in particular the political dynamics of the Council[184]. The Experts should be nominated by the President of the Council, from a candidates' roster, open to all stakeholders for recommendations, and with attention paid to equitable gender and geographical balance (The Republic of Korea, the Japan, and the US): "a hybrid model should prevail".

At the end, the Council has opted for a public list of eligible candidates in a standardized format to be maintained by the OHCHR, while nominations are to be submitted by relevant stakeholders, namely Governments, Regional Groups operating within the UN Human Rights system, International Organisations or their offices (e.g.: OHCHR), NGOs, and other Human Rights Bodies.

Procedurally, "at the beginning of the annual cycle of the Council, regional groups will be invited to appoint a member" of a new ad hoc *filtering* mechanism, the so-called Consultative Group, which is an inter-governmental mechanism. The Consultative Group "will consider either candidates included in the Public List, as well as additional nominations or those excluded by the Public List who will be brought to its attention[185]. With specific regard to the selection, the following pattern has been put in place:

i. Nominations by relevant stakeholders (not only by States);
ii. Inclusion in a Public List;
iii. Selection by the Consultative Group (only made by States);
iv. Identification of the appropriate candidate by the President of the Council;
v. Approval of the candidate by the Council.

As to the selection criteria, the Special Procedures should reflect "representation from all geographical regions, cultures, civilisations and legal systems, expertise, experience in the field of mandate, personal integrity, objectivity, independence, impartiality and gender balance (the technical and objective requirement for eligibility have been decided subsequently). Attention should be paid to the role of the Consultative Group,

[184] This rationale has been paraphrased and inserted in Art. 3, lett.A of Resolution, entitled "Code of Conduct for the Mandate Holders of the special procedures (SP) of the Human Rights Council": (A/HRC/5/L.3/Rev.1).
[185] Both the UPR and the selection procedure of the special procedures (SP) have a common denominator: the y are both UN Member States-driven mechanisms.

especially when considering "under exceptional circumstances and if a particular post justifies it", additional nominations "with equal or more suitable qualifications for the post[186]".

As for the "improvement" of the mandates, the System of Special Procedures has been developed, over the years, without a coherent institutional framework and, generally, according to the necessities[187]. This has shown some lack of coordination between mandate-holders[188], and more seriously has prompted States, through Regional Groups or cross-regional blocs, to attack Special Procedures, on the ground that some mandates overlapped or – worse - were unnecessary[189].

During the last years of the Commission, there was an increasing perception of an unnecessary proliferation of mandates[190]. In this light the relevant wording of GA Resolution 60/251 was welcomed. However, it has been argued that an indication of the current position of most States could be predicted, since Op.6 refers to "a system of Special Procedures". The Chinese proposal to raise the threshold for the establishment of country procedure, few hours before the adoption of the de Alba Package, also indicates the resistance of many UN Member States towards country Rapporteurs.

In the course of the RRI WG meetings, it was registered a general openness towards the Special Procedures, in particular towards independent experts and thematic Special Rapporteurs, as long as their mandates aim at ensuring cooperation, advisory services and studies on general thematic issues. On the contrary, much scepticism arose with regard to country Rapporteurs so that most Members expressed their preference for a Package focussing on thematic Rapporteurs.

On a more specific note, the RRI WG focussed on specific issues, mainly relating to incitement to racial and religious hatred and the promotion of tolerance, the right to development and the situation in Palestine and other Occupied Arab

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[186] See Chapter II.

[187] Sunga, L., What Effect If Any Will the UN Human Rights Council Have on Special Procedures, in International Human Rights Monitoring Mechanisms, essay in honor of J.T. Moller, second edition, R Wallenberg Institute, M. N. Publishers, 2009, p.179.

[188] At the outset the special procedures (SP) were never conceived as a "system". There are recurring difficulties associated with co-ordination, consistency and overlap, which were identified at the Vienna World Conference on Human Rights and have continued to resonate through subsequent resolutions adopted by the Commission.
In the last decade, three reviews have attempted to tackle some of these deficiencies. Both the Bureau and an intergovernmental working group of the Commission examined the Special procedures (SP) between 1998 and 2000. In 2002, the UN Secretary-General considered the special procedures (SP) in his report "Strengthening of the United Nations: an agenda for further change". Under Action 4 of that report, the Secretary-General highlighted two related sets of measures: improvement in the quality of reports of the special procedures (SP) and increased support for their functions. The special procedures (SP) themselves have also sought to improve their operation, notably through their annual meetings which are convened primarily for this purpose (AI Index: IOR 40/017/2005, entitled "United Nations Special procedures (SPs): Building on a cornerstone of human rights protection").

[189] For instance, over the last years of the Commission on Human Rights, a specific trend emerged. The tendency to appoint country mandate-holders coming from the region of the country concerned so as to avoid further accusations of partiality.

[190] Overlapping and duplication still represent matters of concern, to be clearly addressed[190] as long as the developing countries have the tendency to undermine the mandates cosponsored by the Western Group. Over these last years, the Council has mandated the Special Rapporteur on Racism to deal with the relationship between racism and freedom of religion as if no specific mandate for the latter is in force).

Territories[191]. The latter was one of the most controversial issues. Unlike other country Rapporteurs, the RRI WG decided that the duration of the mandate of this Rapporteur would be extended "until the end of the occupation in the Occupied Palestinian Territories (See Council's Resolution 5/1, Appendix I).[192]"

By recalling that the Council "should always strive for improvement" and that "Equal attention to all human rights should be given", at the very last minute of the June 18, 2007 negotiations, the reference to country mandate-holders was retained in the de Alba Package. More importantly, it also retained the indication that "areas which constitute thematic gaps will be identified and addressed, including by means other than the creation of Special Procedures, such as by expanding an existing mandate, bringing a cross-cutting issue to the attention of mandate-holders, or by requesting a joint action to the relevant mandate-holders (para.58, lett.d)". The de Alba Package thus envisages both the creation of new mandates and (/or) the review (not the improvement) of the existing ones (para.58, lett.f).

The different treatment between thematic and geographic mandates stems from the different duration of their respective mandates: "thematic mandates term will be of three years. Country mandates periods will be of one year (See para.60)" save the case of the Special Rapporteur on OPT. It was stated that this difference responds to a sincere preoccupation for the risk of politicization when dealing with country-mandates[193].

To reduce this risk, the African Group managed to introduce a paragraph concerning the possibility to create or transform individual mandates in new working groups, based upon the principle of the equitable geographic distribution (para.58, lett.f).

One of the most challenging issues referred to the accountability of Special Procedures, which has been later introduced in the African Group-backed Code of Conduct (See Council's Resolution 5/2), which is intended "as a reminder to current and future mandate-holders[194]" on the nature of their role within the UN framework**.**

As for the Code of Conduct, despite some ambiguity arising from the wording of the relevant Council's Resolution (A/HRC/RES/5/2, Annex)[195], the facilitator of the relevant Working Group emphasized that the Code is intended to expand upon the

[191] Op. cit. supra in note 42.
[192] Primarily the Special Envoy of the High Commissioner for Human Rights on Cuba and the Special Rapporteur on the situation of Human Rigths on Belarus, whose mandates were promptly discontinued in June 2007, upon request by Cuba and the Russian Federation themselves.
[193] As a way of example, it is worthy of mention the Group of Experts following-up on the situation of human rights in the Sudan between March and June 2007. While being endorsed by all Council's members, it is worrisome that the duration of these mechanisms, on an ad hoc basis, have very brief terms, three/six months-long. It risks to pave the way to an à la carte approach when establishing or reviewing existing mandates. Indeed it is in the hands of the Council to minimize the accusations of double-standards, selectivity and excessive politicization that over the years distorted the Commission's efforts.
[194] See Brett R., "Neither Mountain nor Molehill, UN Human Rights Council: One Year On", Quaker United Nations Office, 2007, p.5-10.
[195] "Considering further that one should distinguish between, on the one hand, the independence of mandate-holders, which is absolute in nature, and, on the other hand, their prerogatives, as circumscribed by their mandate, the mandate of the HRC, and the provisions of the UN Charter".

Regulations[196] so that it does contradict either Regulations or the Manual for the operation of the Special Procedures[197].

As for the scope of the newly adopted instrument, Article 1, entitled "Purpose of the Code of Conduct" lays down that **"**The purpose of this Code of Conduct is to – *simply* - define the standards of professional conduct and ethical behaviour that mandate-holders under the Special Procedures of the Council shall observe whilst discharging their mandates".

The IB Package applies whenever a mandate needs to be assessed. Due to the complexity of the RRI process, it is correct to argue that it was not concluded on June 2007[198] but continues to date.

6.2. The Universal Periodic Review (UPR)

In the course of the negotiations to define the modalities of the UPR, it was argued that, for the first time, the human rights performance of all States will be put under examination, on par. It was also argued that the Human Rights Council will systematically look at how to facilitate a better implementation of all human rights obligations and commitments[199] through a structured tool - embodying protection, promotion and prevention elements - which complements and does not duplicate the work of Treaty-monitoring Bodies or, to a lesser extent, the work of Special Procedures[200]. *Prima facie*, it was stressed, the Universal Periodic Review provides for a

[196] More importantly, he recalled how several mandate-holders stressed the importance of the Regulations (2002).
[197] Germany and the US requested the transmittal of the text to the Office of Legal Affairs of the UN for checking the consistency of the Code with the Regulations.
[198] See Chapter II.
[199] See the Suggested Elements for Voluntary Pledges and Commitments by Candidates for Election to the Human Rights Council prepared by the Office of the High Commissioner for Human Rights, available at: www.ohchr.org (1. **Commitment** to ensure an effective Human Rights Council, including by: ensuring effective and timely responses to human rights violations, including human rights crises, wherever they occur; supporting fully the system of independent expert special procedures (SP) of the Council; contributing substantively to making the Universal Periodic Review mechanism effective and transparent; supporting the widest possible opportunities for effective participation of non-governmental organizations in the Council. 2**. Commitmen**t to ensure effective promotion and protection of human rights at home and abroad, including by: cooperating fully with the special procedures (SP) of the Council, including by responding promptly and in full to their communications, implementing their recommendations, issuing a standing invitation and facilitating visits as requested; ratifying and implementing all human rights treaties and the Rome Statute of the International Criminal Court, removing any limiting reservations, and accepting individual communications, inquiry and inspection; committing to cooperate fully with the treaty monitoring bodies, including by submitting periodic reports on time and promptly implementing their concluding observations and recommendations).
[200] Resolution 60/251 stipulates that the UPR mechanism shall complement and not duplicate the work of human rights treaty bodies. The nature, scope and activity of the human rights treaty bodies are quite distinct from those envisaged for the UPR mechanism for the following reasons. First, the treaty body review is carried out between the state party and the treaty monitoring bodies which comprise independent members who have expertise in the area of the treaty concerned. Second, as many states have not yet ratified all seven principal human rights treaties, and therefore are not subject to periodic scrutiny by all the treaty bodies, treaty body review neither covers all countries nor all human rights.(12) Third, the periodicity of reviews of states parties' compliance with the legal obligations under the treaties is determined by the fixed reporting cycle of those treaties, and for the most part takes place every four or five years.(13) Fourth, the review of states parties' compliance with their treaty obligations is based on reports prepared by the states themselves and therefore tend to stress positive aspects rather than objectively identifying impediments. Lastly, in developing their concluding observations and recommendations following the consideration of states' compliance, the treaty bodies do not systematically look at capacity-building needs.

comprehensive and systematic coverage, by referring *inter alia* to the work of the Special Procedures[201]. Based on objective and reliable information[202], the Universal Periodic Review aims at scrutinizing the fulfilment by each State of both human rights obligations and commitments, in a manner which will ensure universality of coverage[203] and equal treatment, pursuant to operative paragraph 5 (e) of the General Assembly Resolution 60/251[204].

Prior to the relevant negotiations within the ad hoc institution-building Working Group, UN Member States tried to find a model to be considered for shaping the Council's UPR. There was not a specific model to be considered so that in the course of the initial exchange of views (June-November 2006) the most frequent question referred to the supervisory modalities by other international Organizations when overseeing the obligations of Member States flowing either from membership as such or from treaties codified under the auspices of said organization[205]

The institution-building WG on the UPR considered existing mechanisms for periodic review as established, among others, by the Council of Europe, UNESCO, African Union, the Organisation of American States, the International Atomic Energy Agency, and the Organization for Economic Cooperation and Development (OECD)[206]. From a comparative analysis, it emerged that none of the above models is totally driven by a political body without external expertise.

The system of special procedures (SP) is also distinct from what is envisaged for the UPR. (14) That system monitors and reports on the situation of human rights in a particular country or on a specific set of rights globally, as stipulated in the resolutions establishing the individual mandates. These activities are carried out by independent experts who focus on the rights or country covered by their particular mandates. The special procedures (SP) can raise human rights concerns directly with the government concerned, undertake country missions and make recommendations to the government regarding action to address violations of human rights, as well as conduct general studies aimed at highlighting human rights phenomena and furthering the development of international human rights law. The ability of the thematic procedures to systematically cover all countries is limited, as most states have yet to issue a standing invitation to the Special procedures (SP) to visit their country, (15) and many states fail to respond adequately to their communications, appeals, requests for a country visit, or recommendations (Article entitled "Complementarities of the Universal Periodic Review mechanism", available at Amnesty International website)

[201] As primary source of information, the special procedures (SP)' information must be processed so that it is both regularly and readily available to the Human Rights Council throughout the year.

[202] The term "objective and reliable information" was included in GA resolution 60/251 following complex negotiations during the drafting phase from which many interpretations arose. The ambiguity of the terms has opened the door to different interpretations, some particularly pessimistic with regard to the participation of civil society, particularly when collecting information: "no other source of information could be more reliable on country situations than the country itself", Bhutan, on August 2, 2006.

[203] **Universality:** The review must be designed to assess the promotion and protection of all human rights in all states. The preparatory process should consider the fulfilment of all human rights obligations and commitments in the state under review, but effectiveness requires that each review focus on particular issues in each state as the best way to improve the enjoyment of rights in the state under review" (AI Index: IOR40/031/2006, available at: www.amnesty.org).

[204] See Decision 2006/103, by which the Council established at its first session an inter-sessional open-ended WG to develop the modalities of the new UPR mechanism.

[205] By its Note Verbale dated 19 July 2006, the OHCHR invited the organizations listed in HRC Decision 1/103 (the Council of Europe, International Atomic Energy Agency, International Labour Organization, International Monetary Fund, New Partnership for Africa's Development, Organization of American States, Organization for Economic Cooperation and Development, and the World Trade Organization) to provide the Working Group with background information on existing mechanisms for periodic review.

[206] See Kalin W. C., Jimenez, C., Kunzli, J., Baldegger, M.,The Human Rights Council and Country Situations, Framework, Challenges and Models, Study on behalf of the Swiss Ministry of Foreign Affairs University of Bern, June 2006, p.22 ff.. None of the other organizations scrutinized (UNESCO, African Union [AU], Council of Europe [CoE], Organization of American States [OAS], Organization for Security and Co-operation in Europe [OSCE]) knows a periodic review system undertaken by a political body (i.e. a body not made up of independent experts but of States). The supervision of Member States' obligations is either accomplished periodically with respect to specific treaty obligations by expert bodies or in an ad hoc manner by political organs whenever they deem it necessary to examine the human rights situation of a specific country.

In this context, it was noted that the closest models have been established within the International Labour Organisation and the New Partnership for Africa's Development (acronym, NEPAD)[207].

In 2002, NEPAD created the so-called African Peer Review Mechanism (acronym, APRM), a unique self-assessment process, concerning the implementation of principles such as good governance and sustainable development[208]. It has been conceived as a collaboration exercise between 23 African States and the APRM itself. At the end of the process, it is envisaged a report by either the country concerned or the APRM Secretariat, in addition to country visits by an expert team and recommendations by both an expert body and a political organ.

Considering the time-consuming nature, the above comprehensive model was deemed not compatible with the Council's needs (It would overburden the Council and its Secretariat (i.e. OHCHR)). However, the following elements inspired the elaboration of the procedural details of the Council's UPR:

i. The cooperative nature of the APRM model, based upon interaction, on different stages;
ii. The way to consider the capacity-building needs of a State under Review (acronym, SuR), and the information provided by the State concerned and other organs;
iii. The preparation of the information gathered;
iv. The inclusion of non-State actors/civil society actors;
v. The linkage between expert examination and recommendations by the political body;
vi. The follow-up procedure (Certain components of the APRM mechanism, such as country visits or the elaboration of Programmes of Action, were set aside since they would have gone beyond what is necessary in the context of the

[207] In particular, the latter results in a strategic framework, based on a mandate by the African Union, to ensure the implementation, inter alia, of MDG No.8.

[208] Being the only review process of this kind, it is worth describing its features in some detail. The APRM has the following organizational components: The Committee of Participating Heads of State and Government (APR Forum), a political body, as the overall responsibility of the APRM. It selects the Panel of Eminent Persons (APR Panel), an expert body, the main task of which is to conduct the APRM with a view to ensuring its independence, professionalism and credibility. For this purpose, the APR Panel appoints so-called APR Teams to conduct country reviews and it may recommend institutions or individuals to conduct technical assessments. The APR Teams are constituted only for the period of country review visits and are composed of individuals with the technical skills necessary to professionally asses a specific country situation. All these organs are supported by the APR Secretariat, having both the technical and administrative capacity to manage the analytical work that underpins the peer review process, and by APR Partner Institutions, such as the UN Economic Commission for Africa (ECA), the African Commission on Human and Peoples' Rights (ACHPR) or any other organ of the AU (NEPAD/HGSIC-3-2003/APRM/Guideline/O&P/9 March 2003).

Council's UPR. For instance, the latter can rely on information provided by Treaty-monitoring Bodies or by Special Procedures[209]).

During the institution-building process, the most important decision to be made was whether UPR should be undertaken entirely by the Council itself or with the assistance of individual or a group of human rights experts[210]. Some suggestions for the Council itself, undertaking the entire review, included the setting up of a Council's members panel or of multiple panels, which would hold an interactive dialogue with the State under Review on the basis of a country dossier, as prepared by OHCHR, on the most recent information already available[211]. In terms of involvement of independent human rights experts, some suggestions included appointing an independent rapporteur for each State under Review, selected among a roster of experts prepared by OHCHR[212]. Other possibilities included appointing a group of experts to review the information on the State and suggesting questions or recommendations, or relying on the expert body/Advisory Committee.

The relevant procedure designed for the Human Rights Council results in a brand new model (See Council's Resolution 5/1, paras.1-38) with features being similar to other review mechanisms which, though, combine political bodies (as for the decision-making) and expertise (as for the information gathering and screening).

During the fifth session (June 2007), the Council defined and completed the process developing the modalities and the necessary time allocation for the Universal Periodic Review mechanism[213].

The Review was thus shaped as a cooperative mechanism[214], UN member-driven and action-oriented, based on an interactive dialogue, with the full involvement of the country concerned and with consideration to be given to its capacity-building needs[215] (and its level of development and specificity).

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[209] The periodical review process of the International Labour Organization (ILO) supervising the obligations of Member States with respect to the ratified conventions is a specific peer review system with not only States but additionally also employers and trade unions as peers. This review is based on periodic reports submitted by States on the implementation of their treaty obligations, as well as on submissions by employer organizations and trade unions assessing this report. The peculiarities of this procedure make it not suitable for country-oriented reviews by the Council.

[210] ISHR's Handbook, entitled "A New Chapter for Human Rights: A Handbook on Issues of Transition from the Commission on Human Rights to the Human Rights Council", 2006, p.72 ff.

[211] HR Peer Review Mechanism (Canada Non-Paper, available at: www.eyeontheun.org).

[212] "The independent session rapporteur would carry out a full visit to the State, prepare a background note on the human rights situation, and review summaries of information assembled by OHCHR in order to prepare written questions for the State to respond to in advance of the session" (See Human Rights Watch Report, on "HRC: No more business, as usual", available at. http://www.hrw.org/en/reports/2006/05/19/human-rights-council-no-more-business-usual, p.1-11).

[213] At its first session, in Decision 1/103, the Council decided to establish an inter-sessional open-ended intergovernmental working group to develop the modalities of the universal periodic review mechanism

[214] India, Saudi Arabia, on behalf of the Asian Group, Pakistan, on behalf of the Organization of Islamic Conference (OIC), Indonesia, and Republic of Korea (Human Rights Monitor Service, 2nd session daily update, 2 October 2006, by ISHR, available at : www.ishr.org).

[215] Algeria, on behalf of the African Group, Iran and Singapore stated that "the UPR mechanism should not be a tribunal (from the ISHR daily bulletin as of October 2, 2006, available at, www.ishr.org)."

More specifically, in accordance with General Assembly Resolution 60/251, the Universal Periodic Review is based on objective and reliable information[216]; ensures universality of coverage and equal treatment with respect to all Member States of the UN[217]; focuses on the fulfilment by each State of its human rights obligations and commitments; takes into account capacity-building needs of the country concerned; it complements and does not duplicate the work of Treaty Bodies[218]; has to be a cooperative mechanism, based on an interactive dialogue, with the full involvement of the country concerned; has to ensure a follow-up (Considering the political theory of philosopher, Oaekshott, the implementation, follow-up stages and the following second cycle of UPR should become the real test for the effectiveness of the UPR mechanism[219]).

Procedurally, UPR is based, to the extent possible, on existing information (not requiring new fact-finding and information-gathering[220]), and is mainly conducted in the form of an interactive dialogue with the country concerned. The main focus of this dialogue refers to the implementation of the human rights obligations and commitments by all States originating from the "Charter of the UN, the Universal Declaration of Human Rights, the UN human rights treaties ratified by the State under Review, its voluntary commitments and pledges (made, e.g. in the context of elections)[221].

As for the legal basis of the Review, it was extensively debated[222] within the ad hoc institution-building Working Group. Several delegations emphasized that General Assembly Resolution 60/251, in particular operative paragraph 5, lett.e, should serve as Terms of Reference for the UPR. It was generally acknowledged that the UPR mechanism should review the fulfilment by each State of its human rights obligations and commitments.

Beyond the identification of specific legal provisions and standards, many delegations asserted that UPR should not be a judicial body but a cooperative mechanism for "moral suasion". Thus, while some delegation emphasized a more general focus on obligations and commitments, other delegations made reference to the Charter of the United Nations (UN Charter) and the Universal Declaration of Human

[216] Algeria, on behalf of the African Group, Iran and Singapore stated that "the UPR mechanism should not be a tribunal (from the ISHR daily bulletin as of October 2, 2006, available at, www.ishr.org)".
[217] African Group, Iran, Republic of Korea, Switzerland.
[218] Asian Group, the EU (either TB or Special Procedures), OIC, Indonesia, and Republic of Korea.
[219] Finland, on behalf of the EU, stated on October 2, 2006, that the UPR should aim at establishing a meaningful, transparent and effective system, focusing on implementation and follow-up.
[220] Finland on behalf of the EU.
[221] As emphasized by Algeria, on behalf of the African Group.
[222] A/HRC/3/CRP.1, para. 35 ff., p.5.

Rights (UDHR)[223], as contained in the de Alba Package (See A/HRC/5/1). Proposals were also made to include International Humanitarian Law (IHL) as a Basis for Review, noting that many aspects of IHL were relevant to human rights (noting also that it would further fuel criticism against countries like Israel) (See Preliminary Conclusions of the ad hoc Working Group, in UN Doc. A/HRC/3/3 of November 2006; see also A/HRC/4/117, entitled "Non-Paper on the UPR mechanism", dated March 20, 2007).

The de Alba Package indicates: "the Review shall take into account applicable international humanitarian law". Such choice can be also explained in light of Preambular Paragraph 6 of GA Resolution 60/251, which provides some guidance as to what the Council should consider. It lays down that: "development, peace and security and human rights are interlinked and mutually reinforcing". By the above wording, the Council may generally address human rights situations, *inter alia*, during international or internal armed conflicts or humanitarian crisis[224].

Despite the proposal by many delegations (mainly from the G-77 Group) to mention within the Basis of the Review, "other human rights commitments and obligations, including those undertaken voluntarily by States when presenting their candidatures for election to the Council and those arising from various world conferences and summits", the de Alba Package mentions: "voluntary pledges and commitments made by States, including those undertaken when presenting their candidatures for election to the Human Rights Council".

The current Basis of the Review includes:

i. The Charter of the United Nations;
ii. The Universal Declaration of Human Rights;
iii. The Human Rights instruments to which a State is party;
iv. Voluntary pledges and commitments made by States, including those undertaken when presenting their candidatures for election to the Human Rights Council[225];

[223] One delegation considered, however, that as to the UDHR, it was merely a declaration containing general provisions. Thus its lack of specificity, particularly with regard to the human rights obligations of States, would pose difficulties as a basis of review.
[224] In such cases, it was noted, it will be necessary to assess the overall picture, including activities by other international organisations or UN mechanisms, in order to work on a complementary basis.
[225] The ultimate goal should be a "common normative basis" for the Review of all States. However, at present and despite a few reservations expressed by some delegations, the only "common standard covering the entire range of human rights is the Universal Declaration of Human Rights" and common commitments are a few, such as the consensus instruments adopted in Vienna in the year 1993 (i.e., the Vienna Declaration and Programme of Action). "Eventually as more States become party to the principal human rights treaties, those treaties might become part of the common core standards" and thus, enlarge the Basis of the Review, while paying due attention to the specificities of each country. "The normative basis should be designed to address the promotion and protection of all human rights and include the human rights provisions in the UN Charter and the Universal Declaration of Human Rights. In addition, the review should be built around the state's treaty obligations as well as specific pledges made in the context of Council elections and commitments to cooperate with the UN's human rights mechanisms". On the other hand, according to the International Rehabilitation Council for Torture Victims, "it is fundamental that the UPR remains independent from limits imposed by instruments

v. Given the complementary and mutually reinforcing nature of international human rights law and international humanitarian law, the Review shall take into account applicable international humanitarian law.

Accordingly the UPR Interactive Dialogue with the SuR (standing for State under Review) focuses, it was stressed, on implementation-related issues so that the UPR should produce appropriate measures, to improve the state of implementation of relevant obligations and commitments[226]. Such measures may include recommendations, specific commitments made by the country concerned at the end of the UPR process, best practices to be followed, assistance in the form of capacity-building and technical cooperation[227], in consultation with and with the consent of the State concerned.

On a general note, it was determined that: All Member States of the Council shall be reviewed during their term; each cycle of the Review lasts four years (Periodicity); during each UPR session the Council examines from within each regional group both UN Members that are also Members of the Council and those States that are observers of the Council; The order of the review is based on the drawing of lots and alphabetical order except for those States that volunteer to be reviewed.

As for the composition of the body examining the SuR, by the practice of other Organizations with country specific review mechanisms involving an element of peer-review[228], the proposal to use a combination of input by experts (Treaty Bodies and Special Procedures sources) and decision-making by Governments proved to be the most balanced[229]. It was thus decided, on June 18, 2007, that the Review will be conducted by States with the involvement, though to a different extent of all relevant stakeholders, including Treaty-monitoring Bodies and Special Procedures.

During the IB negotiations it was envisaged that, from a procedural standpoint, the UPR shall include the following phases: *preparation; interactive dialogue with the State under Review; Outcome of the review process with the relating response by countries under review; and the follow-up to the Review.*

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of ratifications, which is why it supports the idea that the entire human rights system should be used for the review. This comprehensive approach, even though appealing, raises a number of questions. Is it realistic and feasible to evaluate each State's fulfilment of its human rights obligations and commitments based on the entire human rights system, including customary law, 'soft law' declarations and government pledges? (AI INDEX: OR40/031/2006, available at, www.amnesty.org)".

[226] As emphasized by the EU.

[227] As stressed by Argentina, Peru, the Republic of Korea.

[228] Along these lines, Brazil and the International Women's Rights Action Watch Asia-Pacific.

[229] On the other hand, during the first round of negotiations, two major trends emerged. On one hand, some States viewing the UPR as a mechanism which should be extensively involve the participation of civil society; whereas, on the other hand, a number of States (including China, African Group, OIC) have called for UPR, to be a purely inter-governmental mechanism.

On a specific note, as for the preparation of each Review, it has been defined the documentation to be submitted:

i. OHCHR prepares a compilation of relevant information contained in UN documents on each State[230], to be considered, including all relevant information from UN sources, in particular "information contained in the reports of Treaty Bodies and Special Procedures[231]". This compilation shall not exceed ten pages (also for conference services and translation constraints)[232];

ii. Then there might be an additional ten-page "compilation" made the OHCHR on the basis of "credible and reliable information provided by other relevant stakeholders", namely NGOs and NHRIs;

iii. The State concerned prepares its national report, in line with the General Guidelines (See UN Doc. A/HRC/PRES/8/1) (it might be recalled that South Africa did not submit any national report and its delegation consisted of diplomats based in Geneva. Therefore States have not decided yet any Code for themselves).

As for the stages through which the Review takes place, it was determined:

- A group of three rapporteurs (the so-called Troika), selected by drawing of lots among the members of the Council and from the various regional groups, is formed to facilitate each State's Review, including the preparation of the report of the ad hoc UPR Review Working Group. The OHCHR provides the necessary assistance to the rapporteurs, while the final outcome is adopted by the Plenary of the Council.

[230] Switzerland and Japan, as well as Françoise Hampson, independent expert, and member of the UN Sub-Commission on the Promotion and Protection of Human Rights, and Vitit Muntarbhorn, as former Chairperson of the Coordination Committee of the special procedures (SP)' mandate holders' proposed that the HRC should use existing materials for the Review, such as reports and recommendations by independent expert bodies, treaty bodies and special procedures (SP). All available documentation should be gathered, including reports of treaty-monitoring bodies, special procedures (SP) as well as NGO material.

[231] Worthy of mention is that in the course of relevant negotiations, mention was also made of the recommendations issued by the special procedures (SP) of the Council. In this regard, some delegations specified that only the recommendations of thematic special procedures (SP) should be utilized by UPR. The need to avoid overlap and duplication with the work of other human rights mechanisms was again emphasized by some delegations, while others considered that UPR could serve as a means for implementation and follow-up to such recommendations, and for identifying any gaps or capacity-building needs in this regard. More generally, several delegations proposed that the review should take into account the measure or extent to which the country concerned cooperates with United Nations human rights mechanisms, including cooperation with regard to reporting obligations, country visits and communications (A/HRC/3/CRP.1)

[232] "To deal effectively with such information from a variety of sources, an efficient, impartial and credible process demands expert analysis and synthesis of the relevant information in order to focus the review. The aim should be to extract clearly identifiable shortcomings or particularly acute human rights issues, to identify possible remedial measures, and to outline a list of specific questions to be addressed by the state under review. Council members and observers, as well as non-governmental organisations should be able to contribute to the identification of such questions. The State under review would be expected to provide responses to the questions well in advance of the interactive dialogue, in order to facilitate a substantive and result-orientated dialogue (see AI INDEX: IOR/40/33/2006, available at, www.amnesty.org).

- Modalities/Interactive Dialogue: The dialogue with the State is undertaken by the full Council, within the framework of the one-Working Group activity, to be chaired by the President of the Council. Observer States can participate in the Inter-active Dialogue, while other relevant stakeholders can - only - attend the conduct of the Review in the Working Group (Within this framework, it would have been important to mention NHRIs, NGOs and special procedures (SP) and let them "participate" in the Dialogue).
- Outcome: It takes the shape of a brief assessment of the review and a mere consideration, on equal basis, of the human rights situation in the country under review, including *positive developments* (so far, the decisions have been standardised).

As for the adoption of the UPR Outcome, it was agreed upon that recommendations enjoying the support of the State concerned are identified as such[233], while other recommendations, together with the comments of the State concerned thereon, are noted. Despite the unbalance, both comments and recommendations are included in the Council's UPR Outcome Report.

The focus shall be thus placed on the final stages. In fact, in the final stage of the UPR process, the general comments which could be delivered in the Plenary of the Human Rights Council *by other relevant stakeholders*, constitute the real added value[234]. Along these lines, the follow-up to the Review, as argued during the negotiations, will play an increasing role particularly in the area of the country-engagement. This should represent the only test to consider "the positive developments" of countries under review[235] and more specifically to assess the fulfilment of the obligations laid down in Article 56 of the Charter of the United Nations.

Differing views were also expressed on the actors responsible for UPR follow-up. It was mentioned the Council, the State concerned itself , the OHCHR and other actors, such as Treaty-monitoring Bodies, Special Procedures, a pool of experts, Non-governmental organisations, National Human Rights Institutions, etc. (See UN Doc. A/HRC/3/CRP.1).

[233] To be effective, the recommendations should take into account the need for capacity-building, available domestic resources, and the potential contributions by other states and by the UN system.

[234] See the first review of Italy under UPR7 and the relating NGOs speeches, on June 9, 2010, available at: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10132&LangID=E.

[235] It would be useful to envisage a specific time-frame as requested by some NGOs in February 2007: "The UPR must include provisions for follow-up in order to ensure implementation of decisions made in the review. These measures should have a specific time-frame (A/HRC/4/NGO/89, ICJ, and APT). It is highly favoured the possibility that the Council might request the state concerned to report on the progress of the implementation of the decisions and recommendations at any given time (A/HRC/4/CRP.3).

However, no ambiguity emerges from the de Alba Package as for the key-players (See UN Doc. A/HRC/5/1). The President's Text is clear: "In considering the UPR Outcome, the Council will decide if and when any specific follow-up "would be necessary"; accordingly, (only) "after exhausting *all efforts* to encourage a State to cooperate with the UPR mechanism, the Council will address, as appropriate, cases of *persistent non-cooperation* with the mechanism".

Following the adoption of the IB Package, on June 18, 2007, the then Secretary-General stated: "The Human Rights Council has now completed the first phase of its institution-building work. The members of the Human Rights Council are charged with a great responsibility. The establishment of the modalities for a strong and meaningful Universal Periodic Review is to be welcomed. It sends a clear message that all countries will have their human rights record and performance examined at regular intervals, starting with members of the Human Rights Council. No country, big or small, will be immune from scrutiny. Civil society and non-governmental organizations will play an active role in this process. The periodic review holds great promise for opening a new chapter in human rights promotion and underscores the universality of human rights".

From the above, it might be anticipated that the UPR is a very complex multi-stages process, driven by UN Member States, to scrutinize the human rights records of the entire UN membership[236]. The UPR first cycle started in April 2008 (See Chapter III)[237]. 48 States undertake this review, each year. So far no country has postponed its own review[238].

6.3. Country situations

On a preliminary note, the Council can deal with specific human rights situations by resorting to various tools. In accordance with Op.3-Op.5-Op.6 of GA Resolution 60/251, the Council can deal with country-human rights situations, under

[236] However during the institution-building process, it was not properly addressed either the follow-up to the UPR or benchmarks and human rights indicators upon which to define the questions for the SuR.

[237] Needless to say, a footnote in the President's text stresses "UPR is an evolving process: the Council, after the conclusion of the first review cycle, may review the modalities and the periodicity of this mechanism, based on best practices and lessons learned (Human Rights Council Resolution 5/1 Annex).

[238] In August 2006, Amnesty International emphasized as follows: "Given the volume of reviews to be carried out each year under the above proposals, i.e. some 64 country reviews per year on the basis of the three-year cycle required by resolution 60/251, measures should be agreed to ensure that the format is the same for all states to help ensure equality of treatment. The criteria for allocating country reviews to the subsidiary bodies should be strictly neutral (for example by alphabet or by lot) to ensure objectivity and non-selectivity as required in resolution 60/251. At least one full meeting (i.e., three hours) should be allocated for each interactive dialogue. The meeting should be public. Following the completion of a full cycle of the UPR, the duration of each interactive dialogue could be reviewed on the basis of experience (AI INDEX: IOR/40/31/2006, available at, www.amnesty.org).

Item 4 ("human rights situations that require Council's attention), Item 6 ("the Universal Periodic Review"), and Item 10 ("technical cooperation and advisory services in the field of human rights") of its Agenda[239].

In accordance with Op.10 of GA Res. 60/251, it can hold ad hoc Special Sessions, "when needed" (as for the complaint procedure, please see paragraph 8.1. below), upon request by one of its members and the support of one-third of the Council's membership.

In the event of gross or serious and systematic violations of human rights, the abolished Commission relied mainly on country-specific mandates, the so-called country Special Rapporteurs, in accordance with ECOSOC Resolution 1235 (1967), so as to scrutinize and maintain pressure on human rights abusers[240].

Procedurally, under Item 9 of its Agenda (entitled," violations of human rights in any part of the world") the Commission envisaged a public debate on information referring to allegations of gross violations of human rights in a given country. The Commission could, eventually, adopt a geographic Resolution, by which it established the mandate of a specific country Special Rapporteur. Item 9 reflected the political nature of human rights and of the work of the Commission[241], as long as this body should decide whether to: deal with a specific situation; adopt a specific Resolution; and create a Special Procedure mandate[242].

When – theoretically - the situation on the ground improved, the Commission could move the situation under Agenda's Item 19 (entitled "advisory services and technical cooperation in the field of human rights"), in order to create an Independent Expert mandate or a specific mandate of cooperation with the OHCHR, - de facto, upon request/consent by the country concerned.

However a decline in the use of geographic resolutions emerged in the last years of the Commission in parallel with the increasing use of other practices, such as:

i. The so-called dilatory no-action motion practice (as envisaged under Article 2 of Rule 65 of the Rules of Procedure for the functional Commissions of ECOSOC). This consists in a proposal by one Member of the Commission (now the Council) to postpone

[239] A different consideration should bre reserved to the situation in the OPT as inferred by Item 7 of the Council's Agenda (See paragraph.7.1.below).
[240] Op. cit. in supra note 83 (Marchesi and Palmisano, p.5 et ff.).
[241] Ibidem
[242] According to a study by Lebovic and Voeten (2006), about 70% of the top offenders were subject to an ad hoc geographic Resolution (op.cit. in supra note 117).

the examination of the situation of human rights in a given country and, to this end, calls for a vote to decide on the postponement, after that two States have spoken on behalf of such proposal and two against (usually two G-77 members supported the postponement, while two Western Group countries were against it). During the Commission's era, a certain number of "no-action motions" affected many relevant initiatives, mainly of the EU, concerning: the abolition of the death penalty; the situation of human rights in Zimbabwe; the situation of human rights in Chechnya; the situation of human rights in Iran; and the situation of human rights in the Sudan[243].

ii. Another negative Commission's practice referred to the inclusion of situations of serious concern under inappropriate Agenda's Items, as was the case with the situation of human rights in the Sudan, in 2004. By this practice, a specific country situation was transferred under a different Agenda's Item so as to *de facto* hinder that gross violations of human rights could be monitored by a country Special Rapporteur, under Item 9 of the Commission's Agenda (entitled, "Violations of human rights and fundamental freedoms in any part of the world"). With specific regard to the Sudan, this was dealt with under Agenda's Item 3 (entitled "Organization of the Work"), in 2004. Other cases refer to the situation of human rights in Afghanistan which was moved from Item 9 to Item 19. In 2004, the Commission appointed an Independent Expert on the situation of human rights in Afghanistan. In 2005, despite the critical conditions in the field, the Commission decided to discontinue that mandate to favour a specific FP of the OHCHR[244]. In the latter case, once a specific situation was moved under the Item on TCP (standing for technical cooperation projects), the Commission could either appoint an Independent Expert or request the assistance by the OHCHR.

[243] See Chapter II.

[244] It is also worthy of mention the increasing role played by the OHCHR in Somalia, whose situation, despite the latest events, continues to be dealt with under Item (10) of the Council's Agenda, devoted to advisory services and cooperation.

Needless to say, the choice to deal with country situations under other Agenda Items was the result of a compromise, to overcome a possible "no-action motion", which would have had a worse impact in terms of protection ability of the Commission: the inaction of relevant Institutions for one year, up to the following Commission's session would have hindered any form of monitoring and thus protection. In this wake, the OHCHR has been increasingly entrusted to monitor specific situations in lieu of a country Special Rapporteur.

The choice between two practices or between different Items stems from the political nature of Resolutions. Either the (thematic and geographic) Resolutions of the past Commission or the Council on Human Rights' fall within the category of the "recommendations[245]". However scholars do recognize that these Resolutions may result in instruments of political pressure and/or moral suasion[246], which, in the longer run, may contribute to change the conduct of the State concerned. Some other scholars argue that these recommendations are not sufficient to deal with gross and systematic violations of human rights[247].

The Council's practice shows that country Resolutions, as previously adopted under Items 9-19 of the Commission's Agenda, currently go through Items 4-10 of the Council's Agenda. With specific regard to country situations, the mandate for relevant activities by the Council stems from Op.3 of GA Res. 60/251, which does not mention ECOSOC Resolution 1235.

By this operative paragraph, the GA has mandated the Council: "to address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon".

Some scholars [248]argue that operative paragraph 3 of GA Resolution 60/251 "supersedes ECOSOC Res. 1235". It has been also argued[249] that, by OP.3, the General Assembly has enabled the Council to defer particular serious country situations to the Security Council, provided that "gross and systematic human rights violations" constitute "a threat to international peace and security".

The wording in Op.3 is basic. The choice of the verb "address" without any reference to either ECOSOC Resolution 1235 or ECOSOC Resolution 1503 – whereas the Commission's Agenda Item 9, lett. b, expressly mentioned the latter - indicates a

[245] Op.cit. supra in note 119 (Zanghì, p120 et ff)
[246] Op.cit in supra note 83 (p. 8).
[247] Op.cit in supra note 13 (p.50 et ff).
[248] See op.cit supra in note 24; see also op.cit in supra note 42.
[249] Ibidem, see op.cit supra in note 51; see also op.cit in supra note 109.

specific intention of UN Member States to distance the Council from the past Commission's practice under Item 9 (entitled "Question of the violation of human rights and fundamental freedoms in any part of the world").

As reported, the Resolutions adopted under Item 9 usually envisaged an ad hoc monitoring by a country Special Rapporteur whose mandate was to be established, in accordance with ECOSOC Res. 1235. As for the Council, despite the above mandate to address country situations, it is not yet clear how and when it is enabled to address country situations.

In light of Op.3 of GA Res. 60/251, if one compares Item 9 of the past Commission's Agenda with Item 4 of the Council's Agenda, the latter does not refer, at all, to "violations of human rights and fundamental freedoms". Item 4 is entitled "Human rights situations that require Council's attention". The vagueness of the relevant wording, some scholars argue, results in "a hot potato[250]" reflecting the North-South divide[251]. In this regard it might be argued that the Council has failed to promptly address the situation of human rights in the Sudan - as the head of the High-Level Mission on the situation of human rights in Darfur, Nobel Peace Prize Laureate, J. Williams, underlined in addressing the Human Rights Council, in March 2007[252] -, as well as in other countries, such as Honduras, Cuba and Belarus.

When Belarus and Cuba, the concerned countries, requested, in June 2007, the discontinuation of the consideration of the situation in their respective countries – entailing the conclusion of the relating Special Procedures's mandate -, many other UN Member States, from G-77, proposed the abolition of all country mandates[253].

As a result, the Council decided to discontinue the mandates of Prof. Severin (on Belarus) and Justice Chanet (on Cuba), respectively.

Within this framework, the current practice also shows that the Council has developed the tendency to move geographic situations from Item 4 to Item 10, under which it is favoured the monitoring by the OHCHR. While this tendency (See the last Council's Resolution on the situation of human rights in the DRC, A/HRC/RES/13/22) shows the ability of the Office that can ensure an easy deployment and work in partnership/cooperation with relevant stakeholders in the field, there is the risk of a *deminutio*, in particular of the Special Procedures system.

[250] See Gomez Isa F., and de Feyter K., International Human Rights Law in a Global Context, eds., 2009, p.260.
[251] As for the rationale behind the Council's Agenda, see paragraph 8.1. below.
[252] See UN Press Release, available at: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=777&LangID=E.
[253] See Council's Session Report A/HRC/5/21, p.50-51; See also UN Presss Release on June 12, 2007, available at: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=7267&LangID=E.

The practice indicates as follows: i. At the second session, Resolution 2/L.47 (under Item 2) and Resolution 2/L.46 envisaged cooperation activities with the OHCHR in Nepal and in Afghanistan, respectively; ii. At sixth session, despite Resolution 6/L.50 extended the mandate of the Special Rapporteur on the Sudan for one year, the Council envisaged by Resolution 6/L.51 (OP.6) a specific role for the OHCHR in Darfur; iii. By Resolution 6/L.45, the Council envisaged an OHCHR TCP in Liberia; iv. By Resolution 6/L.29/Rev.1 on the situation of human rights in Burundi, the Council envisaged a specific field's role for the OHCHR, though extending for one year the mandate of the relevant Independent Expert (Item 10); iv. By Resolution 7/L.13 on the Democratic Republic of the Congo, the Council took note of the work by the country Independent Expert though focussed on the field work by the OHCHR; By Resolution 11/L.17 on the situation of human rights in the Sudan, the Council indicated a specific role for the High Commissioner being invited to undertake a mission in loco jointly with other tools such as the UPR and various thematic mechanisms (OP19); By Resolution A/HRC/RES/12/14, on the Coup d'état in Honduras, the Council requested the OHCHR to prepare a comprehensive report on the violations of human rights since the coup d'état; By Resolution 13/L.14 on Equatorial Guinea, the Council requested, under Item 10, the assistance by the OHCHR; By Resolution 13/L.23 on the situation of human rights in the DRC, there has been a specific focus on the activity of the OHCHR; By Resolution 14/L.2 on Kyrgyzstan, the Council has merely requested "(Op 10.) the United Nations High Commissioner for Human Rights to continue to provide technical assistance through her office in Bishkek and to work with the Government of Kyrgyzstan and other actors, as needed, to identify additional areas of assistance that will aid Kyrgyzstan in its ability to fulfil its human rights obligations, to brief the Council on progress and to submit a report thereon to the Council for consideration at its seventeenth session".

Indeed there is a political resistance towards country Resolutions, as shown by the Chinese attempt of June 18, 2007 to raise the threshold for the adoption of country-resolutions.

Of the abolished Commission, it was criticised "the corporatism" characterizing relevant blocs, especially in the event of Resolutions involving a State of the same regional group/bloc[254]. However the above practice shows that the divide

[254] See Abraham, M., "A new Chapter for Human Rights: A handbook on issues of transition from the Commission to the Council (ISHR), Geneva, 2006, p.28 et ff.

between the Western Group and the Rest of the World has become more evident, especially if one considers the various groupings:

i. New Zealand, Canada, Australia, Switzerland and Japan have created the political group named Juscanz;
ii. The Eastern European Group is currently divided into two blocs, between Ukraine and the Russian Federation, as long as the former normally aligns itself to the EU position when adopting Council's Resolutions;
iii. The United States, under the Clinton Administration, created, in the late 1990s, the Community of Democracies that over the years has supported the initiatives of its members, such as the Chilean Resolution on gender mainstreaming in the UN system. This grouping also include Poland, Mongolia and Italy, among others;
iv. The Arab League;
v. The European Union and the African Union;
vi. The Non-Aligned Movement;
vii. The Organization of the Islamic Conference;
viii. And, more generally, G-77.

It has been correctly argued that the political human rights Agenda is decided accordingly[255].

At the time of the writing[256], UN Member States have initiated the Council's Review process within which there are various attempts to re-open the so-called IB Package with specific regard to country mandates.

6.4. Special Sessions

[255] See Kedzia, Z., United Nations Mechanisms to promote and protect human rights, in Janusz Symonides (ed.) in Human Rights International Protection Monitoring Enforcement, Aldershot, Ashgate, 2003, p.11.
[256] This continues under Item 4. While mantaining the practice of interactive dialogues with the Special Procedures, there are several attempts to reduce this practice. Within the Council framework, the conformity of "the orders of the day" with the scheduled Session's Programme is often unpredictable. The result is that smaller States delegations, being usually Observer States, and civil society, that are not based in Geneva meet difficulties in taking the floor. No effective space has been envisaged for either Observer States or "other relevant stakeholders". Time constraints, points of order and opposition, in particular by the OIC and the African Group have facilitated this weak situation which has also increased the tension between the EU, being a firm supporter of the system of the Special Procedures, and most countries of other blocs, oriented to a minor role for SP).

In the 1990s, emergency sessions of the Commission were authorized by ECOSOC, upon approval by half of the Commission's members (See ECOSOC Res. 1990/48 of May 25, 1990). In that juncture, the then Commission convened five special sessions concerning the situation of human rights in: the former Yugoslavia (August/December 1992); Rwanda (1994); East Timor (1999); and OPT (2000)[257].

Under GA Resolution 60/251, Special Sessions have been intended as protection tool, by which to enhance the ability of the Council, to better address pressing human rights situations/human rights emergencies. By operative paragraph 10 of GA Res. 60/251, the Assembly decided that the Council: "shall be able to hold special sessions, when needed, at the request of a member of the Council with the support of one third of the membership of the Council"

By the above wording, it emerges a new tool for the Council, of which GA Res. 60/251 does not define the scope. The Special Session tool has been positively considered throughout the institution-building process as long as it ensures a prompt action (2006-2007). For its flexibility it resembles the extraordinary sessions of the Security Council. The Council has been thus empowered to promptly respond to developing human rights crises and act as an early warning mechanism. However the practice shows a selected approach which has given rise to criticism for the misuse of this tool.

Since its first regular session, the Council has made full use of the special sessions' tool. From July 2006 through February 2011, the Council held sixteen regular sessions (February 2011) and fifteen special sessions (February 2011) plus one special sitting, the latter alternatively called "urgent debate" (on June 1, 2010, upon written request by the OIC), as renamed by the High Commissioner for Human Rights in September 2010 before HRC15[258].

Focus has been mainly placed so far on emergency geographic situations concerning the situation of human rights in the OPT, Lebanon, the Sudan, Myanmar, Sri Lanka, Haiti - the latter, following to the natural disaster caused by the earthquake on January 12, 2010 - and Cote d'Ivoire. Furthermore, for the first time, in May 2008 and February 2009, the Council convened special sessions on the food crisis and on the financial crisis, respectively. As for the above thematic Special Sessions, notwithstanding the international concern about these issues, the EU stressed that the

[257] Op.cit in supra note 61 (Nowak, p.107)

[258] See High Commissioner's speech of Septemeber 2010, in this regard, see UN Press Release, available at: www. http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10317&LangID=E.

use of the Special Session tool should be basically reserved to country situations in need of urgent action.

On a more specific note, the practice shows that, besides dealing with thematic human rights issues, the majority of Special Sessions focus on the Israeli-Palestinian Conflict, in particular on the situation of human rights in the OPT:

i. 1st special session on OPT-July 2006;
ii. 2nd special session –August 2006 on the situation in Lebanon between Hezbollah and Israel;
iii. 3rd special sessions-November 2006 on the attack of Israel in OPT and Beit Hanoun;
iv. 4th special session-December 2006 on Darfur;
v. 5th special session-October 2007 on Myanmar (due to the harsh house arrest's conditions of Aung San Suu Yi) ;
vi. 6th special session-January 2008 (on Israeli incursions in OPT);
vii. 7th special session-May 2008 on the world food crisis;
viii. 8th special session-November 2008 on the DRC;
ix. 9th special session-January 2009 on the OPT following the ad hoc Israeli military mission in the Gaza Strip;
x. 10th special session-February 2009 on the global financial crisis;
xi. 11th special session-May 2009 on Sri Lanka (which refers to the situation of the civilians during the final defeat of Tamil);
xii. 12th special session-October 2009 on OPT;
xiii. 13th special session-January 2010 on Haiti;
xiv. 14th special sitting/urgent debate-June 2010 on the Israeli attacks on a humanitarian aid flotilla;
xv. 15th special session- December 2010 on the situation in Cote d'Ivoire.

The above Special Sessions show the two sides of the coin: 1. On a positive note, in most cases the Council envisaged follow-up activities, such as the fact-finding mission to Beit Hanoun in Gaza after Israeli military action in November 2006, headed by Archbishop D. Tutu (para.7 of Council's Resolution S3-1 of 15 November 2006); the High-Level mission to Darfur, led by J. Williams (para. 4 of Council's Resolution S4-101 of 13 December 2006); the fact-finding mission to Gaza, after the Israeli military

action in January 2009, headed by justice R. Goldstone (para.14 of Council's Resolution S-9/1 of 12 January 2009)[259]. It has been also acknowledged that during the Special Sessions, the Council shows its ability to promptly act upon and to follow-up within the regular sessions of the Council. In this regard, mention has to be made of the following sessions:

i. Special Session 1 (July 2006) relating to the situation of human rights in the OPT. By resolution S-1/L.1 OIC and African Group members requested an urgent visit of the High Commissioner to the OPT. A/HRC/S-1/L.1 was adopted by a recorded vote of 29 in favour, 11 against and five abstentions. The General Assembly endorsed to dispatch a fact-finding mission, led by the Special Rapporteur on the OPT. Accordingly, in the course of the second regular session the follow-up resolution (A/HRC/2/L.13) by Palestine, adopted with 34 votes in favour, one against and twelve abstentions, envisaged a fact-finding mission in addition to a report by the relevant Special Rapporteur: Unlike the situation of human rights in Darfur, the Special Rapporteur on the OPT got the support of developing countries to discharge his mandate (See below). It has been noted by some scholars that "the first special session failed to mention either the kidnapping of an Israeli soldier, by which the dramatic escalation of violence originated, or the Hamas government's involvement[260]";

ii. Special Session 2 of August 2006 referred to the "The grave situation of human rights in Lebanon caused by Israeli military operations". The relating Resolution (S-2/1) was adopted by a recorded vote: 27 in favour, 11 against and eight abstentions. It

[259] The above sessions indicate that in most cases the Council envisaged a follow-up to the resolutions, including fact-finding missions, and commissions of enquiry, as follows: The first special session on the situation in the OPT was followed-up by Council's Resolution 2/L.13 (as submitted by Palestine and adopted with 34 votes in favour, 1 against and 12 abstentions), by which the Council established, under Item 2, to dispatch a fact-finding mission, besides a specific reporting by the Special Rapporteur on the situation in OPT. Afterwards Council's Resolution 4/L.2 followed-up on both Special sessions on the OPT, S/1 e S/3.The second Special Session referred to the Israeli attacks in Lebanon. The relating Resolution (S 2/1), as adopted with 27 votes in favour, 11 against and 8 abstentions, envisaged to dispatch a commission of enquiry, without mentioning the Hezbollah's action. When the members of the Commission presented their findings (See UN Report A/HRC/2/7), including references to Hezbollah, OIC Members challenged the experts' work). According to scholars (See Hampson 2007, p.15), "this approach proved the one sidedness of the Council". Other scholars note that the Council gathered the same day, in which action was to be taken by the UN Security Council (See Council's Res. 1701 (2006), and thus in violation of Art.12 of the Charter of the United Nations. Op. cit supra in note 160 (Bahrer, p.28); See also Rehman, J, in International Human Rights Law, Pearson Education Lim., Essex, 2010, p.60 et ff.; See further Terlingen, Y., The Human Rights Council: A New Era in UN Human Rights Work?, Ethics and International Affairs, Vol. 21, 2007, 167–178. Clapham, A., United Nations Charter-Based Protection of Human Rights (Draft chapter for R. Hanski, M. Sheinin & M. Suski (eds) An introduction to the International Protection of Human Rights, A textbook. Third Edition, Institute for Human Rights, Abo Akademi University, 2009 forthcoming), p. 1-23; See Hicks P., How to put UN HRCouncil Back on Track, 2007, available at www.forward.com/articles/how-to-put-human-rights-council-back-on-track.

[260] Op.cit in supra note 160.

envisaged dispatching a commission of enquiry, reporting to the Council by September 2006 (with the omission of any reference to the conduct by Ezbollah[261]). When the Council considered the findings of the four independent experts (See A/HRC/2/7), all OIC members took the floor to challenge the work of these experts who looked also at Hezbollah and did not limit their reporting activity to Israeli violations. Only Chile confirmed its support to the experts and their reports. Some scholars[262] correctly argued the partiality and one sidedness of the Council. It was observed that "the Commission took over forty years to discredit itself; the Council achieved that result in less than two month". Needless to say, the resolution was sponsored by the same States of resolution S-1/1, namely Algeria, Bahrain, Cuba, Egypt, Indonesia, Jordan, Lebanon, Malaysia, Morocco, Pakistan, on behalf of the OIC, Saudi Arabia, the Sudan, Syrian Arab Republic, Tunisia, on behalf of the Group of Arab States, and the United Arab Emirates. It has been also correctly observed that the Council convened the special session the same day that action was taken (SC Res. 1701) by the Security Council, in contrast with Art.12 of the UN Charter[263];

iii. In November 2006, at the conclusion of the third Special Session, the Council adopted Resolution S-3/1, by recorded vote of 32 in favour, eight against and six abstentions, on human rights violations emanating from Israeli military incursions in the Occupied Palestinian Territory, including the recent one in Northern Gaza and the assault on Beit Hanoun, by which to dispatch a fact-finding mission;

iv. In December 2006, the attention was drawn to the situation of human rights in Darfur. By consensus, Council Decision S-4/101 envisaged the dispatching of a High Level Mission despite the existence of a Special Rapporteur. It also "welcomes the cooperation between the latter and the Government of the Sudan but requests that the latter further cooperation with the Council and

[261] Op. cit. in supra note 259 (p.5 et ff).
[262] Ibidem; see also op.cit in supra note 92 (Hampson, p.15).
[263] Op.cit. in supra note 160 (p.28).

the OHCHR, as if the special procedures could be set aside at its convenience. At the fourth session, by Council resolution 4/8, adopted by consensus, the Council regretted that the mission was not allowed to visit Darfur. In March 2007, the head of that mission, Ms. Jodie Williams, Nobel Peace Prize Laureate, challenged the Member States of the Council by questioning their real intention about the mandate ahead. It was thus decided to set a group of special procedures, led by the Special Rapporteur on the Sudan to work with the Government. The attempt was to shift towards a cooperative mandate rather than monitoring. After that, both the Government of Sudan and the Council engaged more constructively with the Group of Independent Experts appointed to follow-up on the proposed mission to Darfur (See Report (A/HRC/5/6) of June 8, 2007)[264]. For sake of completeness, at HRC14, by Decision 14/117, the Council decided to extend the mandate of the Independent Expert on the Sudan for three months, up to the September 2010 regular session of the Council[265];

v. The fifth special session on Myanmar (See Resolution S-5/1) was followed up by Council's Res. 6/L.38.

All the Special Sessions have been followed up by relevant Council's Resolutions. In particular, the Council has established ad hoc monitoring mechanisms, such as commission of enquiries and fact-finding missions. In this context, by Resolution 4/2 and 4/8 of March 30 2007, the Council called for the implementation of all the previous Special Sessions' Resolutions in line with operative paragraph 12 of GA Res. 60/251[266].

On the other hand, aside from the operational result, some scholars[267] argue that this tool indicates the degree of "politicization" of the Council. In particular the practice shows that all geographic sessions referring to the Israeli-Palestinian conflict resulted in condemnatory resolutions on the Israeli policy without adequately addressing the responsibility, for instance, of the Hezbollah. It might be recalled that the Council convened the ninth special session, due to the Israeli military operation in Gaza, from

[264] This last modality, indicating the flexibility and variety of tools at the disposal of the Council, might dilute the work of the Special Procedures.
[265] Having ascertained that the situation did not merit anymore a specific monitoring, the Council opted for a cooperation mechanism. In this regard, it might be recalled that the 2010 Freedom House Survey scores the Sudan among the top offenders (7 out of 7).
[266] Which stipulates "that the methods of work of the Council [..[shall enable genuine dialogue, be results-oriented, allow for subsequent follow-up discussions to recommendations and their implementation and also allow for substantive interaction with special procedures and mechanisms."
[267] Op.cit in supra note 13; op.cit. in supra note 150.

December 2008 through January 2009 (in parallel with the transition from the Bush Administration to the Obama's). At that session, despite the refusal by all EU Member States, being also Members of the Council, the Council called for a fact-finding mission, with the aim of investigating violations of international human rights and humanitarian law (See Council's Resolution S-9/1). In April 2009, the decision to appoint justice Goldstone got the endorsement by the EU. In September 2009, the Fact-Finding mission presented its report, the so-called Goldstone Report (See UN Doc. A/HRC/12/48 of September 2009). Goldstone found that there was evidence "indicating serious violations of international human rights and humanitarian law [..] committed by Israel during the Gaza conflict, and that Israel committed actions amounting to war crimes, and possibly crimes against humanity." The mission also found that there was evidence that "Palestinian armed groups committed war crimes, as well as possibly crimes against humanity, in their repeated launching of rockets and mortars into Southern Israel". The mission called for referring either sides in the conflict to the UN Security Council for prosecution by the ICC in the event of refusal of a fully independent investigation. By Council's Resolution 13/9, the Council's Members requested, for the first time, to establish a unique reparation fund for the victims of this conflict[268]. Italy, the Netherlands and other Western countries did not support that Report since it did not adequately address violations occurred in Israel. Again it was felt that the conflict was not tackled in an objective manner[269].

The EU called for the 11th Special Session, due to the crisis in Sri Lanka (See Council's Report A/HRC/S/11-2). Nevertheless, at the end of the debate, it did not support the relevant Resolution (Council's Resolution S-11/1 of May 2009), since it failed to envisage both the assessment of the situation on the ground and any effective follow-up.

As discussed, country situations involve a political evaluation and thus a political decision which impacts on both the international scenario and the State concerned. This pattern is clearly exposed to the risk of politicization/polarization. The Special Session tool can confirm the above arguments, as long as developing countries request the convening of special sessions/urgent debates (so far they have requested the

[268] Operative paragraphs 8-9 of Council's Resolution 13/9 indicate, as follows: [the Council] "Calls upon the High Commissioner to explore and determine the appropriate modalities for the establishment of an escrow fund for the provision of reparations to the Palestinians who suffered loss and damage as a result of unlawful acts attributable to the State of Israel during the military operations conducted from December 2008 to January 2009; Decides, in the context of the follow-up to the report of the Independent International Fact-Finding Mission, to establish a committee of independent experts in international humanitarian and human rights laws to monitor and assess any domestic, legal or other proceedings undertaken by both the Government of Israel and the Palestinian side, in the light of General Assembly resolution 64/254, including the independence, effectiveness, genuineness of these investigations and their conformity with international standards".

[269] See explanation of position of March 24, 2010, available at: ttp://www2.ohchr.org/english/bodies/hrcouncil/13session/resdec.htm).

vast majority of the sessions) and determine the relating outcome. It has been observed that the OIC enjoys, through its members, one-third of the seats and thus control the request for the Special Sessions[270]. Most of the above Resolutions were adopted on a confrontational basis[271].

Notwithstanding the positive result of follow-up Resolutions and the general "flexibility"[272] displayed by use of this tool, the above-mentioned cases recall the past Commission's practice and indicate that criticism still persists. The special sessions tool highlights the recurring problem of politicization and double standards. Human Rights Watch notes that the practice developed in the special sessions is even more discouraging. It seems that the emergency sessions may be used according to the political priorities of relevant blocs without objectively considering situations which should warrant the Council's attention, such as the situation of human rights in Zimbabwe[273] (As for the last Special Session on the Situation of Human Rights in Libya, please refer to the Conclusion, p. 305 et ff.).

7.1. Additional foundations: "A complaint procedure"

In 1967, the ECOSOC entrusted, by Resolution 1235, the Commission and its subsidiary organ, the Sub-Commission on Prevention of Discrimination and Protection of Minorities, to examine, in public debate, any "information relevant to gross violations of human rights and fundamental freedoms [..] in all countries", which has paved the way to the establishment of the System of Special Procedures[274]. In the event that information concerning human rights country situations revealed "a consistent pattern of gross and reliably attested violations", the then Commission faced the political difficulties of tackling this information publicly[275]. By ECOSOC Resolution 1503, it was introduced a confidential procedure, mostly carried out by peers, based on reliable

[270] Op. cit. supra in note 160 (Bahrer, p.24).
[271] A specific consideration merits the special sitting/urgent debate requested in the course of the fourteen regular session of the Council (June 2010), by the OIC and the Arab League, following the Israeli attacks to a flotilla of aid workers in international waters. This variation of the SS's tool took place under Council Agenda's Item 1, entitled "organizational and procedural matters". As expected, a Resolution (A/HRC/RES/14/1) was adopted by a recorded vote of 32 States in favour, 3 against and 9 abstentions. In this case, no effective possibility of negotiations arose. The EU attempted to propose alternative language which was ignored by the OIC and Egypt, on behalf of the African Group. While countries, such as Italy, proposed a thorough domestic investigation by the Israeli Authorities, the Resolution envisaged an international independent fact-finding mission.
[272] With a positive view on the tool of the special session, see Tistounet, op.cit in supra note 61.
[273] On June 2008, international media tried to draw the general attention to Zimbabwe . The Economist published an Article on the United Nations and Zimbabwe Crimes Against Humanity, by which it stressed "In theory, calling an emergency session on Zimbabwe should not be so difficult [..] but with its 16 members, the OIC, supported by the African Group (13 members), has a stranglehold over the Council.".
[274] Alston, P. Steiner, H.J, Goodman, R., International Human Rights in Context, 2008, p.600 et ff.
[275] See Commission on Human Rights Report on the Thirty-Fourth Session, ESCOR 1978. Supp. No.4 (E/1978/34), para. 208.

information provided by any individual, group of individuals or Non-Governmental Organisations, through a petition[276].

Procedurally, "communications" received by the UN, "which appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedom" were transmitted to a five-member Working Group of the Sub-Commission, the so-called Working Group on Communication (acronym, WGC), made of independent experts of the Sub-Commission. This marked the beginning of a lengthy process whose outcome could eventually be concluded by a decision of the Commission:

i. to start a public monitoring procedure;
ii. to appoint a rapporteur (initially ECOSOC Resolution 1503 envisaged an investigation by an ad hoc Committee (op.6, op7);
iii. to make public the situation reported;
iv. or to discontinue the exam of that given situation.

Considering the political nature of human rights, this procedure offered the opportunity to hold a debate with the following features: i. among peers; ii. in private sessions, namely between the country concerned and the Member-States of the Commission; iii. without any external "interference"; iv. with the advantage of using objective UN reports; iv. the investigation to be carried out upon the consent of the State concerned.

The 1503 procedure was thus established to draw attention to a "situation" of gross and reliably attested violations of human rights, i.e. a situation affecting a large number of people or a whole territory, rather than individual cases. It has been correctly argued[277] that by this procedure, it has been activated, somehow, the petition right envisaged by the UN at its inception.[278]

Some scholars have thus argued that both the public and confidential procedures were the very achievements of the past Commission[279]. Of a contrary view, some other scholars[280] have criticised such procedure on the ground that it might be used as a shield against the public scrutiny.

[276] Op.cit in supra note 83 (See Palmisano and Marchesi, p.7).
[277] Ibidem.
[278] Nevertheless it is worrisome that this right has been affected by the delays of the Council in resuming this procedure and by the attempt of most countries to abolish, provide that GA Resolution 60/251 barely refers to "a complaint procedure."
[279] Ibidem.
[280] Op. cit supra in note 20 (Alston, p.154); Op. cit. in supra note 117.

From 1972 through 2005, as Alston observes[281], 86 States were scrutinized under 1503 procedure. Of these, 27 were in Africa, 27 in Asia, including the Middle East, 16 in Latin America, 10 in Eastern Europe, and 6 in Western Europe[282].

GA Resolution 60/251 of March 15, 2010, (Operative paragraph 6) envisages: "the Council shall assume, review and, where necessary, improve and rationalize all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights in order to maintain [..] a complaint procedure".

At the outset of the IB process (June 2006-June 2007), to avoid a protection gap, it was promptly decided the extension, for one year, of all relevant mandates, including the two relevant bodies under the confidential procedure (See HRC Decision 2006/102).

At its second session in 2006, the Council considered only three countries under the 1503 procedure: The Islamic Republic of Iran, Uzbekistan, and Kyrgyzstan. As for the latter, it is noteworthy that the recent turmoil in the country led to the adoption of Council's Resolution A/HRC/14/14 – though under item 10 (devoted to advisory services in the field of human rights) – by which it has been requested a domestic enquiry and a specific technical cooperation project with the OHCHR[283].

As for the above first two cases, it has been correctly argued [284]that, despite the deteriorating situation, the Working Group on Situations of the Council decided to discontinue the monitoring on Iran and Uzbekistan[285]. It has been argued that this decision was grounded on the need to preserve, in that juncture, the institution-building process. On a more realistic note, it might be argued that political influence persists as long as cross-regional blocs may affect the simple majority voting rule, being applied within both the relevant Working Groups, if consensus cannot be achieved[286]. It resulted "in a step backward" in the UN human rights protection's practice since the 1960s[287].

On 18 June 2007, the Council adopted Resolution 5/1 to establish "a Complaint Procedure". The "Complaint Procedure" aims at addressing "consistent patterns of gross and reliably attested violations of human rights and fundamental freedoms".

Procedurally the current complaint procedure follows the pattern indicated by ECOSOC Resolution 2000/3, by which it was decided to eliminate the stage before the

[281] Op.cit in supra note 274.
[282] Available at: www.ishr.ch/handbook/Annexes/CommProcs/1503outcms.pdf
[283] Which also proves the operational trend to by-pass Item 4, devoted to human rights situation deserving Council's attention, as well as the possibility of appointing an Independent Expert.
[284] Op. cit. in supra note 250 (p.266).
[285] HRW's report: "UN; HRC remains timid in face of Abuses, available at: www.hrw.org/English/docs/2007/03/30/global15608.htm.
[286] Op. cit. supra in note 259.
[287] Op cit supra in note 274.

plenary of the Sub-Commission. The current process does engage: the Working Group on Communications, consisting of Committee's experts; the Working Group on Situations, consisting of governmental Council's representatives;[288] and the Council.

On a more specific note, similarly to the past procedure, two Working Groups are in charge with the Complaint Procedure: the *Working Group on Communications* (acronym, WGC) and the *Working Group on Situations* (acronym, WGS).

The WGC consists of five independent experts, selected among the Experts of the Advisory Committee on the basis of the principle of the equitable geographic distribution. The experts serve for three years and determine whether a complaint deserves investigation. If this is the case, the WGC submits the complaint to the WGS. The WGS, consisting of five members, one from each regional group (The Council appoints the five members for a term of one year), reports to the Council about the complaints received from the WGC and makes recommendations about the course of action that the Council should take.

The 1503 procedure was reviewed and re-thought as a sort of confidential peer review, as long as no element was introduced to ensure minimum standards referring to the adversarial model. Once the complaint is submitted, the procedure is focused on the State concerned that can: be questioned; submit specific reports and additional information; or request the assistance of the Council. No specific protection tool has been envisaged for the complainant.[289]

7.2. The "Expert Advice"

Operative paragraph 6 of GA Resolution 60/251 set forth: "that the Council shall assume, review and, where necessary, improve and rationalize all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights in order to maintain [..] expert advice; the Council shall complete this review within one year after the holding of its first session".

In the course of the relevant institution-building negotiations within the RRI Working Group, it emerged a common position according to which it was "necessary"

[288] Op. cit supra in note 140; see also op.cit. supra in note 173 (p.83).
[289] Alston observes that follow-up to complaints considered by the Council should be normally included as part of the UPR so as to adequately assess the state of human rights performance in that given country, as was not the case, for instance, in February 2010 when Iran underwent the UPR process. See Alston, P., Re-conceiving the UN Human Rights regime: Challenges confronting the new UN Human Rights Council. Melbourne Journal of International Law, 7, 2006, p. 185 et ff.

to rationalise the expert advice, by introducing a detailed list of tasks to be performed by the new body and by reducing the relevant expertise. It emerged a cross-regional request to ensure that the Expert Body could function, at the strictest direction of the Council, on thematic issues. It was thus emphasized that it should "provide expertise to the Council, in the manner and form demanded by the Council, focusing mainly on studies and research-based advice. Further, such expertise shall be rendered only upon the latter's request, in compliance with its resolutions and under its guidance. Its advice should be limited to thematic issues pertaining to the mandate of Human Rights Council and thus shall not involve itself in any specific country situation and should not adopt any resolutions or decisions"[290].

All the above criteria have been matched. Pursuant to Human Rights Council Resolution 5/1, the Human Rights Council Advisory Committee (hereinafter "the Advisory Committee"), consisting of 18 independent experts[291], has been established to function as a think-tank of the Council and to work at its strict direction (See Chapter IV below). This direction is so strict that, under the current review process of the Council, UN Member States, though with differing motivations, question the added value of the Advisory Committee.

8.1. Procedural (substantive) issues: The Council's Agenda and Programme of Work

At the third session (December 2006), the Council turned the attention to the last aspects of the institution-building process: the Agenda, Programme of Work and Methods of Work; and the Rules of Procedure. To this end, the Council established an ad hoc institution-building Working Group[292]. The Working Group met twice in January and April 2007, respectively.

Since the initial negotiations, it was made clear that the Agenda should not be as structured as the Commission's Agenda, consisting of 19 Items and 19 Sub-Items (At present, the Council's Agenda includes ten Items).

[290] File with the Author.
[291] The Advisory Committee consists of eighteen experts on the basis of the principle of the equitable geographic distribution. They are distributed as follows: five from African States; five from Asian States; three from Latin American and Caribbean States; three from Western European and other States; and two members from Eastern European States (the Sub-Commission consisted of 26 experts).
[292] See Council Resolution 3/4.

Opposite stances between the Western Group and the African Group gave rise to different proposals. The former favoured a more flexible Agenda, while the latter was oriented to reduce the focus on geographic situations save a specific stand-alone Item on the Israeli-Palestinian conflict. Their views diverged on whether the Agenda of the Council should be flexible[293] or detailed. Those in favour of the former proposal stated that the main advantage of a flexible basic Agenda, it was argued, would allow the Council to deal with any issues, at any time and session. On the contrary, those in favour of the latter proposal mentioned that a detailed Agenda, enlisting all the substantive items that the Council should address throughout the year, would ensure transparency and predictability[294].

Substantively, the debate focused on the consideration of all human rights while paying specific attention to key-issues, such as country situations, the right to development, the situation of human rights in Palestine (OPT), and racism.

As for country situations, there was no room to improve the wording referring to the Item on country situations. Item 4 of the Council's Agenda is entitled, "human rights situations that require Council's attention". It is indeed the wording that indicates the activities which presumably will be developed under that Item. "Attention" does not entail any specific result-oriented course of action, while the past Item 9 of the Commission's Agenda referred to ECOSOC Resolution 1503.

As for the right to development, the need to address all human rights, on an equal footing, was stressed by recalling "the universality, indivisibility, interdependence and interrelatedness of all human rights". Additionally, it was also stressed the need for a balance in the treatment of all human rights, by highlighting both civil and political rights and economic, social and cultural rights, including the right to development, without any hierarchy. By recalling the Vienna Declaration and Programme of Action (1993), developing countries extensively debated on the need to deal with "the right to development", on par with the other thematic human rights under the same Agenda's Item (Council's Item 3 is entitled "Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development"). In this regard, one sees merits in dealing with the right to development within the above framework. It entails that there are outstanding signals that the right to development does not have to be tackled alone as an urgent issue (*tout court*) and that it has been

[293] EU Non Paper of 22 November 2006 (file with the Author).
[294] NAM's proposal of 6 December 2006, supported by the African Group, the League of Arab States, and the Organisation of the Islamic Conference (file with the Author).

included among pars. In this regard this inclusion facilitates the long-searched and declaimed “new start”, in a spirit of dialogue and cooperation.

During the negotiations, the very focus was on: “The Human Rights Situation in Palestine and other Occupied Arab Territories (Item 7 of the Council’s Agenda), whose relevant negotiation reflected the above two opposite positions. In particular developing countries requested a separate and standing-alone Item on the situation of human rights in the occupied Palestinian territory and the occupied Syrian Golan. It was stressed that the human rights situation in the occupied Palestinian territory warrants the full attention of the Council until the occupation ends, due to the seriousness of the violations on the ground (the same rationale applies to the relevant Special Rapporteur on OPT whose mandate is *sine die*). On the other hand, those in support of the flexible Agenda rejected the idea of establishing a standing-alone Item on specific country situations. It was stated that no specific human rights situation should be singled out as a permanent Item on the Agenda, to comply with the principle of equality among all human rights.

In the course of the discussion, alternative proposals were put forward by individual delegations. In one instance, it was proposed that the issue of human rights situation in the occupied Palestinian territory could be dealt with under a specific agenda item on “urgent situations”, “emerging themes or issues”, or “current issues”. However this was opposed by those who argued that the situation in Palestine is not an “emerging” issue. In another instance, a suggestion was made that the Agenda could include an item on foreign occupation, in particular with regard to the occupied Palestinian territory, and possibly an item on self-determination. It was thus pointed out that the determination of what is “urgent” is subjective; and a more neutral term was proposed, such as “any situations”. It was also expressed the view that an Agenda’s item on “other issues” could be used as a means for delegations to raise any issue at any time and at any session (UN Doc. A/HRC/4/CRP.2 of March 1, 2007).

Item 7, entitled “Human rights situation in Palestine and in other Occupied Arab Territories”, clearly determines the scope and the focus. The OIC stressed that such “situation” does not fall under the country situations’ Item (namely Item 4) but refers to the thematic issue, “the occupation”. The above decision is contrary to the rationale behind GA Resolution 60/251 (See PP.3-PP5) concerning the universality of human rights.

Last, to give prominence to racism and the follow-up to the Durban World Conference on Racism (2001), the African Group claimed an ad hoc Item 9, to be entitled: "Racism, racial discrimination, xenophobia and related forms of intolerance, follow-up and implementation of the Durban Declaration and Programme of Action[295]"

The final version of the Council's Agenda includes ten Items and 11 sub-Items (UN Doc. AHRC/16/1 of February 2011).

It has been observed that the Agenda is lighter than in the past. Theoretically it should enhance the interrelatedness of human rights, as one could infer from Item 3. In practical terms, this Agenda reflects the North-South divide and is irrespective of the achievements of the past Commission that devoted a specific sub-Item, for instance, to NHRIs.

With specific regard to Programme of Work, it should be recalled that operative paragraph 10 of GA Resolution envisages – on a positive note: "that the Council shall meet regularly throughout the year and schedule no fewer than three sessions per year, including a main session, for a total duration of no less than ten weeks", in addition to the UPR sessions (three sessions, per year) and Special Sessions.

Operative para. 11 of the relevant Assembly Resolution sets out that: "The Council shall apply the rules of procedure established for committees of the General Assembly, as applicable, unless subsequently otherwise decided by the Assembly or the Council". During the Council organisational session, on the margin of the adoption of the de Alba Package, it was emphasized (on June 22, 2007) that the rules of procedure of the Council require that the Council adopts its agenda, programme of work, and calendar for the Council-year at the beginning of each cycle (in June). This result was achieved further to specific negotiations between those States considering the necessity of a yearly calendar, to improve clarity and predictability and those other States stressing the need to ensure flexibility and effectiveness, so that the Council could respond to emergency issues and situations. As a way of compromise, the Council elaborated principles, to ensure that the Agenda and Programme of Work be either predictable, so that all stakeholders can participate, and flexible, so that any issue can be raised, at any time.

As for the principles which guide both the Agenda and Programme of Work of the Council (UN Doc. A/HRC/4/CRP.2 of March 1, 2007), in the course of negotiations,

[295] In line with operative paragraph 5, lett. d of GA Resolution 60/251, which spells out that the Council has to: "Promote the full implementation of human rights obligations undertaken by States and follow-up to the goals and commitments related to the promotion and protection of human rights emanating from United Nations conferences and summits".

frequent reference was made to the principles contained in General Assembly Resolution 60/251, and more specifically, to operative paragraph 4, which stipulates, "the work of the Council shall be guided by the principles of universality, impartiality, objectivity and non-selectivity, constructive international dialogue and cooperation, with a view to enhancing the promotion and protection of all human rights, civil, political economic, social and cultural rights, including the right to development". Additional general principles refer to: accountability, balance, clarity, comprehensiveness, flexibility, focused on implementation, foreseeable, inclusiveness, predictability, and transparency[296]. In this context, it might be positively noted that the "Principles" focus on the concept of "implementation" which somehow recalls the spirit of Article 55-56 of the Charter of the United Nations.

8.2. The Working Methods and Rules of Procedure

As far as the working methods and rules of procedure are concerned, the Council applies the rules of procedure of the General Assembly (since this is a new subsidiary body of the General Assembly), unless it or the General Assembly decides, otherwise.

While the General Assembly rules are similar to ECOSOC's. With the establishment of the Human Rights Council, there are some important differences: for instance, the General Assembly has no provision for the Agenda; and the General Assembly does not have any rules for the participation of Non-State Actors. Moreover, further to the last relevant negotiations and the first cycle practice, the Council has taken some rules based upon the practices of the past Commission on Human Rights, such as the practice referring to the NGOs' participation.

"The methods of work, pursuant to General Assembly Resolution 60/251, should be transparent, impartial, equitable, fair, pragmatic; lead to clarity, predictability, and inclusiveness. They can also be updated and adjusted through time". Along these lines, mention has to be made of the following elements: i. the practice of the High Level Segment (as institutionalised in the last years of the Commission and then included in the de Alba Package); the Rules of Procedure (Arts.1-20) might be amended and/or changed. In particular it is worthy of mention the following Rules:

[296] "Principles: Universality; Impartiality; Objectivity; Non-selectiveness; Constructive dialogue and cooperation; Predictability; Flexibility; Transparency; Accountability; Balance; Inclusive/comprehensive; Implementation and follow-up of decisions (A/HRC/5/L.2)".

i. Rule 1. stipulates: "The Human Rights Council shall apply the rules of procedure established for the Main Committees of the General Assembly, as applicable, unless subsequently otherwise decided by the Assembly or the Council").

ii. A specific provision is devoted to the "Convening of the special sessions[297]"(Rule 5."The rules of procedure of special sessions of the Human Rights Council will be the same as the rules of procedure applicable for regular sessions of the Human Rights Council");

iii. In the Package, there is a clear reference to the role of NHRIs reflecting both Operative Para. 11 of the relevant Assembly resolution and Commission resolution (E/CN.4/RES/2005/74). The latter enhances the role of NHRIs within the Commission framework. Rule 7. sets outs "(omissis) Participation of national human rights institutions shall be based on arrangements and practices agreed upon by the Commission on Human Rights, including resolution 2005/74 of 20 April 2005, while ensuring the most effective contribution of these entities";

iv. As for the quorum, the last minute negotiations aimed at raising the threshold for the adoption of country-initiatives, by envisaging a two-third majority of votes. As discussed, such option was set aside. Thus, Rule 19 on Quorum stipulates: "The President may declare a meeting open and permit the debate to proceed when at least one third of the members of the Council are present. The presence of a majority of the members shall be required for any decision to be taken"). Accordingly, as for the "Majority required", it has been decided (Rule 20) "Decisions of the Council shall be made by a simple majority of the members present and voting, subject to Rule 19 (on quorum)".

[297] In 2006, the Council held four special sessions concerning two areas, namely the Middle East and the Sudan (Darfur). As to the latter, it was included in the work of the HRC upon request of both the S-G and the HC in December 2006 in order to i. Address an urgent issue of major concern to the UN; ii. Disrupt the perception that the Council overly active concerning one country and silent regarding others. Emphasis was placed on the need to promote implementation of relevant recommendations on Darfur as adopted by the Council, the former Commission and other UN HR institutions. More generally, efforts had been made to ensure that decisions and resolutions adopted by the Council would not remain dead letter and deprived of any implementation. Accordingly, an important text was adopted, also by consensus, which calls for the implementation for previous special sessions resolutions. See Eudes, M., De la Commission au Conseil: varie reforme ou faux-semblant : vraie reforme ou faux-semblant ? Annuaire Français de droi internatiola, 2007, p. 599-616.

9. The work of the Council

As for the standard-setting activity, the Council adopted at the first session (June 2006), new human rights standards, as negotiated within the past Commission framework: the International Convention for the Protection of All Persons from Enforced Disappearance (UN Doc.A/61/488 of December 2006) and the UN Declaration on the Rights of Indigenous Peoples (UN Doc. A/HRC/RES/5/2 of June 2006). In this context, it is also worthy of mention the adoption of the Convention on the Rights of Persons with Disabilities (UN Doc. A/61/106 of January 2007), the work undertaken by the Council's Working Group on the Draft Optional Protocol to the ICESCR, as adopted by the General Assembly, in December 2008 (UN Doc. A/63/117), the Guidelines for Alternative Care of Children, the so-called Guidelines on alternative parental care (UN Doc.A/HRC/RES/11/7 of June 2009) and the current work by the inter-governmental Working Group on the Draft Optional Protocol to the UN Convention on the Rights of the Child "to provide a communication procedure (UN Doc. A/HRC/RES/13/3 of March 2010)".

As recalled, initiatives on the creation of complementary standards aimed at combating all contemporary forms of racial discrimination have been launched. With specific regard to the eradication of racism, it might be recalled the Durban Review Conference, which took place in April 2009, in Geneva (when Italy, Israel, the US, the Netherlands and few other States decided not to participate). To this end, the Council decided to transform itself into a prep-Committee, and embarked on a series of activities relating to racism and racial discrimination.

Such controversial event whose Outcome Document was endorsed by the General Assembly (UNGA 64), has mandated the Council to broaden the basis of the work in the field of relevant complementary standards.

When the Council deals with racism, freedom of expression, freedom of religion and defamation of religions, there is the tendency by most States to overlap the above issues.

During the RRI process, many debates took place to question the ToR of the mandates of the Special Rapporteur on Freedom of Religion and the Special Rapporteur on Freedom of Expression. On March 28, 2008, the Council adopted an amendment to the duties of the Special Rapporteur on Freedom of Expression which was criticized by the Western countries and various human rights NGOs. Upon proposal by the OIC and

the African Group, it was added the following duty: "(d) To report on instances in which the abuse of the right of freedom of expression constitutes an act of racial or religious discrimination, taking into account articles 19 (3) and 20 of the International Covenant on Civil and Political Rights, and general comment No. 15 of the Committee on the Elimination of All Forms of Racial Discrimination, which stipulates that the prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with the freedom of opinion and expression" (See p. 67 in the official draft Report of the Council, 7/L.10).

The relevant amendment, passed by 27 votes in favor, 15 against and three abstentions. As a result of that amendment, about 20 initials co-sponsors of that resolution (aimed at renewing the mandate of the Special Rapporteur) withdrew their support, due to the above change in the mandate under reference. The amendment was criticised by organizations, including Reporters Without Borders and Human Rights Watch, sharing the view that the amendment threatens the right to freedom of expression. As recalled in the Introduction to the present Thesis, the Outcome Document of the 2009 Durban Review Conference, under para. 12 outlines a dangerous overlap between freedom of religion, racism and defamation of religion (without considering that the last issue has never gotten the support by the Western countries).

Conclusion

In the lapse of time between the last session of the Commission on Human Rights (March 27, 2006) and the first Session of the Council (June 19, 2006), there was the fear that during the first year of the Council and thereon, there might be a protection gap.

The current work of the Council shows specific improvement in the field of standard-setting while the protection area needs to be improved, as long as the Council seems focused only on the UPR-related work and on Special Sessions 'tool. So far, the Council has been unable to address, during the regular sessions, situations that require Council's attention. On the other hand, the establishment of the Council with an elevated status within the UN shall be considered as an important step towards the effective implementation of relevant Charter's provisions, *in primis* Article 1, para. 3, Article 55 and Article 56.

CHAPTER II

The "eyes and ears" of the Council: The role of the Special Procedures vis-à-vis the Human Rights Council

"The Special Procedures are the eyes and ears of the Commission. Their reports should thus reflect the reality they see and hear in the field", Amb. Diallo[298]

INTRODUCTION

The acknowledgment of the role of "the system of the Special Procedures" dates back to the 1993 Vienna World Conference on Human Rights (para.95 of UN Doc. A/CONF.157/23, of June 1993): "The World Conference on Human Rights underlines the importance of preserving and strengthening the system of special procedures [..]".

After the creation of the first Special Procedure (See Commission's Resolution 2 (XXIII) 1967), namely the ad hoc Working Group of Experts on South Africa

[298] See UN Doc. E/CN.4/1999/3, para.6, of July 1999, entitled Study of the High Commissioner for Human Rights on procedures for ensuring implementation of, and follow-up to recommendations of special rapporteurs/representatives, experts and working groups.

(1967)[299], it took twenty-three years to achieve the above result. In this regard, scholars[300] argue that "The system of Special Procedures" has been developed gradually, without a clear *telòs*[301]. However, over the very last years, Special Procedures Mandate-Holders (acronym, SPMH) have evolved to function. on a systemic basis[302], as shown by the institutionalised practice of the annual meetings (which takes place, every year, in June) and by the recent creation of the Coordination Committee of the Special Procedures Mandate-Holders[303].

Within the framework of the newly established Human Rights Council, Op.6 of GA Res.60/251 sets forth: "The Council should assume, review and, where necessary, improve and rationalize all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights, in order to maintain a system of Special Procedures [..]. The Council should complete this review, within one year[304]".

"A system of Special Procedures" refers to both geographic and thematic mechanisms in the field of human rights, as originally developed within the framework of the then Commission on Human Rights and, subsequently, inherited by the Human Rights Council, to address either specific country situations or thematic issues in the field of human rights.

This system includes UN Special Rapporteurs, Independent Experts, Working Groups, Secretary-General Special Representatives and other bodies. More specifically, "Special Envoy", "Special Rapporteur", "Special Representative of the Secretary-General" or "Independent Expert" refer to those Mandate-Holders who have to perform individually their mandate, while Working Groups are composed of - usually - five experts, reflecting the principle of equitable geographic distribution.

From a legal standpoint, Special Procedures Mandate-Holders have the status of "experts on mission", in line with the Convention on Privileges and Immunities of the United Nations (1946). Accordingly they enjoy privileges and immunities with a view to the independent performance of their mandate.

Unlike other human rights mechanisms, such as the Treaty-monitoring Bodies, alternatively called Treaty-based Bodies, whose mandate originates from the relating

[299] Until long after (1967-1993) it would have been acknowledged that there is a "system". See Sunga, L., The Special Procedures of the UN Commission on Human Rights: Should they be scrapped?, International Human Rights Monitoring Mechanisms, Vol.7, M. Nijhoff Pub. 2001, p. 233-270.
[300] Ibidem, see also Clapham A, United Nations Charter-Based Protection of Human Rights, 2010, p. 1-23, available at: http://graduateinstitute.ch/faculty/clapham/HR%20Class2010/claphamCharterbasedHR.pdf.
[301] Ibidem (Clapham, p.4 et ff).
[302] Op.cit in supra note 2, p. 240 et ff.
[303] Also to counter-balance, somehow, the resistance and the various attempts by several UN Member States that aim at reducing the impact of the Special Procedures' work.
[304] See also para.6.1 of Chapter I.

binding Treaty (as a way of example, it might be recalled the UN Human Rights Committee relating to the ICCPR or the UN Committee on the Rights of the Child relating to the UN Convention on the Rights of the Child), the creation of Special Procedures is negotiated within the Council, an inter-governmental body, that determines the establishment, the renewal or any other variations,[305] by means of a non-binding Resolution.

By definition, these mechanisms are established, on an *ad hoc* basis, to examine, monitor and publicly report – and to follow-up - either on human rights issues or on a specific human rights situation, in a given country (or territory), with a victim-oriented approach[306]. At the Vienna World Conference (1993), Special Procedures addressed UN Member States by stressing their functions: "what we do is render the international norms that have been developed more operative [..] the core of our work is to study and investigate in an objective manner, with a view to understanding the situations and recommending to governments solutions to overcome the problem of securing respect for human rights (UN Doc. A/CONF.157/9, dated June 16, 1993)[307].

Scholars, NGOs and human rights practitioners[308] agree on the invaluable role played by independent and impartial Special Procedures.

Against this background, the practice shows that they encapsulate a contemporary conflict: on one hand, they have developed the ability to promptly stand close to the victims of human rights violations wherever they occur, by undertaking country missions, sending communications, joint *communiqués*, and urgent appeals to the UN Member States concerned; on the other, these mechanisms stem from the willingness of UN Member States to deal with specific human rights issues, either thematically or geographically. When Special Procedures voice too many concerns (The DRC, arbitrary detention, secret detention) or raise too sensitive issues (sexual orientation and LGBT rights, secret detention, broadening the scope of arbitrary detention), their conduct and working methods are challenged, as was the case with the presentation of the joint UN Report on secret detention and counter-terrorism, at the Council's sessions 13th-14th, between March-June 2010[309]. On that occasion States

[305] Op.cit. in supra note 2, See also Nifosi, I. The UN Special Procedures in the Field of Human Rights. Institutional History, Practice and Conceptual framework, in Yearbook on Humanitarian Action and Human Rights, 2005, p.131 et ff; see further Nifosi, I., The UN special procedures in the Field of Human Rights, Intersentia, Antwerpen, Oxford, 2005, p.17 et ff.

[306] See Alston, P., The United Nations and Human Rights: A Critical Appraisal, Oxford, Clarendon Press (1992(a), 1992, p. 126-210; See also Ramcharan B.G., The Protection Roles of UN Human Rights Special Procedures, M. Nijhoff Ed., 74, Nijhoff Law Specials, 2009, p. 51 et sequitur.

[307] See Gutter J., Special Procedures and the Human Rights Council: Achievements and Challenges Ahead, in Human Rights Law Review 2007, p. 93-107.

[308] See Marchesi, A., and Palmisano, G., Il sistema di garanzia dei diritti umani delle Nazioni Unite: prospettive di riforma e limiti intrinseci, in www.costituzionalismo.it, 2006, p.13; See also op.cit. in supra notes 2,3,9, respectively.

[309] which may trigger some of the consequences reported under paragraph 6.3 of Chapter I.

complained that relevant Special Procedures had acted outside the mandate, in conflict with the newly introduced Code of Conduct for Special Procedures Mandate-Holders (Council's Resolution 5/2 of June 18, 2007)[310].

At present, within the Council's framework, there are eight country mandates and thirty-first thematic mandates, respectively[311].

1. The origin of "The system of the Special Procedures"

By the joint reading of Articles 62, paras.1-2 and Article 68 of the Charter of the United Nations, ECOSOC can undertake, including through its subsidiary organs, studies on human rights matters: "The Economic and Social Council may make or initiate studies and reports with respect to international economic, social, cultural, educational, health, and related matters and may make recommendations with respect to any such matters to the General Assembly, to the Members of the United Nations, and to the specialized agencies concerned. It may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all"; and "The Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions".

As recalled by some scholars[312], the ECOSOC decided, by its Resolution 9 (II) of June 1946, to authorize the then Commission, to establish ad hoc working groups and individual experts, to carry out studies on specific human rights issues: "(para.3) The Commission is authorized to call in ad hoc working groups of non-governmental experts in specialized fields or individual experts, without further reference to the Council, but with the approval of the President of the Council and the Secretary-General."

However, as discussed[313], the UN and the international community had just entered the Cold War era. In that juncture, the Commission stated not to have the power: "to take any action in regard to any complaints concerning human rights,[314]"

[310] See the relevant UN Press Release available at: http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10103&LangID=E.
[311] See the complete list available on the OHCHR website: http://www2.ohchr.org/english/bodies/chr/special/index.htm.
[312] See Ramcharan B.G. The Concept and Present Status of the International Protection of Human Rights: forty years after the UDHR. Dordrecht; M. Nijhoff Publishers, 1989, p. 408, 438, 520 et ff.
[313] See para.1.1 of Chapter I.
[314] See Commission on Human Rights, Report of the First Session, E/259, (para.22).

namely communications on gross violations of human rights.[315] This "Declaration of Inaction" was later endorsed by ECOSOC Resolution 75(V) of August 1947[316]. The then UN Secretary-General, Trygve Lie, voiced his concern about the above decision, in the UN Report on "the Present Situation with regard to Communications concerning Human Rights (as presented at the fifth session of the Commission (See UN Doc. E/CN.4/1949/165)", by which, he stressed that the Organization's role could be undermined.

Scholars note the negative impact of the above decision[317]. Some other scholars[318] also note that the situation worsened when, within the UN framework, the US decided, in 1953, not to maintain the lead in the field of human rights. Rather the US proposed an Action Plan (renamed by liberals: "the Inaction Plan"[319]) for the UN, which envisaged annual country reports, advisory services, studies and research-related activities[320]. Accordingly the UN developed some forms of assistance by providing - though in a limited number - advisory services and technical cooperation projects in the field of human rights, in accordance with General Assembly Resolution 926 (X) of 1955 on advisory services in the field of human rights, by which it authorized "the following forms of assistance: (a) advisory services of experts, (b) fellowships and scholarships, and (c) seminars". From 1953 throughout 1962, Costa Rica and Haiti requested advisory services to the UN[321].

In 1959, by Resolution 728 F (XXVIII), the ECOSOC confirmed the Commission's declaration of inaction: "The Commission recognizes that it has no power to take any action in regard to any complaints concerning human rights", though it requested the UN Secretary-General to prepare, without reporting the sources, a list of relevant communications, only for circulation among the Commission's Members, during private sessions[322].

Of that period, it has been generally acknowledged that the very positive note refers to the intense UN standard-setting activity[323]. Beside from the Universal Declaration of Human Rights, the Commission put forward, with the assistance of the

[315] See Moller, J.Th., Petitioning the United Nations, in Universal Human Rights, Vol. I, No.4, J. Hopkins University Press, 1979, p.57 et ff.
[316] See UN Doc. Report 26 of the first session of the Commission, Chapter V, as approved by ECOSOC Resolution 75 (v).
[317] See Prof. Lauterpacht H., International Law and Human Rights, 1968, p. 236; Op. cit. in supra note 9 (Alston, p.142).
[318] See Forsythe D.P., Turbulent Transition: From the UN HRC to the Council, in "The United Nations, Past, Present and Future, Proceeding of the 2007 Francis Marion University – UN Symposium, Global Political Studies Series, Nova ed., 2007, p.10 et ff.
[319] Ibidem
[320] See Tolley, H. Jr., The UN Commission on Human Rights, Boulder, Westview, NY. 1987, p.45 et ff..
[321] This activity flourished following the request of services by, among others, Bolivia, Equatorial Guinea and Uganda from the 1980s onwards.
[322] See Kamminga M.T., Inter-State accountability for human rights violations, University Pennsylvania Press, 1992, p.84.
[323] Op. cit. in supra note 8.; See also Lempinen, M., Challenges facing the system of special procedures of the United Nations Commission on Human Rights, Abo, Finland, Institute for Human Rights, Abo Akademi University, 2001, p.25 et ff.

then Sub-Commission, the draft Covenant on Economic, Social and Cultural Rights (UN Doc. A/RES/2200 (XXI)A-B of 1966) and the draft Covenant on Civil and Political Rights (A/RES/2200 (XXI)A-B-C of 1966), as well as the draft International Convention on the Elimination of All Forms of Racial Discrimination (UN Doc.A/RES/C.3/L1221 of 1965).

Considering the paralysis in the Security Council and the declared "inaction" of the Commission, it has been argued that the standard-setting activity was the result of a political compromise among the Great Powers. However, unlike the Security Council, the approach of the Commission changed when the General Assembly started admitting new members emerging from the decolonization process (See UN GA Resolution 1514 (XV) of 1960)[324].

The composition of the Commission became more geographically representative. As discussed, this factor contributed to accelerate the advancement of human rights, from both the substantive law and procedural standpoints. To respond to various and increasing requests, mainly from developing countries, the Commission created the first mechanisms aimed at examining gross violations of human rights "as exemplified by the apartheid policy", in accordance with ECOSOC Resolution 1235[325].

On a more specific note, the new international scenario triggered various effects in the field of human rights:

i. The modification of the composition of the Commission, from a Western-dominated body to a more geographically representative one[326];
ii. New Member States from the African and Asian Regions that could participate in the relevant decision-making;
iii. Following the increasing requests of action, from developing countries, relating to, for instance, the situation of the Buddhists in Southern Viet-Nam and, more importantly, the Apartheid in Southern Africa, the Commission initiated to create ad hoc monitoring mechanisms (the first Special Procedures)[327].

[324] Op. cit. in supra note 23 (Tolley); see also in supra note 9 (Alston).
[325] As later supplemented by an additional procedure, namely the so-called 1503 procedure.
[326] See for instance GA Res.1923 (XVIII) on "the equitable geographic representation on the Commission on Human Rights," of December 1963.
[327] Kedzia, Z., United Nations mechanisms to promote and protect human rights, in Janusz Symonides (ed.) in Human Rights International protection monitoring enforcement, Aldershot, Ashgate, 2003, p.51.

In that juncture, the UN General Assembly mandated, by Resolution 1761 (XVII) of December 1962, a Special Committee of Member States' representatives, "to keep the racial policies of the Government of South Africa under review (See op.5, lett.1) and to report to both the General Assembly and the Security Council, accordingly. Against this decision, the Government of South Africa invoked the principle of "non interference in internal affairs[328].

Following the persecution of the Buddhist community in Viet-Nam, under the military regime of General Ne Win, it was decided, by a GA cross-regional initiative, to dispatch, in October 1963, a fact-finding mission, led by Mr. Humphrey, the first Director of the UN Human Rights Division, to investigate on the allegations of human rights violations[329].

In 1965, in parallel with the increasing number of individual petitions from South Africa, the UN Special Committee on Decolonization requested the Commission to take action on violations of human rights in colonial and dependent territories and in South Africa under apartheid regime. In 1966, the UN General Assembly adopted Resolution 2144 (XXI), by which it invited: "The Economic and Social Council and the Commission on Human Rights, to give urgent consideration, to ways and means of improving the capacity of the United Nations, to put a stop to violations of human rights wherever they may occur".

On March 6, 1967, the Commission established by Resolution 2 (XXIII) an ad hoc Working Group of experts on South Africa (acronym, WGSA), to examine the allegations, inter alia, of ill-treatment of political prisoners [and trade union workers][330].

By the introduction of the above mechanism, the Commission entered the phase of action-oriented measures. Backed by the ECOSOC, the Commission began laying the foundations of the Special Procedures.

In March 1967, the Commission adopted Resolutions 8 and 9 (XXIII), as later endorsed and broadened by ECOSOC Resolution 1235 (XLII)[331], by which the subsidiary body of the ECOSOC started developing a public procedure in order to give

[328] Article 2, para.7 of the Charter of the United Nations.
[329] At that time he put forward the proposal of an High Commissioner for Human Rights, though this idea will take thirty years to get through. See Humphrey, John P., Human Rights and the United Nations: A Great Adventure (New York: Transnational Publishers, 1984. See also op.cit. in supra note 18.
[330] See Commission's Resolution 2 (XXIII) of 1967.
[331] See Pp.1 and Op. 1 of ECOSOC Res. 1235 (XLII): "*Noting* resolutions 8 (XXIII) and 9 (XXIII) of the Commission on Human Rights, 1. *Welcomes* the decision of the Commission on Human Rights to give annual consideration to the item entitled "Question of the violation of human rights and fundamental freedoms, including policies of racial discrimination and segregation and of apartheid, in all countries, with particular reference to colonial and other dependent countries and territories," without prejudice to the functions and powers of organs already in existence or which may be established within the framework of measures of implementation included in international covenants and conventions on the protection of human rights and fundamental freedoms; and concurs with the requests for assistance addressed to the Sub-Commission on Prevention of Discrimination and Protection of Minorities and to the Secretary-General."

annual consideration to "the question of the violations of human rights and fundamental freedoms, in any part of the world", as follows:

> i. The Sub-Commission on Prevention of Discrimination and Protection of Minorities should screen the relevant communications, submitted to the UN[332];
> ii. Those communications appearing "to reveal a pattern of gross violations of human rights" were to be forwarded to the Commission;
> iii. The Commission could publicly debate on question of violations of human rights and fundamental freedoms in the course of its annual sessions.
> iv. The Commission could decide either to study or to investigate the situation before referring it to the ECOSOC[333];

In June 1967, ECOSOC broadened the mandate of the above WGSA (See ECOSOC Resolution 1216 (XLII), by including the examination of the communications, as submitted by the World Federation of Trade Unions, through ILO, claiming the infringement of trade union rights and the ill-treatment of trade union workers.

By Resolution 1236 (XLII), entitled, "Questions of the violation of human rights and fundamental freedoms, including policies of racial discrimination and segregation and of apartheid, in all countries, with particular reference to colonial and other dependent countries and territories", the ECOSOC condemned the lack of cooperation from the Government of the Republic of South Africa.

In this context, the ECOSOC introduced by its Resolution 1235 (XLII) the so-called "1235 public procedure", as follows:

> a. [OP1.] "Welcomes the decision of the Commission to give annual consideration to the Item entitled, "Questions of the violation of human rights and fundamental freedoms, including policies of racial discrimination and segregation and of apartheid, in all countries, with particular reference to colonial and other dependent countries and territories [..]";
> b. [OP 2.] "Authorizes the Commission and the Sub-Commission on Prevention of Discrimination and Protection of Minorities, in conformity with paragraph 1 of Commission's resolution 8 (XXIII), to examine information

[332] By its Decision 1999/256, the Economic and Social Council renamed the Sub-Commission, from Sub-Commission on Prevention of Discrimination and Protection of Minorities to Sub-Commission on the Promotion and Protection of Human Rights.
[333] Op. cit. in supra note 15; Op.cit. in supra note 8 (Nifosi, p.12).

[not only communications] relevant to gross violations of human rights and fundamental freedoms, as exemplified by the policy of apartheid […];

c. [OP.3] "Decides [that the Commission on Human Rights] may, in appropriate cases, and after careful consideration of the information thus made available to it, in conformity with the provisions of paragraph 1 above, make a thorough study of the situations which reveal a consistent pattern of violations of human rights [..] and report, with recommendations thereon, to the Economic and Social Council".

The above Resolution paved the way to develop the first of the two main procedures of the Commission, by which the latter could[334]:

i. Deal with gross (large-scale, systematic) human rights violations wherever and whenever they occur[335];
ii. Tackle human rights violations regardless of the sources, from individuals, groups of individuals or NGOs ;
iii. Initiate a relevant public debate, upon initiative of one of its members[336];
iv. Monitor relevant situations by ad hoc mechanisms (as was the case with South Africa).

The introduction of the public annual debate on "the violations of human rights and fundamental freedoms occurring in any part of the world" usually triggered the adoption of the so-called condemnatory Resolutions of the Commission, by which to stress that a given situation was a matter of "concern" or "serious concern[337]". As discussed, the debate and the relevant Resolution were adopted under Item 9[338] of the Commission's Agenda. Initially, by these Resolutions the Commission established ad hoc Working Groups, which were later replaced by individual Special Rapporteurs, to carry out in-

[334] Op. cit. in supra note 11, p.9.
[335] It has been correctly argued that the procedure was initiated upon a political decision. As a consequence the initial definition of a situation of gross violations, being a matter of international concern, was the result of a political decision (ibidem). As such, it was subject to a negotiated definition so that the practice shows that, over the years, the relevant resolutions could express concern/serious concern about either gross violations of human rights or grave, widespread and systematic violations of human rights or large-scale violations of human rights.
[336] Scholars stress the political rationale behind the creation of the country procedures. Marchesi,A., Diritti Umani e Nazioni Unite, diritti, obblighi e garanzie, Ed. Franco Angeli, 2007, p.74.
[337] See for instance para.1 of the Council's Resolution 13/14 of March 2010 on the situation of human rights in the DPRK.
[338] Op.cit. in supra note 2 (p.23,69). See also paragraph 6.3 of Chapter I.

depth studies[339] on those situations revealing "a consistent pattern of violations of human rights (operative para.3 of ECOSOC Resolution 1235 (XLII)[340]".

In this regard scholars argue that, despite the political nature of these Resolutions, the UN aimed at providing assistance to the State concerned, to ensure the fulfilment of the obligations stemming from Articles 55-56 of the Charter of the United Nations[341].

In that juncture (1967-1968), the international scenario was characterised by significant events, such as the June 1967 "Six-day War" in the Middle East. The UN General Assembly proclaimed the year 1968 as the International Year for Human Rights (UN Doc. GA Resolution 2217 (XXI). In Tehran, it took place the World Conference on Human Rights (1968), by which it was stressed, inter alia, that: "6. States should reaffirm their determination effectively to enforce the principles enshrined in the Charter of the United Nations and in other international instruments that concern human rights and fundamental freedoms[342]". In 1969[343], the Commission adopted a Resolution on Israel[344], by which it established an ad hoc Working Group on the Arab Territories (acronym, WGAT).

Despite the similarities in the mandates of the WGSA and of the WGAT, some scholars emphasize their differing approach to the work[345]. The former reported on and overtly denounced the conduct of the Government of South Africa, while the latter paid much more attention to the political context.[346]

In those years, many States, including those emerging from the decolonization, were experiencing dictatorial regimes. To circumscribe the inherent publicity of the 1235 procedure[347], the ECOSOC introduced a confidential procedure, which is commonly considered as the second main procedure developed within the Commission.[348]

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[339] Ibidem; see also op. cit. in supra note 26.
[340] See J. Avery Joyce, Human Rights, International Documents, Vol.3. Ed. Sijthoff and Nordooff, 1978, p.338 et sequitur.
[341] Op. cit. supra in note 39 (p.76).
[342] See U.N. Doc. A/CONF. 32/41 at 3 (1968).
[343] Ibidem; see also Gutter, J. Thematic Procedures of the UN Commission on Human Rights and International Law: in Search of a Sense of Community, Ed. Intersentiam, School of Human Rights Research Series, Vol.21,2006, p. 58.; see further Kamminga, M.T., The thematic procedures of the UN Commission on HR", 34, Netherlands International Law Review, 1987, p.299.

[344] See Commission's Resolution 6 (XXV) of 1969.
[345] Op. cit. in supra note 8 (p.68).
[346] Ibidem; The mandate of the WGAT will later evolve into the current open-ended mandate Special Rapporteur on the situation of human rights in the OPT since 1967. This is the only the Special Rapporteur whose mandate is not subject to any expiration but to the duration of the Israeli occupation in the Palestinian Territories.
[347] Historically, the need emerged when the Sub-Commission made public NGOs' information referring to the violations of human rights perpetrated by the military regimes running Greece and Haiti, respectively.
[348] Op. cit. in supra note 9, (p.139-142); see also op. cit. in supra note 46 (p. 60); see further op.cit in supra note 11; and Rehman, J, in International Human Rights Law, Pearson Education Lim., Essex, 2010, p.60 et ff.

On May 27, 1970, ECOSOC adopted Resolution 1503 (XLVIII) providing for a confidential complaint procedure, whereby "relevant situations" were to be dealt with by the Commission's members, in private sessions, at the solely presence of the country concerned.[349]

ECOSOC Resolution 1503 authorized: "the Sub-Commission on Prevention of Discrimination and Protection of Minorities, to appoint a Working Group [on communications]", with the mandate to consider "all communications, received by the Secretary-General, under Council Resolution 728F (XXVIII) of 30 July 1959 (first phase of the procedure)". Those communications, "which appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms (See Op.1)" were brought to the attention of the Plenary of the Sub-Commission (second phase of the procedure). The Sub-Commission should determine whether to refer to the Plenary of the Commission on Human Rights, for its consideration, "particular situations" which appear to reveal a consistent pattern of gross and reliably attested violations of human rights. Once transmitted "the particular situation", the Commission should examine any situation referred to it by the Sub-Commission, to determine (third phase):

> "(a) Whether it requires a thorough study by the Commission and a report and recommendations thereon to the [Economic and Social] Council;
> (b) Whether it may be a subject of an [confidential] investigation by an ad hoc committee to be appointed by the Commission which shall be undertaken only with the express consent of the State concerned [..]";
> (c) at the latest, a dialogue could be initiated by the Commission with the country concerned (as was the case, in 1974, with the regime of Pinochet in Chile in 1974).

By ECOSOC Resolution 1503, it was requested that all relevant activities "shall remain confidential until such a time as the Commission may decide to make recommendations to the Economic and Social Council (See OP.8) .[350]"

Beside from the political rationale behind it, the upgrade determined by ECOSOC Resolution 1503 is of immediate evidence. Those "communications"

[349] See OHCHR Fact Sheet No. 27 available at http://www2.ohchr.org/english/bodies/chr/further-information.htm) (For a negative assessment of the confidentiality at risk of political manipulation, see Liskosky, HRJ, 1975, p.902, as cited by Gutter in supra note 46).
[350] Op.cit. in supra note 2.

appearing to reveal "a reliably attested pattern of gross violations of human rights and fundamental freedoms" could evolve into "situations", to be brought to the attention of the Plenary of the Commission, though in a confidential setting.

The above framework was later amended by ECOSOC Resolution 1990/41 of May 1990, by which the ECOSOC created (Op.1) the Working Group on Situations of the Commission (consisting of States' representatives: one for each regional group), in charge with examining those "situations" to be referred to the Plenary of the Commission (it was thus introduced a fourth phase).

By ECOSOC Resolution 2000/3 of June 2000, it was eliminated the phase before the Plenary of the Sub-Commission so that the communications were transmitted from the WGC of the Sub-Commission directly to the WGS of the Commission. By this Resolution, it was also envisaged, among the operational tools at disposal of the Commission, the appointment of an Independent Expert, as follows:[351]"In accordance with the established practice, the action taken in respect of a particular situation should be one of the following options:

i. To discontinue consideration of the matter or action is not warranted;
ii. To keep the situation under review in the light of any further information received from the Government concerned and any further information which may reach the Commission under the 1503 procedure;
iii. To keep the situation under review and to appoint an independent expert;
iv. To discontinue consideration of the matter under the confidential procedure governed by Council resolution 1503 (XLVIII), in order to take up consideration of the same matter under the public procedure governed by Council resolution 1235 (XLII) [..]".

In brief it was introduced a complex and structured confidential procedure involving both the Sub-Commission and the Commission, by which the latter could

[351] Under this formula, it was appointed, in 2005, an Independent Expert on the situation of human rights in Uzbekistan. Despite his attempt to undertake a dialogue with the State concerned, he denounced the lack of cooperation (file with the Author). Despite the situation on the ground, the Council decided, in 2007, to discontinue the consideration. Various international NGOs, such as HRW and AI, voiced his concern and denounced the Council's "inaction". See http://www.amnesty.org/en/region/uzbekistan/report-2007).

either conduct a thorough study or investigations, through ad hoc country mandates or initiate a dialogue with the Government concerned, in a confidential manner[352].

Notwithstanding the main feature of this procedure[353], namely the confidentiality, the Soviet delegation argued that: these communications cannot be at basis of whatsoever investigations, as long as individuals do not have the *locus standi* to submit complaints against Governments because of their irrelevant status at the international level - they are not subjects of international law; and, more importantly, there is the need to preserve the principle contained in Article 2, para.7, of the Charter of the United Nations.[354]„

In the middle Cold War era, it was often recalled that any "interference into domestic human rights situations" would challenge the foundations of the UN, in particular "the equal sovereignty of its Members".

However, the Commission decided, in 1975, to publicly appoint, under the public procedure, an ad hoc Working Group (WGC) to investigate the situation of human rights in Chile (See Commission's Resolution 8 (XXXI) of February 1975)[355]

Many scholars[356] argue, that the creation of the ad hoc Working Group on Chile (acronym, WGC)[357] marked the effective beginning of a system overcoming the strict interpretation of Article 2, para.7 of the Charter of the United Nations, to favour the effective implementation of Article 1, para.3, Articles 55-56, 62, 68 of the Charter of the United Nations.

Specifically, Kamminga argued in 1992[358] that the mere ascertainment of a pattern of gross violations, not relating to a threat to international peace and security, becomes the ground for the a specific UN action in the field of human rights, by making full use of the Commission's tools, in particular the Special Procedures. Other scholars argue that, regardless of the specific methods, since the outset the UN has been entitled, "to utilize for each situation such methods or procedures as it considered best suited to deal with that situation[359]„.

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[352] See "From State-Centric Int'l Law Towards a Positive Int'l Law of Human Rights, Excerpt from *The Protection of Human Rights in Disintegrating States: A New Challenge*, by Bartram S. Brown, 68 CHI-KENT L. REV. 203 (1992), available at: http://www.kentlaw.edu/faculty/bbrown/classes/HumanRightsSP10/CourseDocs/2FromStateCentric.pdf, p.1-3.
[353] See UN E/AC.7/SR.641, as cited by Kamminga, p.84. Emphasis added.
[354] See also Greece and Haiti challenging relevant reports on the situation of human rights as infringement of Article 2, para.7. In this regard, see op.cit.in supra note 25, (p.61). See also Zuijdwick, Petitioning the UN: A study in HR, 1982 1982, p.90 as quoted by op.cit.in supra notes 10, 8, respectively.
[355] See Bossuyt, M. ,"The development of Special Procedures of the United Nations Commission on Human Rights", HRLJ, vol. 6, 1985, p.185; see also op.cit. in supra note 2, p.236.
[356] Ibidem, see also op.cit.in supra note 9, see further op.cit. in supra notes 46 and 25, respectively.
[357] Nifosi stresses that "despite the ambiguity of the Pinochet regime (apparent cooperation and de facto inaction), the WGC managed to investigate and collect relevant information. Zuijdwick, as cited by Nifosi, argued that the publicity brought by the WGC, put pressure on the Chilean Government. Op. cit, in surpa note 9.
[358] Op.cit. in supra note 25 (p.93 et ff.).
[359] Ibidem.

In 1977, there were three operational Working Groups: on South-Africa, on the OPT, and on Chile, respectively[360].

In that juncture, as the then acting High Commissioner, B. Ramcharan, notices: "because of the logistics and costs, the United Nations could not investigate gross violations of human rights in many countries with groups" of experts. The UN was looking for a different formula also to initiate an increasing number of investigations.

In 1979 the Commission appointed an expert to replace the above WGC and another expert to study the human rights situation in Equatorial Guinea[361]. Afterwards the Commission initiated to appoint many other country Rapporteurs, under the 1235 public procedure, such as the Special Envoy of the Commission on Human Rights on the situation of human rights in Bolivia, the Special Representative of the Commission on Human Rights on the situation of human rights in El Salvador (both appointed in 1981) and the Special Rapporteur on the situation of human rights in Guatemala (in 1983)[362].

The first thematic Working Group was established to overcome the resistance of the military regime of "the Generals" to a public country investigation in Argentina[363]. Thus the Commission set up, in 1980, the Working Group on Enforced or Involuntary Disappearances (acronym, WGED), by Resolution 20 (XXXVI).

Scholars argue that this Working Group was envisaged as a thematic reaction to the long-standing misuse of the confidential 1503 procedure.[364] In September 1980, Argentina submitted a Note to the UN, by which it stressed its preference for the so-called 1503 confidential procedure.

Given the *prima facie* lower impact of the thematic procedures, the then Commission appointed: in 1982, the Special Rapporteur on Extra-judicial, Summary, or Arbitrary Executions (See Commission's Resolution 1982/35); and in 1985, the Special Rapporteur on Torture (See Commission's Resolution 1985/33). To date, the Council counts 31 thematic mandates[365]. In those years, the thematic Special Procedures paved the way to the general acceptance by the UN membership that independent experts

[360] At the beginning of this new stage, the following resolutions provide clear indications on the mandates of relevant mechanisms: CHR Resolution 2 (XXIII) of 1967 establishing the Working Group on Southern Africa (WGSA); CHR Resolution 6 (XXV) of 1969 establishing the Working Group on Arab Territories (WGAT); CHR Resolution 8 (XXXI) of 1975 establishing the Working Group on Chile (WGC).
[361] See op.cit. in supra note 58 (p.142 ff).
[362] See Harris, D.J., and Livingstone, S., The Inter-American system of human rights, Oxford University Press, p. 404, 1998.
[363] Ibidem. See Nowak, M., Introduction to the International human rights regime, Boston-Leiden 2003, p.115; see also op.cit. supra in note 8, p. 18, 39, 78. see further op.cit supra in note 8, p. 135 et ff.
[364] Op. cit. in supra note 10 (p.72 et ff.); op.cit.in supra note 8.
[365] See Steiner, H.J, Alston, P., Goodman, R., International Human Rights in Context: Law, Politics and Moral, Oxford University Press, 2007, p.765-791.

could examine human rights violations: 1. from a thematic standpoint; 2. globally, meaning in any part of the world, without a specific focus on a given country.

As discussed, after the Fall of the Berlin Wall (1989), any development within the UN relied upon various factors, including, inter alia, the resurgence of armed conflicts all over the world, in the form of civil wars, and a renewed role for the Security Council.

Gross violations of human rights characterised (as acknowledged by the Security Council) the majority of internal conflicts of the early 1990s, such as the civil war in Liberia, Central African Republic, Congo/Ex Zaire, and Ex-Yugoslavia.

In that juncture, following the first Special Session on the situation of human rights in the Former Yugoslavia (on 14-15 August 1992), the Commission authorized, by Resolution S-1/1, the collaboration between relevant geographic and thematic Special Procedures and the preparation of (bi-monthly) periodic reports, to be eventually made available to the Security Council.

As discussed, in the Post-Cold War era, the Special Procedures gained momentum at Vienna World Conference (1993). By a joint Declaration, independent experts stated (See UN Doc. A/Conf.157/9) that: "This broad range of procedures constitutes a unique and crucial element in the implementation of the body of specific standards that have been adopted by universal consensus through the UN General Assembly. While it may never have been conceived as a "system", the evolving collection of these procedures and mechanisms now clearly constitutes and functions as a system of human rights protection".

In response to this, UN Member States reported in para.95 of the Vienna Declaration and Programme of Action (acronym, VDPA[366]): "The World Conference on Human Rights underlines the importance of preserving and strengthening "the system of special procedures", rapporteurs, representatives, experts and working groups of the Commission on Human Rights and the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, in order to enable them to carry out their mandates in all countries throughout the world [..]".

Besides acknowledging the existence of the system of the Special Procedures, the Vienna Conference paved the way to the creation of new ad hoc thematic procedures, to advance the principle of "the universality, indivisibility and

[366] See UN Doc. A/CONF.157/23.

interdependence of all human rights (UN Doc. A/CONF.157/23, para.5)[367]. Since then there has been an increasing focus on thematic human rights issues, particularly relating to economic, social and cultural rights and to right to development. In those years, many thematic mandates were requested, in particular, by developing countries to ensure that all human rights could be treated on an equal basis, so as to overcome any possible hierarchy. Indeed the Vienna Conference contributed to initiate a new phase for the enhancement of the Special Procedures' work. The "eyes and hears[368]" of the Commission became a system, aimed at monitoring, investigating, and providing advice.

Provided that the relevant Commission's Resolutions detailed the Terms of Reference for each Special Procedure's mandate, they achieved, during the 1990s, a certain degree of standardisation. It is thus possible to distinguish the Special Procedures, as follows:

i. Country Special Rapporteurs were appointed by the Chairman of the Commission, "to examine" the human rights violations committed, for instance, in the occupied Kuwait (See Commission's Resolution 1991/67) or to conduct "thorough study on the violations of human rights" by, for instance, the Government of Iraq (See Commission's Resolution 1991/74) in Iraq. Both mandates were to be fulfilled, in accordance with ECOSOC resolution 1235 (the international concern for gross or systematic and widespread violations of human rights was the pre-requisite for the mandate);

ii. Either thematic special rapporteurs or thematic working groups, were appointed by the Chairman of the Commission, inter alia, for examining the [thematic] questions relating, for instance, to the sale of children (See Commission's Resolution 1990/68). Some scholars[369] note that the mandate of thematic Special Rapporteurs was set in accordance with ECOSOC Resolution 1235; other scholars[370] stress the broadness of the mandate, including

[367] Op.cit in supra note 26.
[368] See UN Doc. E/CN.4/1999/3, para.67.
[369] Op.cit. in supra note 66.
[370] Op.cit. in supra note 39 (p.86).

investigations, reporting and examination on extended phenomena of violations of human rights as well as on individual cases;

iii. Thematic Independent Experts were appointed by the Chairman of the Commission, inter alia, for analysing and indentifying new issues, such as the relation between human rights and extreme poverty (See Commission's Resolution 1998/25);

iv. Country Independent Experts were appointed, on the assumption of the improvement of the situation on the ground, by the Chairman of the Commission, for the purpose of providing advice and cooperation, with the consent or upon request by the State concerned, as was the case with the mandate relating to "the Assistance to Guatemala in the field of human rights (See Commission's Resolution 1990/80)".

The practice shows that the term "Special Rapporteur" was used for a mandate primarily aimed at investigating the human rights situation, in accordance with ECOSOC Resolution 1235,[371] and the term "Independent Expert" was used for a mandate mainly focused on advisory services or, thematically, on new human rights issues.[372] The above distinction remains *de facto* valid, within the Council, despite UN Member States have stressed the desirability of a "uniform nomenclature[373]."

In the early XXI century, as reported under Chapter I, the criticism surrounding the Commission, due to politicisation, affected the negotiations on the establishment or the renewal, in particular, of country mandates. As discussed, the Commission increasingly adopted, under Item 19 of its Agenda, resolutions on cooperation-related issues, despite the systematic, grave and serious violations of human rights occurring in the field, as was the case with Afghanistan and Somalia:

1. As for the former, the Special Rapporteur on Afghanistan (Commission's Resolution 2002/19 of April 2002) evolved into an Independent Expert's mandate, in 2003, despite the situation on the ground (Commission's Resolution 2003/77 of April 2003).

[371] On the contrary, by para.59 of the Annex to Council's Resolution 5/1, UN Member States have stressed the desirability of a "uniform nomenclature for all Mandate-Holders". For instance the current Special Rapporteur on Cambodia has a mandate established under Item 10 of the Council's Agenda, devoted to TCPs.
[372] OHCHR Factsheet 27, available at www.ohchr.org.
[373] See para.59 of the Annex to Council's Resolution 5/1.

2. As for the latter, despite the collapse and the condition of failed State dating back to the early 1990s, Somalia continues to receive assistance and advice by an Independent Expert (Commission's Resolution 2005/83 of April 2005 and Council's Resolution 12/16 of September 2009, respectively).

Specific attention should be paid to development of "the situation of human rights in the Sudan". In 1993, the Commission established a Special Rapporteur, under Item 9 (Commission's Resolution 60/1993 of February 1993). In the early XXI century, the African Group managed to postpone any decision on this situation, in the course of two consecutive sessions of the Commission, between 2002- 2003, by a "no-action motion" proposal[374]. In 2004, it was reached a compromise on discussing this situation under the organizational Item 3 of the Commission's Agenda, entitled "Organization of the Work of the Commission". Under that Item, it was adopted a Decision (UN Doc. E/CN.4/DEC/59/128 of April 2004) envisaging the appointment of a country Independent Expert (Justice Addo) for one year, despite the atrocities occurring in Darfur. Since the outset, the newly established Human Rights Council stressed the need to effectively implement the principle of "dialogue and cooperation[375]". Though welcoming the cooperation between the Government of the Sudan and the Special Rapporteur on "The Situation of human rights in the Sudan (Ms. Sima Samar)", the Council decided, at its fourth special session on the human rights situation in Darfur (December 2006), to envoy a High-level Mission (See Council's Decision S-4/101 of December 2006). The Sudanese Authorities denied it the access to Darfur. At the presentation of the High-level Mission Report, in March 2007, despite the situation on the ground and the findings of the Mission itself, most Council's Members were reluctant and not willing to a dialogue with the head of the mission, Mrs. J. Williams (a Nobel Peace Prize Laureate). In a strong address J. Williams recalled all UN Member States that they bear the primary responsibility to protect human rights.[376]

The above cases clearly shows the attempt of many countries to reduce the monitoring and protection role of the Council. As discussed in Chapter I, on June 12,

[374] No-action motion is a procedural motion provided by Article 2 of Rule 65 of Rules of Procedure of the Functional Commissions of the Economic and Social Council of the United Nations. The Rules of Procedure were initially adopted in resolution 100 (V) of 12 August 1947 and has been revised several times since. The text of Article 2 of Rule 65 stipulates that "A motion requiring that no decision be taken on a proposal shall have priority over that proposal." Since the adoption of the Rules of Procedure of ECOSOC, the no-action motion has been proposed on numerous occasions by countries on draft resolutions in different functional commissions of the ECOSOC, including the Commission on Human Rights and the Sub-Commission on Promotion and Protection of Human Rights.

[375] which is impacting on the work of the Council whenever it addresses human rights violations (See Op.3 of GA Resolution 60/251). See also Chapter I.

[376] UN Press Release of March 16, 2007. http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=777&LangID=E)

2007, prior to the adoption of the IB Package, it was proposed the abolition of country resolutions and thus of country rapporteurs mandates. More generally, it might be inferred that there is a conflict arising from the implementation of relevant Charter's provisions. Provided that all UN Member States should implement all the obligations stemming from the Charter, the practice shows the tendency of many States not to pursue the implementation of Article 55-Article 56 of the Charter of the United Nations.

2. The mandate of the geographic and thematic Special Procedures: the dual vision and the practice

Within the past Commission, although there was no formal hierarchy among the Special Procedures, the practice shows that the different terminology, applying to mandate-holders[377] was determined on the basis of a political evaluation of the seriousness of the violations or the situation on the ground[378]. Theoretically the choice to appoint an Independent Expert in lieu of a Special Rapporteur indicated that the country concerned was in need of cooperation rather than condemnation and investigations.

In accordance with para.59 of the Annex to Council's Resolution 5/1 (IB Package)[379], the traditional classification has been partly overcome, and does not indicate anymore "major differences in terms of general responsibilities and methods of work[380]" among the Special Procedures.

As discussed, there are currently eight country Special Procedures and thirty-first thematic Special Procedures. From the different number of mandates between these two categories, it may be inferred that the current focus of the Council is primarily on thematic issues.[381]

Geographically, mention has to be made of the following mandates: The Independent Expert on the Situation of Human Rights in Burundi; the Special Rapporteur on the Human Rights in Cambodia; the Special Rapporteur on the Democratic People's Republic of Korea (acronym, DPRK); the Independent Expert on the Situation of Human Rights in Haiti; the Special Rapporteur on the Situation of Human Rights in Myanmar; the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories occupied (OPT) since 1967; the Independent Expert on the

[377] See Oberleitner, G., Global Human Rights Institutions, between remedy and ritual, Polity Press Eds., 2008, p.54.
[378] See op.cit. in supra note 9; See also op.cit. in supra note 39.
[379] It should be considered desirable to have a uniform nomenclature of mandate-holders, titles of mandates as well as a selection and appointment process, to make the whole system more clear
[380] See para.6 of the Manual on Operations of the Special Procedures, as adopted in June 2008 at the annual session of the Special Procedures Coordination Committee.
[381] Op. 5, lett. b of GA Res. 60/251 sets forth that the Council: "shall serve as a forum for dialogue on thematic issues on all human rights."

Assistance to Somalia in the field of human rights; the Independent Expert on the Situation of Human Rights in the Sudan.

Thematically, mention has to be made of the following mandates:

The Special Rapporteur on Adequate Housing; the Working Group on People of African Decent; the Working Group on Arbitrary Detention (acronym, WGAD); the Independent Expert in the field of Cultural Rights; the Special Rapporteur on the Right to Education; the Working Group on Enforced or Involuntary Disappearance (acronym, WGED); the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions; the Independent Expert on the Question of Human Rights and Extreme Poverty; the Special Rapporteur on the Right to Food; the Independent Expert on the Effects of Foreign Debt; the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association; the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression; the Special Rapporteur on Freedom of Religion or Belief (acronym, FoRB); the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health; Special Rapporteur on the Situation of Human Rights Defenders; the Special Rapporteur on the Independence of Judges and Lawyers; the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Poeple; Special Rapporteur on the Human Rights of Internally Displaced Persons (acronym, IDPs); the Working Group on the Use of Mercenaries; the Special Rapporteur on the Human Rights of Migrants; the Independent Expert on Minority Issues; the Special Rapporteur on Contemporary Forms of Racism**,** Racial Discrimination, Xenophobia and Related Intolerance; the Special Rapporteur on Contemporary Forms of Slavery, including its Causes and Consequences; the Independent Expert on Human Rights and International Solidarity; the Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism; Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment; the Special Rapporteur on the Adverse Effects of the Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights; the Special Rapporteur on Trafficking in Persons, especially in Women and Children; the Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises, the Independent Expert on the Issue of Human Rights Obligations related to Access to Safe Drinking Water and Sanitation; the Working Group on the Issue of Discrimination

against Women, in Law and in Practice; the Special Rapporteur on Violence against Women (VAW), its causes and consequences.

On a preliminary Special Procedures are in a position to: Conduct country visits (this is the primary task of both country and thematic procedures); Exert good offices (as was the case with the Independent Expert on the situation of human rights in Somalia who facilitated the release of a young woman); Monitor, examine and report on relevant issues or situations (For instance, the Special Rapporteur on the Situation of Human Rights in DPRK and the Special Rapporteur on Violence against Women); Prevent violations of human rights, by means, inter alia, of communications, urgent appeals and joint *communiqués*; Provide advisory services (For instance, the Independent Expert on Haiti); Facilitating cooperation (For instance, the Special Representative on human rights and TNCs); Detecting both relevant legislative and implementation gaps (For instance, the WGAD); Ensuring advocacy for the victims (For instance, the Special Rapporteur on Indigenous Peoples); Releasing recommendations (All Special Procedures) and, in some cases, far-reaching deliberations (For instance, the WGAD)[382]. Special Procedures also play an outstanding role in the standard-setting processes, as inferred, for instance, by the work of the Independent Expert on Extreme Poverty, whose initial elaboration of draft principles on extreme poverty and human rights will lead to the adoption, by 2012, of the UN Guiding Principles on the Rights of Persons Living in Extreme Poverty (See HRC/RES/15/19 of September 2010) and, more clearly, by the work of the first thematic Special Procedure, namely the WGED (See the above paragraph 1), which has greatly contributed to the elaboration of the newly adopted International Convention for the Protection of All Persons from Enforced Disappearance (as entered into force on December 23, 2010)[383]. In terms of development of new standards, it might be also recalled the work initiated by the then Sub-Commission's expert, Prof. Weissbrodt, on Human Rights and TNCs[384]. In addition to the above traditional functions, the Special

[382] As for the latter, it is worthy of mention the practice introduced by the UN Working Group on Arbitrary Detention (WGAD) that is mandated (See, for instance, Council resolution 6/4 of September 2007), inter alia, "to formulate deliberations on issues of a general nature in order to assist States to prevent and guard against the practice of arbitrary deprivation of liberty and to facilitate consideration of future cases (information available at http://www2.ohchr.org/english/issues/detention/index.htm).

[383] See Boyle, K., (ed.), New Institutions for Human Rights Protection, 2009, Oxford, Oxford University Press, Collected Courses of the Academy of European Law, XVIII/2, 2009, p.11-47; see also op.cit. in supra note 9.

[384] In order to prevent the further development of "Draft Guiding Principles on Human Rights and TNCs", the then Commission requested, in 2005, the then UN Secretary-General to appoint an ad hoc Special Representative. At the fourth session of the Council, Prof. Rifkin presented a progress report (See UN Doc. A/HRC/4/41) by which he observed the State-duty to protect against Non-State abuses, as a foundation to international human rights law. More importantly, he stressed that Corporations were, to some extent, participating, at the international level, with the capacity to bear some rights and duties under international law.

Procedures Mandate-Holders are developing, in line with the 1993 VDPA[385], follow-up initiatives, by which to pursue the following goals[386]:

i. To generally enhance the constructive dialogue with all UN Member States (For instance, during the interactive dialogue with the States concerned and with all stakeholders, on the occasion of regular sessions of the Council);
ii. To specifically ensure the effectiveness of the Special Procedures' work (as an example of follow-up initiative, it might be recalled the transmittal to UN Member States of set of questions on issues analysed or emerged from country missions about which the Special Procedures issue specific recommendations. This kind of measure is traditionally utilised by UN Working Group on Arbitrary Detention);
iii. To develop synergies among all stakeholders (on the occasion of regional or international seminars and conferences).

On a positive note, the variety of thematic mandates indicates the willingness of UN Member States either to implement the Vienna principle of "the universality, inter-relatedness and indivisibility of human rights[387]" or to advance the promotion and protection of all human rights[388]. However, in comparing the 2008 Manual of Operations of Special Procedures and the relevant sections of the IB Package, it emerges a dual vision about the role of the Special Procedures.

The 2008 Manual of the Operations of the Special Procedures indicates a broad mandate[389], resulting from the practice - and the potentialities - of these mechanisms[390]. Pursuant to para.1 of said Document, the Special Procedures' purpose is: "to promote and to protect human rights and to prevent violations in relation to specific themes or issues, or to examine the situation in specific countries". Para.5 supplements it, by enumerating "the principal functions" of the Special Procedures:

[385] By which it was requested that "follow-up to recommendations should become a priority matter for consideration by the Commission on Human Rights (Part II, para.15).
[386] See the 2008 Manual of the UN HR SPMHs, paras.88 et ff.
[387] para.5 of UN Doc. A/CONF.157/23.
[388] As laid down in Op.4 of GA Res. 60/251: the work of the Council has to be carried out "with a view to enhancing the promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development."
[389] Information available at: http://www2.ohchr.org/english/bodies/chr/special/annual_meetings/docs/ManualSpecialProceduresDraft0608.pdf. This Manual was originally adopted at the Annual Meeting of Special Procedures in 1999 and subsequently updated)
[390] See for instance the section of the Manual on Follow-up activities, p.23-27.

i. "*analyze* the relevant thematic issue or country situation, including undertaking on-site missions; *advise* on the measures which should be taken by the Government(s) concerned and other relevant actors;

ii. *alert* United Nations organs and agencies, in particular, the Council, and the international community in general, to the need to address specific situations and issues (In this regard they play a major role in providing "early warning" and encouraging preventive measures);

iii. *advocate* on behalf of the victims of violations through measures, such as requesting urgent action by relevant States and calling upon Governments, to respond to specific allegations of human rights violations and provide redress;

iv. *activate* and mobilize the international and national communities, and the Council, to address particular human rights issues and to encourage cooperation among Governments, civil society and inter-governmental organizations;

v. and *follow-up to recommendations*".

The above list clearly indicates the will of Special Procedures not to get confined in narrow mandates.

On the other hand, by the joint reading of Council's Resolution 5/1 and Resolution 5/2, UN Member States recall that the Special Procedures' mandates are determined in accordance with the IB Package and the single Council's Resolution relating to the renewal/extension or the establishment of a given mandate.

The current practice shows that, irrespective of common "general responsibilities and methods of work", one Special Procedure differs from another with regard to the origin, the Terms of Reference, and, somehow, the duration: 1. the "Special Rapporteur on human rights in Cambodia", despite the title[391], has been appointed under Item 10 of the Council's Agenda, relating to advisory services and technical cooperation in the field of human rights (See Council's Resolution 12/25 of September 2009); 2. the current mandate of the Independent Expert on the situation of human rights in Burundi will continue "***until the establishment of an independent national human rights commission (Op. 8 of Council's Resolution 9/19).***"

[391] In this regard it is worthy of mention that unlike the past practice referring to geographic Special Rapporteurs there is no more reference to "the situation" of human rights in the title, as a way to underline that the focus is on cooperation-related activities and not on a situation to be monitored.

i. Geographic mandates

Geographic Special Procedures are mandated by the Council, to examine the human rights situation in a given country or territory, such as the OPT ("occupied since 1967"), Burundi (characterised by a transitional status), Somalia (failed State), DPRK (situation, in which the human rights violations have been ascribed to dictatorship) and so forth[392].

The transition from the Commission to the Council has significantly impacted on their role. "The establishment of a country specific mandate remains one of the most sensitive responsibilities of the Council[393]".

As discussed in Chapter I, politics affects the entire negotiation process up to the adoption of the final decision/Resolution, by which the Council establishes, renews or extends a geographic mandate - and even afterwards, when the Council has to assess the state of the implementation of the commitments (obligations) contained therein.

The practice shows that when approaching the creation or the renewal of country Special Procedures there is the tendency, despite the situation on the ground, either to covert a country Special Rapporteur mandate into a country Independent Expert mandate (as was the case with the Sudan) or eventually to rely on the work and the field presences of the OHCHR (as was the case in Nepal).

As discussed, in the last years of the past Commission, successful "no action motions" prevented the Commission from creating Special Rapporteurs under Item 9 on the situation of human rights in Chechnya, Iran and the Sudan, respectively. In parallel[394], the UN increasingly developed the practice to appoint UN country Independent Experts, such as the Independent Expert on Afghanistan and on Somalia, respectively.

In June 2007, in its infanthood stage, the Council decided to discontinue the country mandates on Belarus and Cuba[395]. In parallel, the African Group started claiming the ownership of any geographic initiatives which might refer to one of regional Members. As a consequence, the EU that traditionally submitted geographic resolutions with the support of the Western Group, has been *de facto* halted to submit

[392] Op.cit. in supra note 9.
[393] Ibidem.
[394] See Zuijdwick in note 57, as quoted by Gutter and Nifosi.
[395] See UN Press Release of June 13, 2007, available at: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=7267&LangID=E)

geographic initiatives on the situation of human rights in the DRC, the Sudan and Somalia.[396]

Despite the critical conditions in the DRC, at the sixth session of the Council (September/December 2007), the African Group dealt with this situation under Item 10 of the Council's Agenda (devoted to technical cooperation and advisory services). The relating draft Resolution was later deferred to the seventh session (March 2008) of the Council. In March 2008, the Council adopted the relevant Text (7/L.13), by which it extended, following the review process (RRI), the mandate of the Independent Expert on the DRC. In March 2009 (at the tenth session), Egypt requested the vote, for the application of rule of procedure 131, in order to consider the African Group initiative (Resolution 10/L.3) before the EU's initiative (Resolution 10/L.1), on the situation of human rights in the DRC. The Egyptian motion got the support of 30 votes in favour, 15 against, and 12 abstentions. Despite the UN reports on the situation in East Kivu, the African text solely aimed at strengthening the cooperation among the Congolese Authorities, the thematic Special Procedures of the Council and the OHCHR. This African draft Resolution - which got the support of the majority of Council's Members (33 votes), no vote against and the abstention by the Western Group and few more States from GRULAC and the Asian Group - has marked a significant shift in the general approach. The preference for the joint work of thematic Special Procedures in lieu of a focused country mandate confirms the tendency of reducing the investigation task of the country Special Procedures. More importantly, by the above Text (Resolution 10/L.3), for the first time, the Council enabled itself "to monitor" the situation (See Op.11 of Council Resolution 10/L.3). On the contrary, the European draft (10/L.1), if adopted, would have envisaged the appointment, at least, of a country Independent Expert, mandated to targeted activities, to be carried out in tandem with the Kinshasa Authorities. In March 2010, by Resolution 13/L.23, entitled "situation of human rights in the DRC and strengthening of the technical cooperation and consultative services (a title which the Past Commission used to indicate situations warranting a Country Special Rapporteur)", the African Group took note of the second joint report by the thematic Special Procedures – which had visited the country - and requested the international community and the OHCHR, to strengthen their measures.

[396] See for instance Council's Resolution 10/L.12 of March 2009.

The Resolution was adopted without a vote, because of the traditional support *tout court* by the Western Group for the work of the Special Procedures[397].

At the second session of the Council (September/December 2006), the EU draft decision (L.45) on *the situation of human rights in Darfur* had the two-fold aim: of ensuring cooperation between the Government of Sudan and the relevant Special Rapporteur; and of requesting OHCHR to report on the state of implementation, by the Sudanese Authorities, of the relevant Special Rapporteur's recommendations. This proposal was then superseded by the African Group Decision (3/L.44), adopted with 25 votes in favour, 11 against and 10 abstentions, by which the Council barely welcomed the cooperation between the Sudan and the Special Rapporteur. At the sixth session (December 2007), the two EU draft Resolutions on *the mandate of the Special Rapporteur on the Sudan* (6/L.40) and on *the Group of Experts on the situation of human rights in Darfur* (6/L.39), respectively, were withdrawn at a very late stage, thanks to a last minute agreement, on a compromise wording, between the EU and the African Group (See Council's Resolutions 6/L. 51 and 6/L.50, respectively). At the ninth session (September 2008), the mandate of the Special Rapporteur was extended for six months (See Council's resolution 9/17). During the relevant debate, it emerged a stark contrast between the African Group and the WEOG, on the role of country rapporteurs. At the eleventh session (June 2009), the Council adopted the relevant African Group text, by only 20 votes in favour, 18 against and 9 abstentions. With care not to mention whatsoever country Expert (See Council's Resolution 11/L.17), the African Group Resolution referred to a generic assistance that the Sudan could get by various relevant mechanisms, including by the OHCHR and through the UPR[398]. On the contrary, the EU text, if adopted, would have requested the creation of a country Independent Expert.

In March 2010, the African Group submitted a Resolution, as adopted without a vote, on the "*strengthening of the technical cooperation and consultative services in the Republic of Guinea* (13/L.14)", by which the Council merely "takes note [..] of the decision by the Government of Guinea to cooperate with the Office of the United Nations High Commissioner for Human Rights with a view to opening a country office in Guinea", thus entailing that, despite the title "Strengthening [..]", no effective form of cooperation has been initiated yet.

[397] File with the Author.
[398] By operative paragraph 19, the Council decided: "Expresses its conviction that various human rights mechanisms, by securing the cooperating and fostering dialogue with the Government of National Unity, can effectively and sustainably realize the objective of promotion and protection of human rights in the country, and notes in this context the value of the mechanisms of the universal periodic review."

Against this background, there are positive examples to be provided: The EU Resolutions on *the situation of human rights in Myanmar* (See Council resolutions 7/L.36, 8/L.12, 10/L.28, 13/L.15 respectively), which include reference to the mandate of the relevant Special Rapporteur and to specific requests, including the request for the Burmese Authorities to allow a visit by the relevant Special Rapporteur. This text, being usually adopted without a vote, gets a cross-regional support, save the Chinese position that backs the Myanmar Authorities; The extension (See Presidential Statements 6/L.28, 9/L.9, and 15/L.4, respectively) of *the mandate of the Independent Expert on Haiti*, as expressly requested by the Port-au-Prince Authorities, since 2005; The Burundi initiative on the extension of *the mandate of the relevant Independent Expert*. In this latter case, at the sixth session of the Council (December 2007), Burundi submitted a Resolution, by which the UN Members extended the mandate of the Independent Expert, for one year (See Resolutions 6/L. 29/Rev.1 and 14/L.20, respectively); The joint EU-Japan initiative on *the situation of human rights in the DPRK* (See Resolutions 7/L.28, 10/L.27, respectively), by which it was decided the one-year extension of the mandate of the relevant Special Rapporteur, besides emphasizing the long-standing request by the SR to visit the country[399].

ii. Thematic mandates

Thematic Special Procedures are mandated by the Council, to examine specific human rights issues globally, irrespective of the ratification by UN Member States of binding human rights standards.

From a functional standpoint, similarly to geographic mandates, the thematic procedures have developed the practice of fact-finding missions and reporting.[400] However, considering their global focus on specific human rights issues, these mechanisms do perform a broad variety of tasks, closer to the list contained in the aforementioned 2008 Manual on the Operations of the Special Procedures: analysis and monitoring, including the state of implementation of relevant domestic legislation and the existing gaps and best practices[401]; responding to allegations of human rights

[399] The past Commission's practice of reciprocal "points of order" during the General Debate under Item 9, between the Japan and DPRK, Cuba and the United States, Myanmar/Burma and the UK, Zimbabwe and the UK, Iran and Canada still persists in the Council, on the occasion of the debate under Item 4 ("Human rights situations that require Council's attention." UN Press Releases, available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=929&LangID=E, and at: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=9175&LangID=E, respectively.

[400] Op.cit in supra note 9, p.100 et ff.

[401] Such as the mandate establishing the Independent Expert on "the issue of human rights obligations related to access to safe drinking water and sanitation (Council's Resolution 7/22).

violations against individuals or groups of individuals, either globally or in a specific country[402]; and reporting on the relevant activities and on the findings of their work.

It has been argued that the lack of geographical limitation to the work of thematic mandates has made possible the investigations of the situation of human rights even in reluctant countries.[403] Unlike country-specific mechanisms which broadly examine the human rights situations in a given country, thematic mechanisms deal with one specific issue in all countries of the world[404].

These mechanisms can also be differentiated from a thematic standpoint[405], as follows:

> i. Some thematic mandates refer to specific rights envisaged by human rights treaties, such as the Special Rapporteur on the right to health (Commission's Resolution 2002/31), the Special Rapporteur on the right to freedom of religion (Commission's Resolution 1986/20), the Special Rapporteur on the right to freedom of assembly (Council's Resolution 15/21), the Special Rapporteur on contemporary forms of racism (Commission's Resolution 1993/20), the Special Rapporteur on violence against women (Commission's Resolution 1994/45);
>
> ii. Other mandates deal with broader cross-cutting issues, such as the Independent Expert on Human Rights and the access to safe drinking water and sanitation (See Council's Resolution 7/22), mandated to study "the issue of human rights obligations related to access to safe drinking water and sanitation", and the Special Representative on Human Rights and TNCs, as mandated: "To provide views and recommendations on ways to strengthen the fulfilment of the duty of the State to protect all human rights from abuses by transnational corporations and other business enterprises, including through international cooperation; To elaborate further on the scope and content of the corporate responsibility to respect all human rights and to provide concrete guidance to business and other stakeholders; To explore options and make recommendations, at the national, regional and international levels, for enhancing access to effective remedies available to those whose human rights

[402] Such as the mandate of the Special Rapporteur on human rights defenders (Commission's Resolution 2000/61).
[403] Op. cit in supra note 66.
[404] To do so, thematic Special Procedures Mandate-Holders need support from the UN Members, including through adequate financial and human resources.
[405] See Hannum H., 2007, in Human Rights Law Review, Reforming the Special Procedures and Mechanisms of the Commission on Human Rights, p.75.

are impacted by corporate activities (See Council's Resolution 8/7 of June 2008);"

iii. The last group of mandates refers to issues whose linkage with human rights is under definition, such as the above mandate on TNCs (which can correctly fall under both groups of issues), the mandate of the Independent Expert on international solidarity (See Commission's Resolution 2005/55), and the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of human rights, particularly economic, social and cultural rights (See Council's Resolution 7/4).

Considering the above distinction between geographic and thematic mandates, it was observed, in the past, that the politicization only refers to geographic mandates whereas thematic Special Procedures encapsulate general legal and political issues. The trend of the last years shows that politicization risks to affect also thematic mandates. As a way of example, it might be recalled the following cases relating to the renewal of the mandates of the thematic procedures:

i. The review of the mandate on freedom of expression, which should focus on the protection of the right to freedom of opinion and expression, including the examination of the situation of the so-called prisoners of opinion. This mandate was subject to a tough debate prior to the adoption of the relevant Resolution (7/L.24). As previously observed, the Western Group traditionally supports all the Special Procedures. In this event it decided to call for a vote and abstain on the relevant Resolution (L.24), as initially submitted by Canada (See the final version under the following symbol: HRC Resolution 7/36 of March 28, 2008), following the adoption of specific amendments, submitted (Amendment 7/ L.39) by the Arab League, OIC and the Africa Group, and by Cuba, respectively[406]. These amendments had broadened the content of Preambular Paragraph 10[407] and of Operative Paragraph 4, in such as way to alter the

[406] The latter acting in contravention to rules of procedure 120 of the functional Committees of the General Assembly, which envisages the circulation of amendments in due course.

[407] as follows: "*Recognizing* the importance of all forms of media, including the print media, radio, television and the Internet, in the exercise, promotion and protection of the right to freedom of opinion and expression", to which to add, "and also the importance for all forms of media to repeat and to deliver information in a fair and impartial manner."

initial rationale behind the Canadian Text[408]. During the Explanation of Vote after the vote, Canada stressed its strong opposition to the new wording attempting to shift the focus from States as duty-bearers to the actions of individuals and on racism, besides imposing undue restrictions on the right to freedom of expression[409].

ii. Racism-related issues have dominated the Commission's work since its inception and particularly from the outset of the era of decolonization. During the very last years of the Commission, the G-77 group, headed by the African Group, has been pursuing a specific standard-setting campaign to develop complementary standards to ICERD[410], irrespective of the opposition of the EU and other Western and JUSCANZ countries claiming the comprehensiveness of ICERD[411]. Along these lines, both the Durban Review Conference (Geneva, April 2009) and the mandate and work of the Special Rapporteur on Racism have been affected. In particular, the review of the mandate of the Special Rapporteur on Racism took place at the same session of the above-mentioned mandate on freedom of expression. Unlike the Resolution on the right to freedom of expression, by Council's Resolution 7/34 concerning the mandate on racism, the Council extensively stressed the need for investigations, to be carried out: "2. [..] to gather, request, receive and exchange information and communications with all relevant sources, on all issues and alleged violations falling within the purview of his/her mandate, and to investigate and make concrete recommendations, to be implemented at the national, regional and international levels, with a view to preventing and eliminating all forms and manifestations of racism, racial discrimination, xenophobia and related intolerance", focusing, inter alia, on incidents of contemporary forms of racism and racial discrimination against Africans and people of African descent,

[408] as follows: "To report on instances where the abuse of the right of freedom of expression constitutes an act of racial or religious discrimination taking into account Articles 19(3) and 20 of the International Covenant on Civil and Political Rights and General Comment 15 of the Committee on Elimination of All Forms of Racial Discrimination which stipulates that the prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with the freedom of opinion and expression."

[409] See relevant press release available at: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=9282&LangID=E) (In this regard, it is worthy of note that one of the supporters of the above amendments was Cuba. Since the first geographic mandates on the situation of human rights in Cuba, the Commission raised a specific concern about the right to freedom of opinion and expression, as inferred by the following resolutions: 1990/48 of 6 March 1990, 1991/68 of 6 March 1991, 1992/61 of 3 March 1992, 1993/63 of 10 March 1993, 1994/71 of 9 March 1994, 1995/66 of 7 March 1995, 1996/69 of 23 April 1996, 1997/62 of 16 April 1997, 1999/8 of 23 April 1999,2000/25 of 18 April 2000, 2001/16 of 18 April 2001, 2002/18 of 19 April 2002, 2003/13 of 17 April 2003, and especially resolutions 2004/11 of 15 April 2004, and 2005/12 of April 14, 2005, respectively. As previously recalled, in 2007, Cuba refused the renewal of the mandate of an ad hoc geographic Independent Expert, namely the Special Representative of the High Commissioner on the situation of human rights in Cuba, also dealing with the freedom of expression and the situation of the so-called political prisoners, despite the many instances from the families of the political prisoners. See relevant AI reports, available at: http://www.amnesty.org/en/region/cuba.

[410] See for instance, UN Docs. E/CN.4/RES/2003/30 of March 2003, E/CN.4/2004/20 of February 2004 and A/HRC/AC.1/1/CRP.2 of February 2008.

[411] ICERD entered into force on January 4, 1969.

Arabs, Asians and people of Asian descent, migrants, refugees, asylum-seekers, persons belonging to minorities and indigenous peoples.

In introducing draft Resolution L.18, on behalf of the African Group, Egypt stated that, despite ongoing efforts in combating racism, "there was ample evidence that the situation of racism worldwide was worsening, not improving [..] The dire situation faced by various groups due to historic crimes and injustices also persist". Egypt continued by stressing the imperative need of continuing to monitor the overall situation, with a particular focus on the most potent and dangerous contemporary forms and manifestations of racism, as well as the emerging forms. Afterwards Slovenia, on behalf of the EU, stressed that: "The European Union remained supportive of the renewal of the mandate of the Special Rapporteur on racism for a further three years". However it was concerned about a number of elements in the text, including about "the possible duplication with other mandates[412]."

At the 15th session of the Human Rights Council, the current Special Rapporteur on Racism submitted a Report (See UN Doc. A/HRC/15/53) on "the manifestations of defamation of religions, and in particular on the ongoing serious implications of Islamophobia, for the enjoyment of all rights by their followers", despite the peculiarities of his mandate and the existence of a specific Special Rapporteur on Freedom of Religion (acronym, FOR).

iii. When approaching the mandate of the Special Rapporteur on Freedom of Religion, this issue has increasingly become the battlefield of opposite stances between the Western Group and the rest of the world, particularly the Islamic countries (See the Introduction to the present thesis). The latter are strenuously supporting the possibility of a binding convention on defamation of religion[413]. Along these lines, they are trying to set new limitations to the right to freedom of expression and indirectly to the mandate of the Special Rapporteur on Freedom of Religion, to effectively fight against defamation of religion[414]. As reported, the Ad Committee in charge of elaborating the above-mentioned complementary standards to ICERD has also approached the feasibility of an ad hoc convention on defamation of religion[415]. On March 2010, Pakistan, on

[412] See UN Press Release: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=9282&LangID=E.
[413] See The Guardian, dated March 2010, by L. Bennet Graham, entitled "No to an international blasphemy law" available at: http://www.guardian.co.uk/commentisfree/belief/2010/mar/25/blasphemy-law-ad-hoc-committee
[414] See for instance all the demonstrations against Denmark following the publication of satirical drawings in September 2005.
[415] See for instance UN Doc. A/HRC/13/58, paras. 38 and 123; see also a relevant letter by OIC, under UN Doc. A/HRC/13/CRP.1. For a critical position of the civil society, being contrary to this cross-regional political action led by the OIC, see remarks at: http://www.iheu.org/human-rights-

behalf of OIC, submitted Resolution 13/L.1 on defamation of religion, by which it was requested: (Op.21) "the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance to report on all manifestations of defamation of religions, and in particular on the ongoing serious implications of Islamophobia, on the enjoyment of all rights by their followers, to the Council at its fifteenth session". With care to not adequately involve the Special Rapportuer on Freedom of Religion, being the Mandate-Holder who should deal with all freedom of religion-related issues, this Resolution shows the attempt to connect Islamophobia to one of the contemporary forms of racism and thus to include it under the mandate of the Special Rapporteur on Racism.

Scholars argue that the concept of defamation of religion is an evolving issue by which new limitations to the right to freedom of expression and opinion could be created[416].

In approaching the review of the mandate of the Special Rapporteur on Freedom of Religion or Belief (acronym, FoRB), under the RRI process, Portugal, on behalf of the EU, was obliged, in September 2007, to postpone the relevant Resolution (6/L.15), for further negotiations to the resumed December 2007's sessions, since G-77 countries being also members of the Council were not willing to accept the content of the relevant mandate. In December 2007, Resolution 6/L.15 Rev.1 was finally adopted but with a content more appropriate for a cooperation mandate than for a Special Rapporteur, who has to investigate on violations relating to the right to freedom of religion (as recent cases of persecutions against Christians show). The mandate was thus limited as follows: "(Op.18.), invites the Special Rapporteur: (*a*) To promote the adoption of measures at the national, regional and international levels to ensure the promotion and protection of the right to freedom of religion or belief; (*b*) To identify existing and emerging obstacles to the enjoyment of the right to freedom of religion or belief and present recommendations on ways and means to overcome such obstacles; (*c*) To continue her/his efforts to examine incidents and governmental actions that are incompatible with the provisions of the Declaration on the Elimination of All Forms of Intolerance

council-resolution-combating-defamation-religion. See Council Resolution 13/L.9 of March 2010, the Council decided "that the Ad Hoc Committee shall convene its third session from 30 November to 10 December 2010."

[416] See Puppinck, G., Lutter contre la diffamation des religion, dans Conscience et Liberté, Ed. par l'Association Internationale pour la defense de la liberté religieuse,2010, p.109 et ff.

and of Discrimination Based on Religion or Belief and to recommend remedial measures as appropriate; (*d*) To continue to apply a gender perspective, inter alia, through the identification of gender-specific abuses, in the reporting process, including in information collection and in recommendations". By Resolution 14/11, the Council barely envisaged the extension of the relevant mandate without strengthening it (despite the increasing cases of violations occurring all over the world, such as the persecution of Christians in some countries in the Middle East, Africa and India). In June 2010 the Council merely decided "(op.2) that there is a need for the continued contribution of the Special Rapporteur to the protection, promotion and universal implementation of the right to freedom of religion or belief".

From the above practice, it is worrisome that most UN Members tend to limit the financial and human resources as well as the operational tools at disposal of the Special Procedures. At present, UN Member States are used to recall, during the General Debate of the Council, that Special Procedures cannot exceed the annual three-mission limit[417]. This is a contradiction if one considers that country missions are essential for all Special Procedures to fulfil their mandates. Country missions allow the Special Procedures to: develop direct contact with domestic civil society; collect first-hand information; and, more importantly, enhance cooperation. The above limit also contradicts the practice of the so-called "extending invitations," by which those countries that have extended invitations, accept the visit by the interested Special Procedure, without any reservations[418].

Over the last years, there is an emerging ambiguity in the practice. On one hand, the Council seems to favour thematic Independent Experts, such as the mandate on access to water and sanitation[419] or joint thematic studies and country missions by thematic Special Procedures (See the joint mission to the DRC) rather than geographic Special Procedures, as was the case with the DRC (See UN Doc. A/HRC/13/63 of

[417] See UN Doc. E/CN.4/2000/5, para. 55.

[418] By the establishment of the UPR mechanism, the "standing invitations practice" has become one of the traditional recommendations, put forward in particular by the EU Members (To this end, the UPR is a valid vehicle, by which to convey the message, particularly supported by the EU, to broadly extend the cited practice). As of June 2010, some 71 countries have extended "standing invitations".

[419] This mandate is mainly focused on a collection of best practices and existing gaps. See Council's Resolution 7/22, by which Op2, lett.a stipulates: "To develop a dialogue with Governments, the relevant United Nations bodies, the private sector, local authorities, national human rights institutions, civil society organizations and academic institutions, to identify, promote and exchange views on best practices related to access to safe drinking water and sanitation, and, in that regard, to prepare a compendium of best practices".

March 2010)[420]. On the other hand, many UN Member States claim that thematic Special Procedures tend to exceed their mandate. As a way of example, it might be recalled the public debates held, in the course of the 13th and 14th sessions of the Council, between March and June 2010, on the joint UN report on secret detention and counter-terrorism. In this regard many UN Member States challenged the sources and the methods of work of the interested Special Procedures (See UN Doc. A/HRC/13/L.10, para.22 and UN Doc. A/HRC/14/L.10, paras.12, 86 et ff.) so as to argue[421] that Special Procedures cannot use anymore all the available sources: they do not have the *carte blanche*[422], initially recognized by the past Commission. Similarly, the OIC, the African Group and NAM strenuously opposed the relevant draft principles on arbitrary detention elaborated by the WGAD[423] as well as the broadening of the WGAD's mandate, as requested by the Working Group itself, in Council's Report A/HRC/10/21 of March 2009. In response, by recalling the IB Package, in particular the Code of Conduct for SPMHs, the Council merely "took note" of the above Report (see Resolution 10/9 of March 2009).[424]

Beside from conflicting views, the practice shows that by monitoring relevant situations - even in those countries that have not ratified specific human rights binding treaties and, in principle, without the consent of the country concerned (this is the case with Special Rapporteurs) and by conduct advanced studies on human rights, Special Procedures contribute to both the protection role of the Council and to the development of international human rights law.

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[420] By Resolution 7/20 of March 2008, the Council invited seven thematic Special Procedures (namely the Special Rapporteur on violence against women, its causes and consequences, the Representative of the Secretary-General on the human rights of internally displaced persons, the Special Rapporteur on the independence of judges and lawyers, the Special Rapporteur the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Special Rapporteur on the situation of human rights defenders, the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, in addition to the Special Representative of the Secretary-General for children and armed conflict) to make recommendations on how best to assist technically the Democratic Republic of the Congo in addressing the situation of human rights, with a view to obtaining tangible improvements on the ground, taking also into account the needs formulated by the Government [..]".

[421] Op.cit. in supra note 25.

[422] Ramcharan recalls that by Resolution 1990/76 of March 1990, the Commission reiterated, inter alia, the need for access "to all available sources of information. Unhampered access to private individuals or groups is vitally important". Op.cit. supra in note 9.

[423] The Working Group on Arbitrary Detention was established by resolution 1991/42 of the former Commission on Human Rights. Its mandate was extended by Commission's resolution 1997/50. The Human Rights Council assumed the Working Group's mandate by its decision 2006/102 and extended it for a further three-year period by resolution 6/4 of 28 September 2007, in order: (a) To investigate cases of deprivation of liberty imposed arbitrarily or otherwise inconsistently with the relevant international standards set forth in the Universal Declaration of Human Rights or in the relevant international legal instruments accepted by the States concerned; (b) To seek and receive information from Governments and intergovernmental and non-governmental organizations, and receive information from the individuals concerned, their families or their representatives; (c) To act on information submitted to its attention regarding alleged cases of arbitrary detention by sending urgent appeals and communications to concerned Governments to clarify and to bring to their attention these cases;
(d) To conduct field missions upon the invitation of Government, in order to understand better the situations prevailing in countries, as well as the underlying reasons for instances of arbitrary deprivation of liberty;
(e) To formulate deliberations on issues of a general nature in order to assist States to prevent and guard against the practice of arbitrary deprivation of liberty and to facilitate consideration of future cases;
(f) To present an annual report to the Human Rights Council presenting its activities, findings, conclusions and recommendations.

[424] See Council's session report, A/HRC/10/29, para.89 et ff. and press release of March 6, 2009, available at: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=9073&LangID=E.

3. The role of the Special Procedures vis-à-vis the Human Rights Council

Since the early 1950s, scholars, such as Prof. Lauterpacht, kept stressing that any debate about the human rights record of any State does not affect the principle of "non interference in internal affairs"[425]. However, from the late 1990s up to the abolition of the Commission in 2006, "the system of Special Procedures", in particular country Special Rapporteurs, were incrementally perceived as too invasive.

In 2000, the Commission adopted the Report of the Inter-sessional Open-ended Working Group on "Enhancing the effectiveness of the mechanisms of the Commission[426]", the so-called Selebi Report. Despite the acknowledgement by the Vienna Conference, this OEWG focused on the rationalisation and strengthening of "the [only] thematic network of Special Procedures (see para.5 et ff.)" without mentioning country Special Rapporteurs[427].

By GA Resolution 60/251 (2006), the General Assembly decided: (See Op.6) "the Council shall assume, review and, where necessary, improve and rationalize all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights in order to maintain a system of special procedures [..]".

The replacement of the Commission by the Human Rights Council was greeted, under the best auspices. When the Council convened its first session (19-30 June 2006), UN Member States underlined "a new fresh" within the UN. They also recalled the principles of universality, interrelatedness and indivisibility of human rights, the need to promote and protect all human rights, including the right to development. Further they reiterated the role of the Special Procedures.

During the Institution-Building progress (June 2006 through June 2007), in the course of the so-called RRI (Review, Rationalisation and Improvement) negotiations, the blocs' policy prevailed. By a divisive approach, some States, such as the EU, showed the readiness to "improve" all the thematic and geographic mandates of "the system of the Special Procedures", while other States, such as China, Cuba, Pakistan, Egypt, the Russian Federation aimed at the rationalization of the Special Procedures, in line with the above Selebi Report.

[425] Op. cit. in supra note 20 (p.168 et ff).
[426] See UN Doc. E/CN.4/2000/112.
[427] This Report also stresses (para.10) "the individual responsibility of each mandate holder", who could eventually relies on "the annual meeting of special rapporteurs and other special procedures" for collective consideration of questions merely related to "organizational aspects."

Human rights practitioners argue that the institution-building process provided the opportunity, for countries, such as China, the African Group, Bangladesh, Belarus, Cuba, DPRK, India, Iran, Malaysia, to introduce the so-called "negative reform Agenda[428]", mainly aimed at eliminating geographic mandates on the ground that the UPR process could replace them[429]. Their proposals ranged from reforming the working methods of the Special Procedures to introducing a code of ethics, in order "to guide them in discharging their respective mandates.[430]" During those negotiations, Arab countries stressed that the Special Rapporteur on the situation of human rights in the Palestinian Territories occupied since 1967 should differ from country mandates, as long as this procedure refers to a thematic issue: the occupation. In this vein it was decided that the duration of this mandate "has been established until the end of the occupation (See Annex to Council's resolution 5/1.)", practically *sine die*. In this context,[431] Cuba and the Russian Federation proposed the abolition of the two geographic mandates referring to Cuba and Belarus, respectively. At the fifth session of the Council, the Council's Members discontinued the consideration of the situation of human rights in these countries.[432]

During the last months of the IB process, UN Member States expressly proposed the abolition of country mandates.[433] On June 18, 2007, China proposed, from the floor, to introduce a specific threshold for the presentation and the adoption of country resolutions: a two-thirds majority of votes for country resolutions and thus for the creation, the renewal or the extension of country mandates.[434]

Considering the size and the composition of the Council, that threshold would have made highly difficult – rather impossible – the creation of country mandates. As discussed, the African and Asian Groups already hold the majority of Council's votes (13+13 out of 47 members). However the Chinese proposal failed, since the African Group preferred to reach a compromise on the entire Package of proposals negotiated

[428] See the Handbook of ISHR, entitled A New Chapter for Human Rights: A Handbook on Issues of Transition from the Commission on Human Rights to the Human Rights Council, 2006, p.33-46.
[429] See op.cit. in supra note 86 (Boyle); See also International Service for Human Rights (2007) N.65, Human Rights Monitor, The Council Institution-building work, the end of a long process, p.16.
[430] Sunga, L.,"Introduction to the Lund Statement to the UN HRC on the HR Special Procedures", 76 Nordic Journal of International Law, in Nordic Journal of International Law 76, 2007, p.286.

[431] See Gutter J., Special Procedures and the Human Rights Council: Achievements and Challenges ahead, in Human Rights Law Review, 2007, p.104.
[432] Since then it should be noted the drastic reduction of country mandates: from the 26 country rapporteurs of 1998 to the current 8 geographic mandates.
[433] See UN Press Release available at: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=5222&LangID=E;
[434] Available at: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=5120&LangID=E.

until then. As discussed, the Council adopted, without a vote, the IB Package, at the very last minute, on June 18, 2007[435].

The IB Package consists of Council's Resolution 5/1, containing provisions on the selection of mandate-holders and on the review, rationalization and improvement of all Special Procedures mandates, and of Council's Resolution 5/2, containing "the Code of Conduct for Special Procedures of the Human Rights Council[436]".

By paragraph 55 of the Annex to the above-mentioned Council's Resolution 5/1, it was decided that the review of individual mandates would continue within the framework of the negotiations of the relevant Resolutions that would renew (or create) the mandates of the Special Procedures.

Despite many calls for reducing the number of Special Procedures mandates, between 2007-2009, the Council renewed all thematic Special Procedures in addition to the creation of new thematic ones relating to contemporary forms of slavery (2007)[437], the access to safe drinking water (2008) and cultural rights (2009). In approaching thematic mandates relating to the first generation of human rights, most developing countries manifested their reluctance. For instance they firmly rejected the request by the thematic Working Group on Arbitrary Detention (acronym, WGAD) to broaden its mandate (Council's Resolution 10/9 of March 2009).

Turning to country mandates, the Council renewed various geographic procedures save the mandates on Belarus, Cuba, the Democratic Republic of the Congo (acronym, DRC) and Liberia. Along these lines, at the 11th session (June 2009), the Council created the mandate of the independent expert on the situation of human rights in the Sudan (Council's Resolution 11/10), because of "the cooperative approach shown by the Sudanese Authorities (See Ops.2, 6, 10-11, 12 of Council's Resolution 11/10)".

Procedurally, the Special Procedures continue to report on their work, on a regular basis, to the Council and to the Third Committee of the UN General Assembly, during ad hoc Interactive Dialogues. However the introduction of the Code of Conduct for SPMHs (Council's Resolution 5/2) is impacting on their work. Mandate-Holders have to ensure that they act in accordance with this Code and that their recommendations have to be consistent with the Code.

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[435] Available at: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=6245&LangID=E.
The following day, Canada recalled that the principles guiding the Council's work should be "the universality, impartiality and non-selectivity". Therefore it regretted the inclusion of the situation in the occupied Palestinian territory and Israel as a result of "a politicised approach". The IB package also failed, according to Canada, "to renew and subject to review only the mandates on Cuba and Belarus, both situations that clearly warranted continued scrutiny by country-specific mandates."

[436] See paragraph 4.1. on the Code of Conduct.

[437] Further to the requests, by NGOs in favour of replacing the former Sub-Commission Working Group on contemporary forms of slavery with a new special rapporteur's mandate. At the initiative of the UK, a new mandate on contemporary forms of slavery was set up by Council Resolution 6/14 (See UN Doc. A/HRC/RES/6/14 of September 2007).

The standardised practice of the Inter-active Dialogue with the Special Procedures results in an important occasion for UN Member States to publicly assess the Special Procedures' reports, including their findings and the relevant recommendations. Usually UN Member States pose questions on the elaboration and the content of the Reports. However the recent practice shows that UN Member Statess use this segment of the Council work to question the consistency of the Special Procedures' studies with the Code of Conduct on SPMH, as was the case with the above-mentioned UN joint Report on secret detention and counter-terrorism.

During the Interactive Dialogues, mandate-holders are thus questioned both on the substance of their reports and on their working methods. As a way of example it might be recalled that, at the second session (September 2006), various special rapporteurs were attacked for having considered the issue of LGBT (standing for Lesbian, Gay, Bisexual and Transgender people) rights. At the fourth session, Nigeria, on behalf of the African Group, overtly criticised Prof. Alston, the former UN Special Rapporteur on summary or arbitrary executions for his study A/HRC/4/20 by which he stressed the increase in summary executions on the ground of sexual orientation. During the same session (March 2007), Ukraine emphasized that the Special Rapporteur on the sale of children, child prostitution and child pornography was using "doubtful methodology and emotional overstatements," following the presentation of the UN Report on his country mission to Ukraine (UN Doc. A/HRC/4/Add.2). At the fifth session, Australia stated that the report of the Special Rapporteur on adequate housing was "unbalanced". At the same session, the US questioned the scope of the report of the Special Rapporteur on the Independence of the Judiciary in dealing with the "state of emergency clause". At the sixth session, on the occasion of the renewal of the mandate of the special rapporteur on the right to health, he was badly criticised by Egypt, on behalf of the African Group, for having signed with other 30 rapporteurs the so-called Yogyakarta Principles, on the ground of misusing the UN name "to promote any concepts that does not enjoy any consensus in the UN system" relating to LGBT rights[438]. In 2008, the UN Secretary-General Special Representative on Human Rights Defenders was criticised due to her proposal to focus on human rights defenders working on LGBT rights[439]. As discussed, at the thirteen session of the Council (March 2010), it was postponed the presentation of a joint study by various special procedures

[438] These principles were elaborated under the auspices of the then High Commissioner, justice L. Arbour.
[439] See UN Press Release of December 2008, available at: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=8877&LangID=E.

on secret detention and counter-terrorism. At the fourteenth session of the Council (June 2010), Prof. M. Nowak, one of the writers of this Report, was publicly put under attack since none of the UN writers was willing to reveal the sources and this, according to States, resulted in unbalanced approach to the work. In all the above cases Member States requested the Special Procedures to stick to the Code of Conduct (Council's Resolution 5/2).

At present, the main concern arises from the challenges and complaints by most UN Member States on the reporting exercise of the Special Procedures. The EU and other Western countries, by definition, support the work of the Special Procedures as invaluable tool of the UN human rights machinery.

With the creation of the Human Rights Council, there was expectation that this new body could enhance the effectiveness of the Special Procedures' work. For different reasons, progress in this regard has not been achieved yet. The only positive note refers to the Coordination Committee of Special Procedures.

As for the establishment of the Coordination Committee, it might be recalled that the 1993 Vienna Conference recognized that "the system of Special Procedures" needed adequate coordination. From 1994 onwards, Special Procedures introduced the practice of convening annual meetings.

The more the Special Procedures gained visibility, the more the meetings proved the necessity of an upgrade. The Selebi Report further recognized a wider coordination for Special Procedures. In June 2005, on the occasion of their Annual Meeting, Special Procedures decided the creation of the "Coordination Committee of SPMHs". At the Council level, this Commission is gaining increasing visibility: from the participation in the Council's regular sessions to its decisions on improving working methods and on better coordinating Special Procedures, in addition to the new supervisory role entrusted by Presidential Statement 8/2[440]. By this Statement, the Coordination Committee is mandated, inter alia, to develop the Advisory Procedure on practices and working methods of the Special Procedures, by which States and other stakeholders can bring, through the Coordination Committee, to the attention of the Council's President, issues relating to the practices and working modalities of the Special Procedures.

4. The selection procedure

[440] By the latter. See UN Doc. Council's Presidential Statement 8/2 of June 2008), it has been introduced a sort of complaint procedure in case of "persistent non-compliance by a mandate-holder with the provisions of Council Resolution 5/2."

Within the past Commission, the appointment procedure was to be endorsed by the ECOSOC. At present, the Council establishes Special Procedures,[441]without the following endorsement by the parent body (the GA), because of its elevated status within the UN hierarchy.[442]

As discussed, to effectively implement the above GA Resolution, the Council adopted the IB Package. Within the framework of the IB negotiations, it was requested the definition of a new selection procedure for Special Procedures Mandate-Holders. As a result, Council's Resolution 5/1 (paras.39-53) defines the new selection procedure[443].

Unlike the appointment process under the Commission, mainly dominated by the decision of the annual Chairperson of the Commission,[444] the new selection procedure results in a multi-phase process, involving in each phase Council's Members.

In particular, the Council has strictly determined the general criteria to be applied when nominating, selecting and appointing mandate-holders, under para.39 of Council Resolution 5/1 :"(*a*) expertise; (*b*) experience in the field of the mandate; (*c*) independence; (*d*) impartiality; (*e*) personal integrity; (*f*) objectivity)". The Council has also specified the above criteria with a long list of requirements, as contained in Decision 6/102: i. "adequate qualifications, ii. relevant expertise (meaning knowledge of international human rights instruments, norms and principles as well as knowledge of institutional mandates related to the United Nations or other international or regional organizations' work in the area of human rights), iii. proven work experience in the field of human rights, iv. established competence (nationally, regionally or internationally recognized competence related to human rights), v. flexibility/readiness and availability of time to perform effectively the functions of the mandate and to respond to its requirements, including attending Human Rights Council sessions".

The SPMHs are "independent experts (para.39, lett.c, para.46 of Council's Resolution 5/1)", who are selected from a public list of eligible candidates, which is constantly updated by the OHCHR (para.43 of Council's Resolution 5/1). The candidates to be included in the list are mainly proposed by UN Member States and by "other relevant stakeholders", including NGOs and NHRIs.

[441] See Op.6 of GA Resolution 60/251.
[442] See Ramcharan, B., The Protection Roles of UN Human Rights Special Procedures, M. Nijhoff Ed., 74 Nijhoff Law Specials, 2005, p. 51 et ff.
[443] as subsequently supplemented by a follow-up Decision (6/102) clarifying "the technical and objective requirements" to be matched by the candidates.
[444] See Sunga, L., What Effect If Any Will the UN Human Rights Council Have on Special Procedures, in International Human Rights Monitoring Mechanisms, Essay in Honor of J.T. Moller, second edition, R Wallenberg Institute, M. N. Publishers, 2009, p.179.

During the IB process, despite the requests by various countries to entrust the High Commissioner for Human Rights (whose independence would have ensured a transparent and inclusive process), the Council has decided that the President of the Human Rights Council appoints the selected candidate (para.52), upon advice by regional groups, being formed through and within the newly established ad hoc Consultative Group (paras.47-51)[445].

The Consultative Group, made of five members (States' delegates), is based upon the principle of the equitable geographical distribution: one member from each Regional Group. The Consultative Group reflects the dynamics of the decision-making process within the Council. It adopts its recommendations (political decisions) on potential candidates, on the basis of a simple majority of votes rule. The political nature of these recommendations emerges, especially if one considers the country of origin of the selected Experts[446]. At present, most country experts are from the regional group of which the country concerned is a member, such as the experts on Burundi, Cambodia, DPRK, and the Sudan. Along these lines, apart from WGs, most individual thematic experts are from countries of the G-77 Group. It is interesting to note that in this regard, para. 9 of the 2008 Manual of Operations of Special Procedures reported as follows: "While overall regional diversity among mandate holders is important, any link between a mandate and a mandate-holder from a particular region would seem to be inappropriate". In this regard Council's Decision 6/102 emphasizes, inter alia, that [..] Special Procedures Mandate-Holders have to represent "different legal systems": meaning that they should reflect the legal systems of all regional groups.

Council's Resolution 5/1 also indicates the duration of the mandates. Apart from the long-debated mandate on "the situation of human rights in the Palestinian Territories, occupied since 1967, established until the end of the occupation,[447]" the IB Package expressly sets forth the duration for all the other experts: (para.45) "whether a thematic or country mandate, it will be no longer than six years. Two terms of three years for thematic mandate-holders (while geographic mandates usually have to be

[445] "The new process has four steps: i Governments, regional groups of States, international organisations, NHRIs, NGOs, other human rights bodies and individuals can nominate candidates for appointment; ii. OHCHR establishes and maintains a public list of eligible candidates; iii. A Consultative Group, consisting of a member of each of the five regional groups, proposes to the President of the Council a list of candidates with 'the highest qualifications', chosen from the public list except in extraordinary circumstances; iv. the President, after broad consultation, identifies an appropriate candidate for each vacancy and presents to the Council a list of persons for appointment, for the Council's approval (Resolution 5/1, Annex, Section II, lett.A). See Clapham, A., United Nations Charter-Based Protection of Human Rights (Draft chapter for R. Hanski, M. Sheinin & M. Suski (eds) An introduction to the International Protection of Human Rights, A textbook. Third Edition, Institute for Human Rights, Abo Akademi University, 2009 forthcoming), p.1-23.

[446] Since 1992, Prof. Alston has stressed the political nature of the selection procedure., see op. cit. in supra note 9.

[447] In his statement to the Council, on 16 June 2008, the Special Rapporteur himself expressed concern about the one-sidedness of the mandate that applies only to Israeli violations of human rights and international humanitarian law in the Occupied Palestinian Territories. He thus called for the Council to review the mandate.See press release available at: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=8489&LangID=E.

renewed every year)". In this regard scholars[448]argue that the different duration affects the effectiveness of the work of the Special Procedures, since longer mandates would allow a better understanding of the relevant human rights situations/issues besides ensuring the continuity in the relevant work.. According to Sir Rodley[449], the one-year geographic mandates are usually discontinued at the end of the term, while the three-year thematic mandate are usually extended, *de plano*.

By Council's Resolution 5/1, it seems that the Council has opted for the return to the origin. Initially the Commission was used to establish the mandates of the Special Procedures for a one-year term[450] when, according to Prof. Alston,[451] the short-term mandate was intended "to restrain the enthusiasm of the mandate-holders".

5.1. The Code of Conduct for the UN Special Procedures Mandate-Holders (acronym, SPMHs)

The Special Procedures Mandate-Holders serve, on an individual basis[452]. They are considered as "experts on mission" and thus refer to the Convention on the Privileges and Immunities of the United Nations (1946)[453] (See PP.4 of Council's Resolution 5/2). Since the creation of the initial mandates, the independence has characterised the work of Special Procedures as a guarantee of impartiality and thus of effectiveness[454].

As discussed, in the late 1990s, both Special Procedures and the Sub-Commission's Experts were subject to a stock-taking exercise by the Commission. By the Selebi Report (E/CN.4/2000/112) containing various recommendations, the Commission noted that a relevant draft Code of Conduct was under consideration by the General Assembly (para.11). "The threats, challenges and change" of the early XXI century severely affected the work of the Commission and its relating mechanisms (See Chapter I).

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[448] Sir N. Rodley, "The UN HR, its Special Procedures, and its relationship with the Treaty Bodies: complementary or competition?, 25 HR Quarterly 882 (2003), as updated in New Institutions for Human Rights Protection The United Nations Human Rights Council, Its Special Procedures and Their Relationship with the Treaty Bodies – Complementarity or Competition? Oxford University Press, 2009, p.49.75.
[449] Ibidem.
[450] See Resolutions 20 (XXXVI) on the WGED.
[451] See op.cit. in supra note 9.
[452] They are all supported by the UN Secretariat, particularly the OHCHR that provides logistical, human and technical resources. Ibidem; see also op.cit. in supra note 58; see further op.cit. in supra note 66 (p.111).
[453] Op.cit in supra note 26 (p.60-80).
[454] See OHCHR Fact-sheet No.27, available at htpp://www2.ohchr.org/English/about/publications/docs/factsheet27.pdf)

By challenging the impartiality of the Special Procedures' work, especially on country situations, an increasing number of UN Member States (those claiming that the SP's reports were contributing to the criticised Commission's practice of "naming and shaming") pointed to the independence and working methods of the Special Procedures.

Despite the clear Terms of Reference for each mandate, during the IB process, the "crown jewels" of the Commission became one of the main negotiation fields[455]. The RRI section of GA Resolution 60/251 (Op.6) paved the way to re-open the achievements of the Commission. By Resolution 2/1 of 27 November 2006, the Council envisaged that an Open-ended Intergovernmental Working Group: "draft a code of conduct" to regulate the work of the Special Procedures[456]. Prior to the adoption of Council's Resolution 5/2, containing "the Code of Conduct for SPMHs of the Human Rights Council," Algeria, on behalf of the African Group, stressed that "the code of conduct aims at enhancing the moral standing and credibility of mandate-holders.[457] Preambular paragraph 12 of Council's Resolution 5/2 indicates that the Code; "will strengthen the capacity of mandate-holders to exercise their functions whilst enhancing their moral authority and credibility".

Unlike the past practice - when the Commission determined the ToR of each mandate by ad hoc Resolutions[458]- the Council has decided to add a general package of provisions (the IB Package), particularly the Code of Conduct, to supplement the specific ad hoc Resolutions dealing with Special Procedures' mandates.

In general terms, the Code of Conduct acknowledges the *acquis* of the Special Procedures, namely the independence and status of "UN Experts on Mission". However when going through the relevant provisions, it emerges as follows:

1. Under Article 2, entitled "independent experts of the United Nations," there is no reference either to the 1946 UN Convention on Privileges and Immunities or to the relevant provisions of the Charter of the United Nations. It stipulates as follows: "The provisions of the present Code complement those of the Regulations Governing the Status, Basic Rights and Duties of Officials other than Secretariat Officials, and Experts on Mission (ST/SGB/2002/9) (hereinafter referred to as "the Regulations")".

[455] See statement by the former UN Secretary-General, K. Annan before the Commission, available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=2763&LangID=E.
[456] The African Group led the relevant negotiations on draft Resolution 5/2.
[457] See the relevant Press Release, available at: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=5222&LangID=E)
[458] As a way of example, it might be recalled the requirements for the Special Rapporteur on Violence Against Women and for the then Expert on the Right to Development - Commission's Resolutions 1994/45 and 98/72, respectively.

2. Article 4, entitled "the status of mandate-holders", indicates that Special Procedures "exercise their functions on a personal basis, their responsibilities not being national but exclusively international".
3. Article 3 further refers to the independence of Special Procedures Mandate-Holders, provided that they "keep in mind the mandate of the Council (see Article 3, lett. b of the Code of Conduct)" and respect the long list of thirteen "principles of conduct" contained therein (and in the respective Council's Resolutions)[459].
4. Article 7, entitled "Observance of the terms of the mandate", supplements the above principles, by stipulating: "It is incumbent on the mandate-holders to exercise their functions in strict observance of their mandate and in particular to ensure that their recommendations do not exceed their mandate or the mandate of the Council itself".
5. Article 15, entitled "Accountability to the Council", concludes the Code by envisaging, "In the fulfilment of their mandate, mandate-holders are accountable to the Council". Indeed the sensitivity, or alternatively, the political nature of the work of Special Procedures emerges from this Article. Its vagueness suggests that it has been shaped along the basic rules of penal law. According to the rules to interpret criminal law sources, the more one specifies the elements of a criminal conduct, the lower the number of cases that will fall within that given conduct. *A contrario*, the less one specifies the elements of a conduct, the more the number of cases which will fall within that criminal conduct[460]. *Mutatis mutandis*, this might entail that the wording of this Article could be widely invoked when considering the conduct of Special Procedures Mandate-Holders.

[459] With a redundant list of "principles of conduct" UN Member States have determined as follows: "While discharging their mandate, [Special Procedures] shall: [1] Act in an independent capacity; [2] and exercise their functions in accordance with their mandate, [3] through a professional, impartial assessment of facts, based on internationally recognized human rights standards, [4] and free from any kind of extraneous influence, incitement, pressure, threat or interference, either direct or indirect, on the part of any party, whether stakeholder or not, for any reason whatsoever [..]; [5] Keep in mind the mandate of the Council which is responsible for promoting universal respect for the protection of all human rights and fundamental freedoms for all, through dialogue and cooperation as specified in General Assembly resolution 60/251 of 15 March 2006; [6] Exercise their functions in accordance with their mandate and in compliance with the Regulations, as well as with the present Code; [7] Focus exclusively on the implementation of their mandate, constantly keeping in mind the fundamental obligations of truthfulness, loyalty and independence pertaining to their mandate; [8] Uphold the highest standards of efficiency, competence and integrity, meaning, in particular, though not exclusively, probity, impartiality, equity, honesty and good faith; [9] Neither seek nor accept instructions from any Government, individual, governmental or non-governmental organization or pressure group whatsoever; [10] Adopt a conduct that is consistent with their status at all times; [11] Be aware of the importance of their duties and responsibilities, taking the particular nature of their mandate into consideration and behaving in such a way as to maintain and reinforce the trust they enjoy of all stakeholders; [12] Refrain from using their office or knowledge gained from their functions for private gain, financial or otherwise, or for the gain and/or detriment of any family member, close associate, or third party; [13] Not accept any honour, decoration, favour, gift or remuneration from any governmental or non-governmental source for activities carried out in pursuit of his/her mandate".
[460] Antolisei F. "Manuale di Diritto Penale, Parte Generale", edited by Giuffré, 1997, p.88 ff..

In this regard, it might be recalled that when drafting Article 15, States did not take on board the proposal put forward by the Coordination Committee of the Special Procedures, to include a reference to the responsibility of Governments, in light of operative paragraph 5 of GA Resolution 60/251, which enumerates all the tasks of the Council. In this regard, the Coordination Committee of the Special Procedures stressed that " a code of conduct, if it is to be meaningful, cannot be a one-way street[461]".

In 2008, the Special Procedures Mandate-Holders adopted the updated version of their June 2006 Draft Manual of the Operations of the United Nations Human Rights Special Procedures (SPs) with the two-fold aim of providing operational guidance to mandate-holders and of raising awareness of their work.[462] It contains the bulk of their working methods and is intended to integrate the Code of Conduct. It was thus updated to outline an operational framework containing guidelines in light of the above Code of Conduct. It does mention criteria of admissibility of allegations, reporting procedures, schedules, terms of reference/guidelines for visits, guidelines on media interaction, and procedure/guidelines for OHCHR support[463].

In response, the Council adopted the Presidential Statement 8/2 of June 2008 concerning "the terms of special procedures mandate holders", by which it was *de facto* stressed that the extension of any Special Procedure's mandate would be conditioned by the absence of any complaint on the performance of the mandate: "(Op.3)[..] the President [of the Council] will convey to the Council any information brought to his or her attention, including that by States and/or by the coordination committee of special procedures, concerning cases of persistent non-compliance by a mandate-holder with the provisions of Council resolution 5/2, especially prior to the renewal of mandate-holders in office".

At the eleventh session (June 2009), the Council adopted Resolution 11/11, entitled the System of the Special Procedures, by which it stressed: "that the Code of Conduct for special procedures mandate holders is aimed at strengthening the capacity of mandate holders to exercise their functions while enhancing their moral authority and credibility, and that it requires supportive action by all stakeholders, and in particular by

[461] Possible elements for a code of conduct, dated April 2007, available at http://www2.ohchr.org/english/bodies/chr/special/docs/note_code_of_conduct.pdf

[462] This was originally adopted at the 6th Annual Meeting of Special Procedures Mandate-Holders in the year 1999[462]. Since then it has been revised to reflect the changing structure of the United Nations human rights machinery, new developments in relation to mandates, and the evolving working methods of the mandate-holders. It is subject to periodic review and updating by the mandate-holders who are responsible for its content and for its revision.

[463] 'Swiss position: Seminar on enhancing and strengthening the effectiveness of the Special Procedures. Seminar on Enhancing and Strengthening Special Procedures (SPs), OHCHR, 12-14 October 2005, available at:
http://portal.ohchr.org/pls/portal/docs/PAGE/SP_MH/SPECIAL%20PROCEDURES%20-%20POSITION%20DE%20LA%20SUISSE%20POUR%20LE%20S%C3%89MINAIRE%20E.DOC

States; [..] that it is incumbent on special procedures mandate holders to exercise their functions with full respect for and strict observance of their mandates, as outlined in the relevant Council resolutions providing such mandates, and to comply fully with the provisions of the code of conduct".

The above framework may be summed up with the words by the former UN Secretary-General: "in the absence of complete independence, human rights mandate-holders and special rapporteurs would hesitate to speak out against and report violations of international human rights standards".[464] Scholars[465] agree on the misuse of this Code and its negative impact on the independence of the Special Procedures. In 1989, Ramcharan already stressed that: "it is not possible nor desirable to establish unduly detailed rules which may turn out not to be applicable in practice".

When the Council determines the mandate of a Special Procedure, the relevant ToR already guides the activities of the mandate-holder. In view of the above, it should be recalled Preambular Paragraph 13 of Council's Resolution 5/2: "*[..]*one should distinguish between, on the one hand, the independence of mandate-holders, which is absolute in nature, and, on the other hand, their prerogatives, as circumscribed by their mandate, the mandate of the Human Rights Council, and the provisions of the Charter of the United Nations[466], in particular Articles 55-56 of the Charter of the United Nations.

5.2. The status of "Experts on Mission"

Following the introduction of the Code of Conduct for Special Procedures Mandate-Holders (June 2007), the Coordination Committee of the SPMH adopted the Manual of the Special Procedures' Operations (in June 2008), which provides guidelines on the working methods of Special Procedures.[467] Though reflecting different approach to the protection role of Special Procedures, the above Documents, expressly or

[464] "Written statement submitted to the International Court of Justice on behalf of the Secretary-General of the United Nations" in the Advisory Opinion on Difference Relation to the Immunity From Legal Process of a Special Rapporteur of the United Nations Commission on Human Rights, para. 55.
[465] See Tardu, M., Le nouveau Conseil des Droits de l'Homme aux Nations Unies: decadence ou resurrection?, Revue Trimestrielle des Droits de l'Homme, No.72, 2007, p.979; See also Ramcharan B.G. ,The Concept and Present Status of the International Protection of Human Rights: forty years after the UDHR. Dordrecht, M. Nijhoff Publishers, 1989, p.536 et ff; See further op.cit. in supra note 26.
[466] Over the last months, when coming across the issue of reviewing the modalities of work of the Council, by June 2011, the above UN Member States have proposed the establishment of an Advisory Committee of Magistrates to oversee the conformity of the work of the Special Procedures to the above Code (See Montreaux seminar of April 2010 on the Human Rights Council Review). The Western Group has immediately rejected the proposal though being indicative of the polarization of the positions, at the political level
[467] At the same meeting, they also adopted an Internal Advisory Procedure to review practices and working methods, to enhance the effectiveness and independence both of the special procedures system as a whole and of individual mandate-holders.

indirectly, recall either the Charter of the United Nations or the so-called "Regulations.[468]" However, over the last years, it has been discussed about the position of these document within the normative hierarchy regulating the work, the independence and the status of Special Procedures Mandate-Holders .

The international customary law[469] indicates that "privileges and immunities" are intended to ensure that foreign officials, primarily diplomatic agents, can perform their work. This is the branch of international law referring to the personal inviolability and to the exemption from civil and criminal jurisdiction. As argued, no customary rule requires States to grant the same treatment to international organisations' officers. As a consequence, there are treaty provisions regarding the immunity of staff members of international organisations, in particular of the UN.

As for the United Nations' officials, the Charter of the United Nations lays down, under Article 105, para.2, a guiding principle concerning the immunity (Article 105, para.3). To implement the above principle, UN Member States adopted the Convention on the Privileges and Immunities of the United Nations, on February 3, 1946. Among its provisions, Article VI, Section 22, stipulates that those experts who perform "missions" on behalf of the UN, shall enjoy various immunities[470].

By the Advisory Opinion of the International Court of Justice (acronym, ICJ) of December 15, 1989, in the case of "the Applicability of Article VI, Section 22, of the above Convention[471], it was indicated that the term "mission" includes either the travel of experts ("on mission") or any other relevant task assigned to individuals, such as the preparation of reports, research and investigation-related activities. The Opinion of the Court was released at the request of the ECOSOC, with regard to the Mazilu case[472].

On April 29, 1999, the ICJ released another Opinion, under Article VII, Section 22, concerning "The difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights". In this case, the UN expert on mission, M. Cumaraswamy, was prosecuted in his country (Malaysia) due to an interview which had been considered defamatory vis-à-vis the Malaysian

[468] See the UN Regulations Governing the Status, Basic Rights and Duties of Officials other than Secretariat Officials are applicable, as the Experts on Mission (UN Regulations, Document ST/SGB/2002/9.
[469] See Conforti. B., The Law and Practice of the United Nations, M. Nijhoff Publishers, 2005, p. 108-118.
[470] Ibidem; see also op.cit in supra note 8 (p.52); see further op.cit. 26, p.50 et ff.
[471] See ICJ, Reports, 1989, p.177 ff..
[472] Mr. Mazilu was a Romanian citizen, who was a member of the then Sub-Commission for the prevention of discrimination and the protection of minorities (thus, Sub-commission for the promotion and protection of human rights, currently known as the HRC Advisory Committee). For political reasons, his Government prevented him from leaving Romania and receiving documents from the UN, in order to prepare a report for the Sub-Commission.

Authorities.[473] In practical terms, the ICJ emphasized that it is the Secretary-General who has to assess whether a UN official enjoys the right to immunity. Accordingly the domestic Courts must give the greatest weight to the Secretary-General's assessment.[474] Scholars[475] argue that this last Opinion confirms the previous judgement on the Mazilu's case. In this regard, another relevant case refers to the former Special Rapporteur on Trafficking in Persons, Ms. Sigma Huda, a national of Bangladesh, who was appointed as Special Rapporteur, on April 19, 2004. She was put under arrest in her country with the charge of corruption. On July 17, 2007, the UN Secretary-General released a statement[476] calling on the Government of Bangladesh to respect the full range of human rights, including the right to a fair trial. He also recalled the 1946 Convention on the Privileges and Immunities, stating that States must alert the Secretary-General if they wish to initiate legal proceedings against UN experts. "Regrettably, he said, the Government of Bangladesh did not do so in this case". After requesting and receiving information from Bangladesh on the nature of the charges brought against Ms. Huda, including the alleged connection of her criminal conduct (corruption) with her functions as Special Rapporteur, the UN Secretary-General concluded that "no immunity under the Convention is applicable in the present case". However he stressed the firm commitment of the UN to assist countries in thwarting corruption, and urged the Government of Bangladesh to act consistently with its international human rights obligations relating to the principle of the due process of law and the right to a fair trial.

To supplement the Convention's provisions, the UN Regulations (UN Doc. ST/SGB/2002/9) apply to officials other than UN Secretariat officials, and to "experts on mission". This Text is annexed to the contract of employment of any individual, including officials other than UN Secretariat officials, and "experts on mission", who are appointed through Assembly's action or through the actions of other representative bodies. The Regulations, which are very general, have to be considered jointly with the relating Commentary as drafted to explain the above provisions:

i. Regulation 1 envisages, under letter b, "Officials and experts on mission shall make the following written declaration witnessed by the Secretary-

[473] Advisory Opinion on Difference Relating to the Immunity From Legal Process of a Special Rapporteur of the United Nations Commission on Human Rights, issued on 29 April 1999; See also AI Index: IOR 40/017/2005, entitled "United Nations special procedures."
[474] Section 20 of Article V of the General Convention provides as follows: "The Secretary-General shall have the right and the duty to waive the immunity of any official in any case where, in his/her opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the UN (In the case of the Secretary-General, the Security Council shall have the right to waive immunity.
[475] See op.cit. supra in note 172.
[476] See UN Doc. SG/SM/11093.

General or an authorized representative: "I solemnly declare and promise to exercise in all loyalty, discretion and conscience the functions entrusted to me by the United Nations, to discharge these functions and regulate my conduct with the interests of the United Nations only in view, and not to seek or accept instructions in regard to the performance of my duties from any Government or other source […] (d) "Experts on mission will receive a copy of the present Regulations Governing the Status, Basic Rights and Duties of Officials other than UN Secretariat Officials, and Experts on Mission (hereinafter referred to as "the Regulations") when they receive documentation from the United Nations relating to their mission and will be required to acknowledge receipt of the Regulations. Officials will receive a copy of the Regulations at an appropriate opportunity. (e) The privileges and immunities enjoyed by the United Nations by virtue of Article 105 of its Charter are conferred in the interests of the Organization[477].

ii. Regulation 2 on the "Conduct" envisages: "(a) Officials and experts on mission shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status. (b) In the performance of their duties, officials and experts on mission shall neither seek nor accept instructions from any Government or from any other source external to the Organization. (c) Officials and experts on mission shall discharge their functions and regulate their conduct with the interests of the Organization [..]. Loyalty to the aims, principles and purposes of the United Nations, as set forth in its Charter, is a fundamental obligation of all individuals covered by the present Regulations[478].

iii. Regulation 3, referring to the accountability, stipulates: "Officials and experts on mission are accountable to the United Nations for the proper discharge of their functions[479]".

[477] "[.]These privileges and immunities furnish no excuse to those who are covered by them to fail to observe the laws and police regulations of the State in which they are not located; nor do them furnish an excuse for non-performance of their private obligations. In any case where an issue arises regarding the application of these privileges and immunities, an official or an expert on mission shall immediately report the matter to the Secretary-General, who alone may decide whether such privileges and immunities exist and whether they shall be waived, in accordance with the relevant instruments. The Secretary-General should inform and may take into account the views of the legislative bodies that appointed the officials or experts on mission".

[478] "(d) While the personal views and convictions of officials and experts on mission, including their political and religious convictions, remain inviolable, they shall ensure that those views and convictions do not adversely affect their official duties or the interests of the United Nations. Officials and experts on mission shall conduct themselves at all times in a manner befitting their status. They shall not engage in any activity that is incompatible with the proper discharge of their duties with the United Nations. (omissis)".

[479] See op.cit. in supra note 172.

Provided that the above provisions are *per se* comprehensive, Article 2 of the Code of Conduct does not set forth any new provision but reiterates that special procedures mandate-holders are UN experts. As such, they fall within the above normative framework, namely Article VI, section 22 of the UN Convention on Privileges and Immunities and the relevant United Nations Charter's provisions.

Conclusion

"L'independence des rapporteurs speciaux est la pierre angulaire du systeme. Elle doit rester preservée… Encore trop d'Etats ne respondent pas aux demandes des visites des rapporteurs… C'est un organe qui n'a pas encore été en mesure de deploy tout son potential[480]*"*

As discussed, Article 62, paragraph 2 and Article 68 of the Charter of the United Nations laid the foundations of the Commission on Human Rights. The ECOSOC decisions, including Resolutions 1235,[481] further supplemented the normative and operational framework of the Commission. The adoption of GA Res. 60/251 has further strengthened and broadened the relevant normative basis by establishing the Council (Article 1, paragraph 3, Article 13, Article 62, Article 68) with an elevated status. It has also acknowledged the role of the Special Procedures (Op.6).

The adoption of GA Resolution 60/251 should thus indicate a broader Charter-based framework, within which Article 1, para.3, Article 55, lett.c, and Article 56 of the UN Charter are "*indissociables*"[482]. The joint reading of the above Articles clearly indicates an obligation to promote the observance of, and respect for, human rights through adequate mechanisms, such as the Special Procedures.[483]

In this vein, the 1993 VDPA acknowledged that Special Procedures constitute "the system" working for the promotion and protection of human rights. The current practice shows that the Special Procedures are not considered yet as one of the main pillars of the Council's protection work. The divisive approach developed within the Council fosters a dual/conflicting vision which may concretely prevent the Mandate-Holders from being effective, whereby "effectiveness means independent ability to cover human rights issues and situations, in a prompt manner".

[480] M. Calmy-Rey, Ministre des affaires étrangères de la Suisse (See Tribune de Genève, dated March 4, 2010)
[481] See op.cit.in supra note 8 (p.52 et ff.).
[482] See the Introduction to the present Thesis.
[483] See Buergenthal, T., The evolving international human rights system, in The American Journal of International Law, 100 (4), 2006, p.783; see also op.cit.in supra note 8 (p.52).

On their own, SPMH have repeatedly stated that "in the accomplishment of their mission, they are merely guided by the needs for protection, including through dialogue, early warning, cooperation and preventive measures[484]. Casting doubts on the integrity of the Special Procedures corresponds to challenge the inner coherence of the work of the Council, as long as it is supposed to "build upon [one of] the achievements of the Commissions", including the system of the Special Procedures.

The rationale behind GA Resolution 60/251 is to ensure that the Council can initiate and conduct primarily result-oriented activities by new and old instruments, including the Special Procedures. Affecting their independence, minimising their status or challenging their work within the UN framework might indicate that States have failed to implement GA Resolution 60/251 and, ultimately, are not compliant with the obligation contained in Article 56 of Charter of the United Nations.[485]

[484] See op.cit. in supra note 133.

[485] As a concluding remark, in the course of informal meetings on the 2011 Council Review (See Chapter VI), some countries from G-77 have proposed to re-open the Institution-Building Package (in the course of the informal seminars between February-May 2010) and to further develop the UPR in lieu of the Special Procedures. Some other countries, such as Costa Rica, have proposed new formulas for Special Procedures such as the creation of regional Special Procedures[485]. This last proposal contradicts the inner coherence of the UN and endangers the independence and impartiality of the Special Procedures, besides overlapping with existing regional mechanisms. Should this last proposal be pursued, how could the Council invoke its core principles (See GA Res. 60/251)?

CHAPTER III

The Universal Periodic Peer Review Mechanism

"The universal periodic review aims at strengthening the existing monitoring system by creating a new route for such monitoring", Prof. Alston, the former Special Rapporteur on Extra-judicial, Arbitrary or Summary Executions,

The ECOSOC "reiterates its belief that the reporting system is not only a source of information, but also a valuable incentive to Governments' efforts to protect human rights and fundamental freedoms and to the implementation of the Universal Declaration of Human Rights [..]"[1]

INTRODUCTION

General Assembly Resolution 60/251 of 15 March 2006 envisages a new mechanism, by which the Council is mandated to review, on a periodic basis, the

[1] See ECOSOC Resolution 1074 C (XXXIX) of 1965.

fulfilment, of the "human rights obligations and commitments" of each United Nations Member State.

By operative paragraph 5, lett.e, the UN General Assembly stipulates that the Council shall "(*e*) Undertake a universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States; the review shall be a cooperative mechanism, based on an interactive dialogue, with the full involvement of the country concerned and with consideration given to its capacity-building needs; such a mechanism shall complement and not duplicate the work of treaty bodies; the Council shall develop the modalities and necessary time allocation for the universal periodic review mechanism within one year after the holding of its first session."

The above Resolution has been supplemented by other UN Texts by which UN Member States have put in place a complex, multi-phase State-driven monitoring procedure.

From a normative standpoint, the UPR mechanism is based upon: the relevant provisions of the Charter of the United Nations, particularly "the Purposes and Principles" as recalled in preambular paragraph 1 of GA Res. 60/251 (though it would have been more appropriate to recall specifically Articles 55-56 of the Charter of the United Nations, given the cooperative nature of this mechanism); A/RES/60/251 of March 15, 2006; Decision A/HRC/1/103, entitled the Universal Periodic Review, of June 30, 2006; the Annex to A/HRC/RES/5/1 (whose initial 38 paragraphs are devoted to the UPR); Decision A/HRC/DEC/6/102 of September 27, 2007, concerning General Guidelines for the Preparation of Information under the UPR; A/HRC/RES/6/17 of September 28, 2007 concerning the UPR Fund; and Presidential Statements A/HRC/PRST/8/1 of 9 April 2008 and A/HRC/PRST/9/2 of 29 September 2008, concerning Modalities and Practices and the relating Follow-up on Modalities and Practices of the Universal Periodic Review, respectively.

All the above provisions set the normative framework for a peer cooperative monitoring mechanism, aimed at reviewing "the fulfilment of human rights obligations and commitments" of each UN Member State (para.4, lett.b, of the Annex to Council's Resolution 5/1).

Indeed the UPR has innovated the UN Human Rights machinery. Unless States use it as a new "shield", it might result in a driving force to develop a public system of accountability, based on reporting and follow-up activities.[2]

1. Historical development

"Nothing comes from nothing", Empedocles, (ca. 490–430 BCE)

As recalled by some scholars, this new mechanism had some precedents dating back to the 1950s[3]. In 1951, the then Commission proposed to request each UN Member State to submit an annual Report indicating how States were promoting "respect for, and the progress of human rights", but the ECOSOC did not pursue this procedure[4]. In 1956, it endorsed the Commission's recommendation to introduce a system of triennial self-reporting[5]. In particular States were requested to illustrate "developments and the progress achieved during the preceding three years in the field of human rights and measures taken to safeguard human liberties[6]". The ECOSOC emphasized that this information would be considered, inter alia, in the Yearbook on Human Rights (one of the activities launched by the 1950s US-backed Plan of Action introduce in the UN[7]), as envisaged by ECOSOC Resolution 683 D I (XXVI) 1958. This self-reporting exercise had the two-fold aim of detecting: the "rights or groups of rights" to be studied by the UN; and those countries in need of technical assistance, upon their request.

Initially the Commission was tasked with examining the summaries of the States' reports, as prepared by the UN Secretariat. In 1961, the then Commission established the forerunner of the current UPR Working Group, namely the Committee on Periodic Reports (Commission's Resolution 3(XIX)), which was to review all the relevant reports, in one week (See the first report by the above WG, in UN Doc. E/CN.4/831 of March 1962)[8].

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[2] See UN Doc.A/CONF.157/PC/62/Add.11/Rev.1 (22 April 1993), entitled "Status of preparation of publications, studies and documents for the World Conference", paras.90 et sequitur. See also reflection group on the strengthening of the human rights council- first working session in Mexico city, October 29-30, 2009, available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/Reflection_Group_Mexico_Report.pdf

[3] See Burci,, G., "The UN Human Rights Council", in the Italian Yearbook of International Law, Vol. XV, 25, M. Nijhoff, 2005, p.25-41; see also Boyle, K., The United Nations Human Rights Council: Origins, Antecedents and Prospects, in New Institutions for Human Rights Protection, Oxford, Oxford University Press, Collected Courses of the Academy of European Law, XVIII/2, p.1-49, (44-49) 2009; see further Tolley, H. Jr, the UN Commission on Human Rights, Boulder, Westview, NY, 1987, p1-50; and Alston, P., Re-conceiving the UN HR regime: Challenges Confronting the New HRC, 7 Melbourne Journal of International Law, 2006, p.185 et ff.

[4] See UN Doc. E/CN.4/517 (1951), p.2.

[5] See Official Records of the Economic and Social Council, 22nd session, Supplement No.3 (E/2844), paras.23-49.

[6] See op.1 of ECOSOC Resolution E 624B (XXII) (1956) and Commission's Resolution 1 (XII) (1956), respectively.

[7] See para.1 of Chapter II.

[8] Op.cit in supra note 8.

In 1965, with the aim of improving the relevant reporting system, it was decided by ECOSOC Resolution 1074 C (XXXIX) (1965) that the Commission would receive, from the UN Secretary-General, the States' triennial reports, in full[9]. It was also decided that the Sub-Commission on Prevention of Discrimination and Protection of Minorities[10] would undertake the "initial study of the materials received [..] to report to the Commission on Human Rights, and to submit comments and recommendations for consideration by the Commission (operative paragraph 15)". In particular the ECOSOC decided that: (paras.17-18) "The Commission should establish an ad hoc Committee composed of persons chosen from its members, having as its mandate the study and the evaluation of the periodic reports and other information received under the terms of this resolution, and, in the light of comments, observations and recommendations of the [..] Sub-Commission on Prevention of Discrimination and Protection of Minorities, to submit to the Commission, comments, conclusions and recommendations of an objective character; the ad hoc Committee will [continue to] meet before the session of the Commission no later than one week prior to the end of the Commission's session[11]".

The above ECOSOC Resolution also envisaged the submission of information by NGOs. When in 1967 the then Sub-Commission took up some allegations by NGOs, States criticised this exercise. As a consequence, the Commission decided, by its Resolution 16 (XXIII), to release the Sub-Commission from the mandate.

In the 1970s, the Commission started deferring year after[12] year the debate under the relevant Agenda's Item. This self-reporting system was discontinued after 1977 when the Secretary-General deemed it obsolete. It has been argued[13] that this decision was determined by the creation of the Special Procedures System in parallel with the establishment of the human rights Treaty-monitoring Bodies. In 1981, the Commission formalised the above decision and abolished it[14] following GA Resolution 35/209 of December 1980, entitled "Identification of activities that are completed or are obsolete, of marginal usefulness or ineffective".

2. The establishment of the [new]Universal Periodic Review (UPR)

[9] See para.14 of ECOSOC Res. 1074 C (XXXIX) (1965).
[10] That will be later renamed, the Sub-Commission on Promotion and Protection of Human Rights.
[11] See Eide, A.,The Sub-Commission on Prevention of Discrimination and Protection of Minorities, in Alston , P. (ed), The UN and HR, Oxford, Clarendon Press, 1995, p.211.
[12] See UN Doc. A/C.5/35/40.
[13] See Abebe, M. A., "Of shaming and bargaining African States and the Universal Periodic Review of the United Nations Human Rights Council, in Human Rights Law Review, 2009, Nottingham University, Oxford University Press, p. 1- 35.
[14] See CHR's Decision 10 (XXXVII) (1981).

With a view to a "clean break" with the past, by an Addendum to the UN Report entitled "In Larger Freedom: Towards Development, Security and Human Rights for All""[15], the former UN Secretary-General put forward, inter alia, the proposal of "an interactive dialogue with the full involvement of the country concerned and with consideration given to its capacity-building needs.[16]" The UN Secretary-General indicated that the Review mechanism should be conducted, periodically, among peers. He provided a very broad concept of what this new procedure should cover: an evaluation of fulfilment of all human rights, in any part of the world. The intention was to overcome the accusations of politicization moved against the Commission when taking action on country situations, particularly under Item 9 of its Agenda (which, as discussed, usually triggered the creation of a mandate for a country Special Rapporteur).[17]

On May 26, 2005, the then High Commissioner for Human Rights, L. Arbour, launched a Plan of Action (A/59/2005/Add.2), by which it was stressed the need for effective supervisory/protection tools[18]. To this end, the then High Commissioner supported the idea of the countries-scrutiny through a system of peer review. In particular it was outlined a procedure aimed at a "universal scrutiny", under which all Member States of the UN should undergo a review of the state of implementation of their respective human rights obligations and commitments, in accordance with the Charter of the United Nations.

Two Canadian Non-papers were circulated between April-July 2005. In the former, Canada stressed that there was no similar mechanism elsewhere, "to enhance the transparency and the accountability of States in national implementation of human rights[19]". In the latter (in July 2005), Canada proposed to focus on implementation-related activities, by building on existing information rather than introducing a new reporting exercise.[20]

During the September 2005 World Summit, States resolved to strengthen the UN human rights machinery, by establishing the Human Rights Council.[21]During the

[15] See UN Doc. A/59/2005/Add.1, p.3
[16] Op.cit in supra note 3 (Burci, p.38).
[17] See Gaer F.D, in HRLR, A Voice Not an Echo: Universal Periodic Review and the UN Treaty Body System, p.109-139, 2007.
[18] See Tistounet, E., From the Commission on Human Rights to the Human Rights Council: Itinerary of a Reform Process, in International Law, Conflict and Development, by Kalin, W., Kolb, R., Spenlé, C.A., Voyame, M.D., M. Nijhoff Pub., Leiden/Boston, 2010, p.336-337, 347.
[19] available at www.eyeontheun.org
[20] This and other proposals were later discussed in the so-called Lausanne seminar (available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/RapportMontreuxFinal.pdf) of May 2006 when a consensus emerged on the need to establish an open-ended Working Group, to consider and develop the modalities of UPR. See below Council Dec.1/103 of June 30, 2006.
[21] See UN Doc. A/RES/60/1, para.157.

negotiation rounds (October 2005-March 2006) for the definition of the Council, it took shape the Universal Periodic Review procedure, as put forward by the Secretary-General. This *peer* review was perceived by all States' delegations as a "new fresh" within the UN human rights machinery, since its core principles are "the dialogue and cooperation" among States[22].

Fifty years after the first self-reporting, the UN Assembly decided, by GA Resolution 60/251 of March 2006, to introduce, *mutatis mutandis*, the UPR mechanism.

Selectivity, politicization, double-standards and finger-pointing had become the most used expressions to describe the work of the Commission. Hence the proposal to elaborate a universal periodic peer review, applicable to all UN Member States, seemed to be "a welcomed measure" to prevent any poisoning position against the new Council.[23] At its inaugural session, in June 2006, many G-77 countries expected that the new UPR would replace the debate on country-situations (Item 9 of the past Commission's Agenda) or, at least, would reduce the impact of the work of the Special Procedures, particularly of the country procedures. The Vice-Minister of Foreign Affairs of China (and the Russian Federation[24]) stated: "the proposed UPR should ensure that all countries regardless of their size, are treated impartially and in a fair manner and that all countries historical, cultural and religious background and difference are equally respected". Brazil (and Algeria, on behalf of the African Group[25]): stressed that the "objective of this mechanism is not to assume the functions of a tribunal and that it must avoid imposing obligations on States for which provisions are already made within the Treaty Bodies framework."

3. The UPR pursuant to GA Resolution 60/251 (A/RES/60/251) of March 15, 2006

The UN Member States have developed the UPR mechanism as "a consensual and cooperative inter-governmental process", under which the role of governments

[22] See Marquez Carrasco, C., and Nifosi-Sutton, I., The UN Human Rights Council: Reviewing its First Year, in Yearbook on Humanitarian Action and Human Rights, University of Deusto and Pedro Arrupe Institute of Human Rights, 2008, p.109.
[23] See Sundberg, U., Five years of working in the UN Commission on Human Rights: some reflections for the future work of the UN Human Rights Council, in Human Rights Quarterly 2009, p.163; see also Five years of working in the UN Commission on Human Rights, in International Human Rights Monitoring Mechanisms, essay in honor of J.T. Moller, second edition, R Wallenberg Institute, M. N. Publishers, p.151-164

[24] See UN Press Release, available at ; http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=6723&LangID=E". The Russian Federation, alone or with Iran, is used to introduce Resolutions within the Council and the General Assembly to highlight the principle of cultural diversity as a way to reduce the concept of the "universality of human rights", meaning equal implementation of all human rights without any *à la carte* selection)
[25] See UN Press Release, available at: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=6723&LangID=E)

remains the primary and most important. UN Member States agreed on a State-driven process with limited space to independent expertise.

In October 2009, the former President of the Council stated before the UN GA Third Committee that: "The UPR is a mechanism translating the principles of the UN Charter and is based upon the principle of equality among Member States of the UN. It is also expression of the principle of solidarity among peers in the promotion and protection of human rights.[26]"

Indeed this is the rationale behind operative paragraph 5, lett.e, of GA Resolution 60/251[27], which envisages, though in very general terms,[28] all the main elements and principles guiding the UPR. It sets out: [The Council] "(*e*) Undertake a universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States [objective standpoint]; the review shall be a cooperative mechanism, based on an interactive dialogue, with the full involvement of the country concerned and with consideration given to its capacity-building needs [subjective standpoint]; such a mechanism shall complement and not duplicate the work of treaty bodies [institutional standpoint]; the Council shall develop the modalities and necessary time allocation for the universal periodic review mechanism within one year after the holding of its first session."

From the above, it emerges that GA Resolution 60/251 envisages the UPR mechanism along the following lines:

i. From an objective standpoint, it focuses on "the fulfilment by each State of its human rights obligations and commitments". The UPR does deal with both obligations, stemming from international human rights binding instruments as ratified or acceded to by UN Member States, and commitments and pledges originating from UN Conferences and Summits or submitted, for instance, at the presentation of the candidature for the Council (when UN Member States supplement their candidature with a list of human rights

[26] Statement by Ambassador A. Van Meeuwen, President of the Human Rights Council from June 2009 through June 2010, as delivered before the Third Committee of the General Assembly, on October 30, 2009, available at: http://www.un.org/News/Press/docs/2009/gashc3962.doc.htm.
[27] During the negotiations on Resolution 60/251, while lacking a common view on the Council to be established, all States' delegations accepted the idea of a peer review

[28] See International Service for Human Rights, N.65, in Human Rights Monitor, The Council Institution-Building work, the end of a long process, 2007, p.24.; see also Vincent, M., Universal Periodic Review of Human Rights, eds. Purna Sen, 2009, p.1-139, Commonwealth

pledges and commitments (See OP.8 of GA Res. 60/251: "[..] when electing members of the Council, Member States shall take into account the contribution of candidates to the promotion and protection of human rights and their voluntary pledges and commitments made thereto").

ii. From an institutional standpoint, although the UPR covers both State's human rights commitments and obligations, it has been designed as complementary to Treaty-monitoring Bodies that by definition are the human rights conventional mechanisms, in charge with monitoring the state of implementation of relevant obligations by States-Parties. Apparently the UPR does not impact on the Treaty Bodies because of their different mandates. However the choice to deal with both obligations and commitments might dilute, it has been argued by scholars, in the longer-term, the impact of relevant obligations.[29]

iii. From a subjective standpoint, the focus is on UN Member States throughout the procedure so as to *de facto* limit the full participation of "other relevant stakeholders", namely NGOs and NHRIs (at least within the current first UPR cycle).

In accordance with the above GA Resolution, Council's members have identified the "principles and objectives" of the Review (See Annex to Council's Resolution 5/1, paras.3-4, Section I, B), among which mention has to be made of the following four principles:

i. Be based on objective and reliable information of the fulfilment by each State of its human rights obligations and commitments;
ii. Be conducted in a manner which ensures universality of coverage and equal treatment with respect to all States;
iii. Be a cooperative mechanism, based on an interactive dialogue, with the full involvement of the country concerned and with consideration given to its capacity-building needs;
iv. and Complement and not duplicate the work of Treaty Bodies.

[29] Op.cit in supra note 13 (Abebe, p.4); see also Papisca, A., Quod barbari non fecerunt, fecerunt Barberini. L'assalto all'edificio dei diritti umani, Archivio Pace e Diritti Umani, 2/2006, p.7-19; see further, Fassassi, I., L'examen periodique universel devant le Conseil Droits de l'Homme des Nations Unies, No.79, Revue Trimestrielle des droits de l'homme, 2009, p.739 et ff; see op.cit. supra in note 3.

From the above, it is outlined a self-reporting mechanism which mainly relies on information provided by the States themselves on the fulfilment of their respective human rights obligations and commitments and on their capacity-building needs. Rather than a mere monitoring mechanism, it also sets a specific dialogue with the full involvement of the State under Review.[30] Although the boundaries are not very clear yet, the UPR should "complement and not duplicate the work of the TB.[31]This was the basis of the work for defining the UPR procedure.

4. The relevant institution-building Working Group

Since the first session of the Council (June 2006), delegations (Ghana, Cuba, Morocco, South Africa, Republic of Korea) emphasized that the Council would mark the new start, "a new fresh", especially if "dialogue and cooperation" might go hand in hand[32].

On June 30, 2006, the Council set up, by Decision 1/103 (para.1), an inter-sessional open-ended Working Group, "to develop the modalities of the UPR," with the aim of ensuring dialogue throughout the Review and cooperation at its outcome.

As discussed, unlike other sections of GA Res. 60/251, UN Member States have thoroughly defined, in operative paragraph 5, lett.e, the main elements of the UPR mechanism (the objective and institutional and subjective elements). During the institution-building process (2006-2007), they detailed the procedural modalities of the UPR cycle.[33]

At the outset the Chairman of the institution-building Working Group on the UPR, Amb. M. Loulichki (Morocco) identified, on the basis of the various contributions he had received, the six following elements to be negotiated: The Basis of the Review; The process and modalities of the Review as intertwined with the "principles and objectives" of the review; and the periodicity and the order of the review. At the end of the negotiations, the IB Package (Annex to Council's Resolution 5/1 of June 18, 2007)

[30] In this regard the Council has not clarified the meaning "full" involvement. Specifically no requirements have been set. It means that for instance in the event of the review of South-Africa, the delegation was merely composed of Geneva-based representatives which does not correspond to the full involvement of the country concerned)
[31] Op. cit. supra in note 19.
[32] See UN Doc. A/HRC/1/L.10, p.57; see also UN Press Releases, available at:http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=3815&LangID=E; http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=5863&LangID=E; http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=6723&LangID=E).
[33] See GA Res 60/251, para.5 (e) and (Council's Decision 1/103); Sunga, L., What Effect If Any Will the UN Human Rights Council Have on Special Procedures, , in International Human Rights Monitoring Mechanisms, essay in honor of J.T. Moller, second edition, R Wallenberg Institute, M. N. Publishers, 2009 p.179. See also Chapter I.

also provides indications on the Outcome of the Review and the Follow-up to the Review.[34]

During the relevant IB negotiations, the following issues were thus tackled:

i. The Basis of Review (See UN Doc.A/HRC/4/CRP/3 of March 2007, para.4);
ii. The principles and objectives of the Review;
iii. The periodicity and the order of the Review;
iv. The process and modalities of the Review;
v. The outcome of the Review;
vi. The follow-up to the Review.

For sake of completeness, it is worth recalling that, before beginning the relevant negotiations, many countries from G-77, such as Ghana, reported, in the course of the first regular session of the Council (June 2006) on their positive experience before the African Peer Review Mechanism (acronym, APRM)[35]. In the course of the negotiations, it was noted that several Review procedures have been put in place within both the UN and regional organizations. Delegations agreed on the Facilitator's proposal to compare existing models in order to better develop the Council's own review mechanism.[36]

Some States aimed at a detailed and strict UPR process, while others called for a light UPR scrutiny process[37]. In particular some States and NGOs proposed the appointment of independent experts and the effective participation of "other relevant stakeholders". Some other States, mainly African countries, called for a State-driven process, in line with the above-mentioned APRM.[38] To support this position, it was observed that existing peer mechanisms are mainly conducted by peers. G-77 countries stressed that the Council's peer Review was to be a totally State-driven mechanism, made by States within an inter-governmental framework.[39]

[34] Though their effective implementation might be evaluated comprehensively within the second UPR cycle, presumably starting in 2012. In this regard, various States have proposed to make the second cycle longer than the first, other delegations have requested a break in order to enable States to effectively implement those recommendations they have accepted.
[35] See para.6.2. of Chapter I.
[36] Op. cit. in supra note 13, At the Lausanne brainstorming, in August 2006, Member States considered various models of peer mechanisms, such as the African Peer Review Mechanism (acronym, APRW), the Peer Review Mechanisms under ILO, as well as those of the OECD and WTO, respectively (See Chapter I).
[37] See draft concept and option paper prepared by Canada, 29 April 2005, at para.9, available at: www.eyeontheun.org).
[38] The final comparative summary of information on existing mechanisms for periodic review, dated 11 December 2006, is available on the Council's extranet, at www.ohchr.org.
[39] Such approach was mostly welcomed by those States contrary to country resolutions and to a growing role for special procedures (namely G-77).

Despite the attempts of the Western Group and JUSCANZ to include an independent expertise to ensure a more technical approach, the Philippines' proposal for a two-stage State-driven process prevailed. Procedurally, it was agreed upon the two-stage model, so that the Review consists of the first stage before the UPR Working Group, made up of all 47 members of the Council and the President of the Council (in this phase UN Member States that sit at the Council as observers, can participate in the Dialogue, while NGOs can only attend), and the second stage before the Plenary of the Council, which includes the participation of observers and other relevant stakeholders[40].

As for the Basis of the Review, the WEOG managed to broaden it. Operative paragraph 3, lett. m, of the Annex to Council's Resolution 5/1 envisages the following standards : "States are reviewed on the basis of:

i. The Charter of the United Nations[41];
ii. The Universal Declaration of Human Rights;
iii. Human rights instruments to which the State is a party;
iv. Voluntary pledges and commitments, including (where relevant) those undertaken when presenting candidature for election to the Council;
v. And applicable international humanitarian law".

As discussed, the UPR focuses on "the fulfilment of the State's human rights commitments and obligations" while ensuring universality of coverage and equality of treatment. In this regard, the reference in the Basis of the Review, to the Charter of the UN, including Article 1, para.3, and Articles 55-56, should contribute to strengthen the "constitutional nature[42]" of the Charter itself and remind Member States that they are obligated to fulfil, in good faith, the Charter-based obligations, including those in the field of human rights[43].

The inclusion of the UDHR in this hierarchy marks a positive step forward. It acknowledges the Declaration as the very basis for the human rights binding treaties, or

[40] However the current practice shows that the procedure is more structured than it was envisaged during the IB process
[41] By this reference, at the top of the source hierarchy, the UPR should entail the monitoring of the state of implementation, among others, of the provisions contained in Article 55-56 of the Charter of the United Nations. Article 55 sets forth: "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: [..] universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion". Article 56 supplements it as follows: "All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article".
[42] See Ziccardi Capaldo, G., Nazioni Unite ed Evoluzione dell'Ordinamento Internationale, Paper presented at the Conference on Nazioni Unite e Diritto Internazionale, Napoli, Novembre 1995, in Democratizzazione all'est e diritto internazionale, 1998, p.299, and Ziccardi Capaldo G., "The pillars of global law, Ashgate, 2008, p. 7-25; See also Chesterman S, Franck T.M., Malone D.M., The Law and Practice of the UN, Oxford University Press, 2008. p.5-15; Op. cit. supra in note 29.
[43] See Simma, B., and Alston, P., The sources of human rights law: custom, jus cogens and general principles, in the Australian Yearbook of International law, Vol. 12, 1992, The Australian National University, 1992, p.82 et ff.

somehow as "the Basic Law" of the international human rights law[44], though it remains a non-binding instrument, a soft law declaration, and, for various States, only "a common standard of achievement."

The limit to the above broad Basis emerges from the reference "to instruments to which a State is a party". This choice results in a sort of "*geometrie variable*" since it entails that questions and recommendations, to be put forward during the Interactive Dialogue, should be based on the specific international human rights treaties ratified by the State under Review (acronym, SuR). For instance the US has not ratified yet the ICESCR, while China has not ratified yet the ICCPR. This means that their respective Reviews cannot focus on those obligations stemming from the above standards and thus limiting somehow the principle of the "universality of coverage" of all human rights.

In the definition of the above hierarchy, major contrasts erupted when it was discussed the introduction of International Humanitarian Law (acronym, IHL). The request was put forward by the OIC, to ensure a specific focus on the situation in the Occupied Palestinian Territories. The UK, on behalf of the EU, managed to narrow the scope of that provision, by proposing to add the clause "applicable". In this regard scholars argue that, though differing in terms of genesis and context[45], international humanitarian law and human rights law share the same goal: the protection of the individual[46]. Given the linkage between IHL and international human rights law[47], it was agreed upon the following wording: "given the complementarity and mutually interrelated nature of international human rights law and international humanitarian law, the Review shall take into account applicable international humanitarian law".

Against this background, it is necessary a separate consideration for "voluntary commitments and pledges". The practice started in April 2008, on the occasion of the first UPR session, proves that the reference in Council's Resolution 5/1, para.2, to "voluntary commitments and pledges" is not adequately addressed, yet.

During the IB negotiations, some States were reluctant in this regard. It was argued that periodic reviews are intended to evaluate the improvements and the concrete setbacks/shortcomings of UN Member States on the ground. It was thus questionable the inclusion of vague commitments. In the course of the first UPR sessions, the recommendations did not focus on pledges and voluntary commitments. Furthermore

[44] See Marchesi,A., Diritti Umani e Nazioni Unite, diritti, obblighi e garanzie, Ed. Franco Angeli, p.15, 2007.
[45] While international humanitarian law is one of the oldest branches of public international law, which refers to the *ius in bello* and aims at the protection of the victims of war – ultimately the protection of the individual -, human rights refer to the domestic organization of the State power vis-à-vis the individual (domestic dimension). Originating from the domestic constitutional law, human rights have acquired an international dimension, over the last decades on the basis of the Charter of the United Nations and the Universal Declaraiont of Human Rights.
[46] See Marchesi, p.19.
[47] See for instance Human Rights Council's Resolution 9/9 of September 2009, on "the protection of the civilians in armed conflict."

the joint reference to pledges and obligations may endanger the inner coherence and the scope of the obligations. For instance, in seeking election to the Council, Italy pledged,[48] in 2007, to combat gender-based discrimination. Since June 10, 1985, Italy has become a State Party to the CEDAW Convention: it is thus obligated to fulfil the relevant obligations contained in the CEDAW Convention, since then.

Beside from a specific emphasis on the issue of "the voluntary pledges and commitments", it is not yet clear the added value of this reference.

As discussed[49], the UPR proceeding was developed on the basis of the two-stage model proposed by the Philippines. However the current practice shows a multi-phase structured process, which include the following key steps[50]: preparation, reporting, and assessment.

When debating on the preparatory and reporting phases, many UN Members stated that they were not in a position to draft a new report. Algeria, on behalf of the African Group, stated that this new exercise should avoid an undue reporting burden. It was thus agreed upon the presentation of three different documents[51]:

> i. A 20-page national report to be drafted by the SuR, through an inclusive process, meaning the consultation with other relevant stakeholders, including national NGOs and, where existing, NHRIs;
> ii. A ten-page OHCHR compilation of observations and recommendations by the Special Procedures and Treaty-monitoring Bodies;
> iii. A summary by the OHCHR of "reliable and credible information" as submitted by "other stakeholders", namely NGOs and NHRIs.

To this end, the Council adopted specific drafting Guidelines, in September 2007 (See Council Decision 6/102). This Decision, entitled "follow up to the institution-building Resolution 5/1" (dated September 27, 2007), underlines that General Guidelines apply to States, other relevant stakeholders as well as to the OHCHR when preparing the documents under its responsibility, and are necessary to define the content and the scope of the relevant information.[52]

[48] See UN Doc. A/61/863.
[49] Op. Cit. In supra note 17
[50] Ibidem
[51] Ibidem, p.122.
[52] available at http://ap.ohchr.org/documents/sdpage_e.aspx?b=10&se=69&t=3)

In particular, national reports shall contain the following information: constitutional and legislative profiles; a description of the state of implementation of human rights obligations; voluntary commitments and pledges, besides identifying challenges, achievements, best practices and constraints. Additionally States might indicate their capacity-building needs and any request for technical assistance.

As for the criteria to be met by "relevant stakeholders" when presenting information, the Council indicates a long list of criteria, including: "(f) Key national priorities as identified by stakeholders, initiatives and commitments that the State concerned should undertake, in the view of stakeholders, to overcome these challenges and constraints and improve human rights situations on the ground. This includes, for example, national strategies, areas where further progress is required, steps regarding implementation and follow-up to recommendations made by human rights mechanisms, commitments for future cooperation with OHCHR and human rights mechanisms and agencies, etc.; (g) Expectations in terms of capacity-building and technical assistance provided and/or recommended by stakeholders through bilateral, regional and international cooperation".

With regard to the reporting phase, it was also defined the degree of (attendance and) participation of NGOs and other stakeholders As discussed, GA Resolution 60/251 recalls in OP.11, inter alia, the arrangements of the former Commission and the ECOSOC for the effective participation of stakeholders as follows: "[the Assembly] also decides that the participation of and consultation with observers, including States that are not members of the Council, the specialised agencies, other inter-governmental organizations and national human rights institutions, as well as non-governmental organizations, shall be based on arrangements, including ECOSOC Resolution 1996/31 of July 25, 1996, and practices observed by the Commission, while ensuring the most effective contribution of these entities".

Throughout the negotiations, no State refused to acknowledge the role of NGOs. However many States from the G-77 Group rejected the participation of NGOs in many UPR phases[53]. Countries with poor human rights records requested that the role of NGOs should be limited to the preparation of the national report.[54]

Council's Resolution 5/1 of 18 June 2007 (the so-called IB Package) envisages that the UPR should: "ensure the participation of all relevant stakeholders, including

[53] See AI article: Has the spirit of General Assembly Resolution 60/251 been Honoured? AI Index IOR 41/015/2007). Their role is still far from being fully recognized as long as time-consuming exercises and serious difficulties in managing the order of the day do not allow on an institutional basis the effective participation of the NGOs.
[54] File with the Author.

non-governmental organizations and national human rights institutions, in accordance with General Assembly resolution 60/251 of 15 March 2006 and Economic and Social Council resolution 1996/31 of 25 July 1996, as well as any decisions that the Council may take in this regard."[55] By comparing GA Res.60/251 and the IB Package, Council's Members have not reiterated the clause concluding Op.11 of GA Res. 60/251: "while ensuring the most effective contribution of these entities".

On one hand, Council's Resolution 5/1 envisages, the participation among others, of NGOs, NHRIs, human rights defenders, academic institutions and research institutes, and regional organizations; on the other, it specifies the *marges de manoeuvres* for the "other relevant stakeholders". In this regard, the Council merely "encourages" Member States to prepare the national report through an inclusive process: "States are encouraged to prepare the information they submit through a broad consultation process at the national level with all relevant stakeholders (Operative paragraph 15 (lett.a)". Council's Resolution 5/1 also details the criteria for written documentation by "other relevant stakeholders:[56]"

i. To be specifically designed for the UPR; Containing credible and reliable information on the State under review;
ii. Highlighting the main issues of concern and identifying possible recommendations and/or best practices;
iii. Covering a maximum four-year time period;
iv. Not containing language manifestly abusive;
v. Being no longer than five pages in the case of individual submissions, to which additional documentation can be annexed for reference (Submissions by large coalitions of stakeholders can be up to ten pages)[57].

As for the public participation, Council's Resolution 5/1 (paragraph 18, lett.c, of the Annex) allows NGOs in consultative status with the ECOSOC and NHRIs to "attend" the Interactive Dialogue before the UPR Working Group when States put forward their recommendations to the SuR. Paragraph 31 allows NGOs and NHRIs to participate in the final phase before the Plenary of the Council by delivering a two-minute speech

[55] See para.3, lett.m of the Annex to Council's Resolution 5/1)
[56] The other relevant stakeholders have to observe both Council's Resolution 5/1 and the above-mentioned Guidelines on information to be submitted.
[57] In this regard, it might be recalled that Council's Resolution 5/1 (See Operative paragraphs 10-13 of the Annex to Resolution 5/1), provides a differing deadline of five months, for the NGOs submission, prior to the relevant session of the UPR Working Group (See www.ohchr.org/EN/HRBodies/UPR/Pages/NewDeadlines.aspx). This is an "anomaly", if comparing it with the deadline indicated for States that are due to submit the national report two months in advance of the consideration by the UPR WG (The practice shows that the marges of manoeuvres for "other relevant stakeholders", including NGOs, are, de facto, very narrow).

under the form "General Comment" - *in limine*, prior to the adoption of the Outcome Decision by the Plenary of the Council. The practice shows the inner limits of this provision, especially if one considers the timeframe. NGOs and NHRIs can only deliver a two-minute speech under the denomination "General Comments" when the UPR WG has already put forward its own recommendations. Para. 31 sets outs: "Other relevant stakeholders will have the opportunity to make general comments before the adoption of the outcome by the plenary". This narrows the *marges* for the participation of the "other relevant stakeholders".[58]

Since the first UPR session (April 2008) NGOs have stressed the lack of inclusion in the national consultation process at the basis of the national reporting, and a general lack of clarity about their role throughout the process, including in the follow-up. It has been recalled that during the Review of Bahrain, some national NGOs requested to meet the Troika members but Bahrain refused it.[59] Considering their "Non-Governmental monitoring[60]", they are the primary source describing the situation of human rights in the countries under review. Many NGOs use the limited speaking time at their disposal to propose means for the implementation of the UPR recommendations. The practice shows that to counter-balance that limited *marges de manouvres* they increasingly resort to the General Debate under Item 6 of the Council's Agenda, entitled "Universal Periodic Review". During the regular sessions of the Council, NGOs further express their views on specific States under review. In response to this, in the course of the last regular sessions of the Council, many States challenged NGOs' statements. In September 2010, Cuba stressed that it would work, within the 2011 UPR review (taking place at the end of the first cycle), to stop "favouritism for some sources.[61]"

Within this framework, NGOs have developed the practice of: holding parallel events to describe the human rights situation in the SuR; specific lobbying activities; and submitting questions through States, mainly from the WEOG, participating in the Dialogue before the UPR WG[62].

On a positive far-reaching note, paragraph 33 of the Annex to Council's Resolution 5/1 envisages "the inclusion of NGOs and NHRIs" in the implementation of

[58] Saito Y. Sweeney G., An NGO Assessment of the New Mechanisms of the UN Human Rights Council (**2009**) 9(2). **Human Rights** Law Review, Oxford University Press, Nottingham University, 2009, p.216-220.

[59] See Vann , as quoted by Fassassi, p.759, Conseil Droits de l'Homme: vent de panique, sur Le Temps, Geneve, April 7, 2008, op.cit. supra in note 29.
[60] Op.cit supra in note 44 (p.92).
[61] See UN Press Release http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10370&LangID=E, of September 23, 2010.
[62] besides delivering "general comments" in the Plenary

the UPR Outcome (though this phase of the process has not been explored yet provided that the first UPR cycle will be concluded in late 2011) [63].

As for the conduct of the review, during the IB negotiations, it was also decided that a group of three rapporteurs, the Troika, will facilitate the process and draft, with the support of the OHCHR, the Report concerning "the consideration of the SuR by the Council's UPR Working Group". To avoid any risk of politicization and polarization, the IB package includes a complex system of safeguards, such as the selection of the above rapporteurs by the drawing of lots among the members of the Council, the respect for the geographical representation, the possibility for the SuR either to change one of the Troika's rapporteurs or to request that one of the rapporteurs be from its regional group[64].

As for the periodicity and order of the review, Council's Resolution 5/1 envisages that the UPR cycle "should be reasonable so as to take into account the capacity of States to prepare for, and the capacity of other stakeholders to respond to, the requests arising from the review (para.13)". Despite the request by Algeria on behalf of the African Group to differ the periodicity between developed and developing countries, The duration of "the first UPR cycle" has been fixed to four years to ensure the review of the entire UN membership. To this end, the UPR WG has to review "48 States per year during three sessions of two weeks each (Section C, paras. 5-14 of Council's Resolution 5/1)".

As for the order of the review, the Council applies: the principle of equitable geographic distribution; the alphabetical order and the expiration of the membership term, unless Council's Member States volunteer to be reviewed first. It was thus decided as follows: "(para.11) Equitable geographic distribution should be respected in the selection of countries for review. All Member States of the Council shall be reviewed during their term of membership. A mix of member and observer States of the Council should be reviewed. The first member and observer States to be reviewed will be chosen by the drawing of lots from each Regional Group in such a way as to ensure full respect for equitable geographic distribution. Alphabetical order will then be applied beginning with those countries thus selected, unless other countries volunteer to

[63] See lessons learned on civil society involvement in the UPR process, NGO side-event organised by F. Ebert Stiftung and CONGO, Palais des Nations, June 13, 2008, available at: http:// www.ngocongo.org)
[64] The introduction of the Troika is a valid tool, whose potentialities have to be further explored

be reviewed". Switzerland and the UK volunteered for the first UPR session, in April 2008.[65]

Under para.34 of Section F of the Annex to Council Resolution 5/1, it is decided: "The subsequent review should focus, inter alia, on the implementation of the preceding outcome, and operative paragraph 14 (footnote) envisages: "The universal periodic review is an evolving process; the Council, after the conclusion of the first review cycle, may review the modalities and the periodicity of this mechanism, based on best practices and lessons learned".

From the above, it might be inferred that the IB Package focuses on the principles and objectives, on the technicalities and proceeding of the first cycle of the UPR, leaving room to future negotiations for the definition of the second cycle[66]. The incoming UPR review might trigger some improvements, including the definition of a standardised implementation of the Outcome Decision.

5. The State-driven procedure

GA Resolution 60/251 envisages a universal, not duplicative, and cooperative mechanism, based on interactive dialogue with the full involvement of the State concerned and with consideration to be given to its capacity-building needs (Operative Paragraph 5, lett.e).

The Review is conducted according to the principles envisioned in GA Resolution 60/251, namely the "objectivity, transparency, non-selectivity", besides ensuring a mechanism, "constructive, non-confrontational and non-politicised".

Along these lines, the objectives of the Review include the improvement of the human rights on the ground, as well as the fulfilment of the State's human rights obligations and commitments and at the State's request, technical assistance for the enhancement of capacity.

Scholars[67] argue that the UPR results in political exercise, since States are both the setters and recipients of recommendations. States supply relevant information (though also other stakeholders can submit information), review and define the UPR

[65] See Summary of the first session of the UPR, of April 2008, available at http://www.ohchr.org/EN/HRBodies/UPR/Pages/MeetingsHighlightsSession1.aspx)
[66] See Chapter VI.
[67] Op.cit supra in note 3.

WG Report. The IB Package thus outlines a procedure, which aims at ensuring equal treatment/consideration, equal assessment, and equal outcome decisions.[68]

Given the State-driven nature of this mechanism, the Interactive Dialogue among peers is the central phase of this procedure[69] within which the above-mentioned three documents, all submitted through the OHCHR, are the basis of the Dialogue. The practice shows that, prior to the Session, interested States submit written questions to the SuR, through the Troika.

Under the guidance of the Council's President[70], the UPR Interactive Dialogue takes place within the UPR Working Group (paragraph.7), which consists of the Council's members and its President. Observers States are enabled to participate, while other relevant stakeholders can only attend.

Presidential Statement 8/1 envisages that the SuR has, at its disposal, 60 minutes for (para.8): a) initial presentation of the national report/responses to written questions; b) replies to the questions raised from the floor during the interactive dialogue, if desired; and; c) concluding comments at the end of the review.

Procedurally, the country concerned opens the three-hour session by providing an overview of its national situation. This stage lasts approximately one hour. Then all the countries, inscribed in the List of Speakers, submit their questions, comments and recommendations. States do take the floor, on a national capacity, without any formal reference to the group or bloc of origin. In this regard, NGOs have denounced that from the Review of Bahrain onwards, the List of Speakers usually includes allies that support the SuR. For instance in the case of Bahrain, Palestine, India, Pakistan, Qatar, Tunisia, the United Arab Emirates, Saudi Arabia, Turkey, Malaysia, Algeria, Libya and Cuba took the floor to express their support for the progress achieved in the country. During the Review of Tunisia (First session of April 2008), Cuba noted that "Tunisia as a developing country and as a member of the Non-Aligned Movement has made a great deal of efforts in the field of human rights". Cuba also noted that "Tunisia is a fascinating country, and its history and culture reminds Cuba of scenes from ancient Carthage". International Service for Human Rights notes that 50 out of 65 statements praised Tunisia. The 2010 Freedom House Survey defines Tunisia as a "Not Free State."

[68] As aforementioned, there is a very limited space throughout this procedure for "the other relevant stakeholders."
[69] See the above Guidelines.
[70] See Council Presidential Statement 8/1.

On June 13, 2008, thirteen NGOs took the floor, by a joint statement, to stress all the above issues. This situation turned to be so tense that at the ninth session of the Council (September 2009), Egypt raised, on behalf of the African Group, several points of order, arguing that the statements delivered by NGOs were inconsistent with the UPR process.[71] By contrast, the EU and Canada stated that stakeholders should be allowed "the leeway to make statements of a general nature.[72]" If UN Member States want to promote and protect human rights effectively, it is a "wishful thinking that this independent source of expertise and information might be better secured[73]. On a positive note, the practice shows that, during the Interactive Dialogue, States often make reference to recommendations and conclusions of Special Procedures and Treat-Bodies. This approach might confirm the complementarity among relevant mechanisms. On the other hand, it should be considered that the SuR can reject the UPR recommendations.[74] The practice also shows that countries, taking the floor, often raise the same issues; and those that had sent written questions, in advance of the Interactive Dialogue, are used to reiterate them orally. While being understandable, this is a unique opportunity for each UN State to spell out its own thinking, the time allocated is not sufficient and really needs to be extended. In nearly almost all the UPR sessions, many States inscribed in the List of Speakers did not have the chance of taking the floor (See the review of Italy when only 51 States out of 69 managed to speak).

To compensate this malfunctioning, the Council has decided, by Presidential Statement 8/1, that the UPR Working Group prepares a factual report of its proceedings, consisting of a summary of the interactive dialogue (See also Presidential Statement 9/2 of September 2008, entitled follow-up to Presidential Statement 8/1), which reflects recommendations and/or conclusions made by delegations (paragraphs 8-9 of Presidential Statement 8/1).

More specifically, the Report of the UPR Working Group is prepared, with the assistance of the Secretariat, by the Troika that fully involves the SuR (para.9), with the

[71] Available at: htpp://www.ishr.ch/index.php?option=com.docman&task=doc.download&gid=68&Itemid=.
[72] The issue will be raised again in the course of the 2011 Council's Review.
[73] In 2004, in the wake of the debates on reforming the Commission on Human Rights, in parallel with the establishment of the HLP by the then Secretary-General, an ad hoc Working Group was created upon initiative by the American Bar Association's Section on International Law. As Nanda recalls (p. 13) this Group proposed in 2006 the adoption "of a code of conduct committing the member States to promote international protection of human rights; to honor international human rights efforts; to cooperate with the investigative mechanisms of the Council; and to appoint as heads of their delegations persons with substantial human rights expertise. To some extent such considerations were put forward in the course of the negotiations but not pursued. It would be important to re-consider such elements when the review of the UPR will be approached by 2011.
The EU also reported in its Annual Report on Human Rights (EU HR Report 2009, p.96), during the UPR sessions of February and May 2009, respectively, Cuba, Saudi Arabia, China, the Russian Federation and Nigeria - that were under Review - challenged the procedure and attempted to manipulate the process. Any procedural obstructionist attempt challenges the principle of transparency and objectivity besides diminishing the improvement "of the human rights situation on the ground".
[74] See International Commission of Jurists in Updated Compilation of Proposals, p.15, available at : *www.ishr.ch/component/.../1117-ngo-minimum-outcomes-of-the-review*; Op.cit in supra note 22, p.118.

aim of providing a "factual description of the proceeding". To this end "the recommendations that enjoy the support of the SuR are to be identified as such". "Other recommendations, together with the comments of the SuR are to be noted. Both will be included in the Report of the Working Group" to be adopted by the Plenary of the Council, at a later stage (usually three/four months later under Council's Agenda Item 6). The drafting of the UPR WG Report is a very delicate moment since misunderstandings can emerge due to the lack of legal knowledge by diplomatic agents.

The following phase starts soon after the Dialogue when the SuR examines all the recommendations and decides those which it can accept in full or partly and those to be rejected (paragraph 10 of Presidential Statement 8/1). The practice shows that the SuR prepares an Addendum containing the national position on the recommendations[75]. The UK and the Republic of Korea were the first countries to introduce this practice.[76]

The political dimension of the Interactive Dialogue, a phase being dominated by States, is confirmed: 1. By the mere attendance of "other relevant stakeholders"; 2. by the possibility for the SuR to reject the recommendations; 3. and overall by the content of the questions and of the recommendations put forward during the Interactive Dialogue. It has been noted the high number of recommendations for each SuR[77], being not always consistent with international human rights standards. In this regard, by Presidential Statement 8/1 (June 2008), the Council has set strict rules: questions/issues should conform to the "Basis of the Review" as identified in Resolution 5/1; shall be raised in a manner that is consistent with "the principles and objectives of the UPR", as laid down in Resolution 5/1; and shall be based mainly on "the three UPR documents".

In this regard, the practice shows the different approach, during the Interactive Dialogue. The African Group's members take the floor, particularly when other Group's members or neighbouring countries undergo the Review[78]. In these case, they usually address very few recommendations. On the contrary, when a WEOG country is under review, the EU partners do not make any "special price". For instance when Italy was considered in February 2010, 19 States from the Western Group, mainly from the EU, took the floor with several recommendations: This unbalanced approach should be better tackled.

[75] See the Reports submitted for the fifteenth session of the Council on the website of the OHCHR, available at www. http://www2.ohchr.org/english/bodies/hrcouncil/15session/reports.htm)
[76] As noted by the OHCHR on the occasion of the Seoul Meeting on the HRC Review.
[77] At the Seoul seminar on the HRC Review, in November 2009, the OHCHR reported an average of 120 recommendations per country (available at the OHCHR extranet).
[78] For instance, no African Group member, save Morocco, took the floor during the review of Fiji, in February 2010.

As anticipated, once it is concluded the Interactive Dialogue, the SuR undertakes the so-called domestic examination of the UPR Working Group's Report by which to start an internal process aimed at evaluating the summary of the Interactive Dialogue, the comments and recommendations put forward by States that took the floor, jointly with those statements which were submitted and not orally read out due to time constraints.

Under this phase (which results in a proceeding within the proceeding), the practice shows that States tend to draft an additional national report, called "Addendum", by which to explain the national position, particularly on those recommendations, rejected or partly accepted. The Addendum is usually circulated two days prior to the adoption, by the Plenary of the Council, of the UPR Outcome . As a way of example, it might be recalled the Addendum of Italy (UN Doc. A/HRC/14/4/Add.1).

As discussed, the practice shows that the Interactive Dialogue before the UPR WG is a time-consuming exercise, which does not provide the opportunity for the SuR to adequately respond, orally. As a consequence the fourth hour of interactive dialogue, namely the only hour before the Plenary of the Council becomes an important stage within the UPR process. This phase takes place, during the regular sessions of the Council, under Agenda's Item 6, three/four months after the Interactive Dialogue.

During this phase, the SuR may wish to respond to recommendations or to clarify some specific matters of concern, mainly relating to the recommendations rejected or partially accepted (See Council resolution 5/1, para.29). This is also the phase under which accredited NGOs and NHRIs can deliver their "General Comments (Council's Resolution 5/1, para.31)".

Following the final remarks by the SuR, the Plenary of the Council adopts the relating Outcome Decision (paragraph 13 of Presidential Statement 8/1), which is the final act of this very complex and structured State-driven mechanism. In particular the standardised Outcome Decision refers to: "the report of the UPR Working Group, jointly with the views of the State under review.." and to "the voluntary commitments made by the SuR and its replies, as presented before the adoption of the Outcome by the Plenary, to questions or issues that were not sufficiently addressed during the interactive Dialogue (paragraph 13 of Presidential Statement 8/1)[79]".

[79] The Council's session Report includes a Summary of the views expressed on the Outcome of the Review by the SuR, and by Member and Observer States of the Council, as well as the General Comments made by "other relevant stakeholders" before the adoption of the Outcome by the Council's plenary (paragraphs 13-14 of Presidential Statement 8/1.

As for the Outcome, those UPR recommendations that enjoy the support by the SuR "should be implemented primarily by the State concerned and, as appropriate, by other relevant stakeholders (Operative paragraph 33 of the Annex to Council's Resolution 5/1)".

From the above it emerges that there is no compelling or binding obligation on the country to enforce the UPR recommendations[80]. As argued by Sir N. Rodley, the UPR Outcome Document is "gentler than the concluding observations by Treaty Bodies[81]". At the semantics level, it is not a mere coincidence the fact that Council Res. 5/1 uses the conditional tense "should be" when mentioning the implementation of relevant recommendations.

On the other hand, some sort of political pressure stems from the follow-up activities: After the adoption of the Outcome Decision, the SuR is expected to follow-up on those recommendations that enjoy its support as well as on voluntary commitments and pledges (paragraphs 32-33-36 of the Annex to Council's Resolution 5/1).

Relevant to this phase, entitled "Follow-up to the Review," is the indication contained in the IB Package: "the subsequent review should focus, inter alia, on the implementation of the preceding outcome".

Indeed the specific indication of follow-up activities should be considered as a positive step towards an action-oriented approach to close any relevant gaps. In fact the indication that the following cycle will consider the implementation of the recommendations, which enjoyed the support by the SuR, should guide its action, up to the following UPR cycle. In this regard the practice shows that there is no yet any standardised follow-up pattern. This is an issue to be further explored. Paragraph 14 of the Annex to Council's Resolution 5/1, indicates that: "the universal periodic review is an evolving process"; and that "the Council, after the conclusion of the first review cycle, may review the modalities and the periodicity of this mechanism, based on best practices and lessons learned". Many States, particularly from the Western Group, have stressed the importance of the follow-up and the scope of the second cycle of the UPR, as potentially harbinger of cooperation activities, including with "other relevant stakeholders".

[80] Op.cit. in supra note 17

[81] See Rodley N. The United Nations Human Rights Council, Its Special Procedures and Their relationship with the Treaty Bodies – Complementarity or Competition?, Boyle 2009, in New Institutions for Human Rights Protection, Oxford University Press), pp.49.75 .He argues that there is the risk is that in the near future States might invoke the UPR Outcome rather than referring to the conclusions and recommendations of Treaty Bodies.

Assessment, improvements and corrections to the current procedure may be adopted at the conclusion of the first cycle of the UPR[82], after October 2011 (last UPR WG session), in accordance with operative paragraph 16 of GA Resolution 60/251 and paragraph 14 of the Annex to Council's Resolution 5/1.[83]

From the above, it emerges that it is not possible yet to draw any final conclusions. Rather it is appropriate to observe the practice and to detect achievements and shortcomings. The following paragraph will be thus devoted to a comparison between the annual assessment provided by an international Non-Governmental organization, Freedom House, and the UPR WG Reports on five specific countries that were considered at the seventh session of the UPR WG.

6. The seventh session of the UPR (February 8-19, 2010): a comparative analysis

The Council published a calendar setting the timeframe for the review of all UN Member States, to be undertaken during the first four-year cycle. The first session of the UPR mechanism, reviewing sixteen States, took place between 7-18 April, 2008. As at February 2011, the UPR WG reviewed 160 UN Member States.

To provide a clear picture of the UPR, it might be useful to compare the evaluation provided by the 2010 Freedom House Survey with the relevant UPR WG reports concerning five UN Member States (one from each regional group) as reviewed, in February 2010, at the seventh session of the Universal Periodic Review.

As for Freedom House[84], since 1972, it issues an annual survey on the status of civil and political liberties worldwide. In terms of methodology, "the political rights and civil liberties categories are scored with numerical ratings, ranging between 1 and 7, for each country or territory, with 1 representing the most free and 7 the least free. States can be considered as Free, Partly Free, or Not Free, depending on the combination of the political rights and civil liberties ratings.[85]"

A. The first State under Review from the African Group: Angola

[82] See Chetail, V. Conseil des Droits de l'Homme des Nations Unies: l'an premier de la reforme, Refugee Survey Quarterly, Vol.26, Issue 4, 2007, p.104-130.
[83] General Assembly "*Decides further* that the Council shall review its work and functioning five years after its establishment and report to the General Assembly".
[84] Eleanor Roosevelt and Wendell Willkie served as Freedom House's first honorary co-chairpersons. "Freedom House is an independent watchdog organization that supports the expansion of freedom around the world". It supports democratic change, monitors freedom, and advocates for democracy and human rights, available at: www.freedomhouse.org.
[85] See Freedom House report 2010 is available at: http://www.freedomhouse.org/template.cfm?page=15.

In the 2010 Survey by Freedom House Survey, Angola was scored, as for political rights and civil liberties, six and five, respectively with the final evaluation indicating "a Not Free State". This Survey reports that "the United Nations concluded its voluntary refugee repatriation program in 2007. Between August and October 2009, Angola and the neighbouring Democratic Republic of Congo (DRC) engaged in a series of tit-for-tat expulsions. The resulting return of some 32,000 Angolans and 19,000 Congolese to their home countries raised concerns about a humanitarian crisis". Angola, Africa's second-largest oil producer, has enjoyed an economic boom in recent years, though it slowed in 2009 following a drop in oil prices. "Corruption and mismanagement have prevented the Country's wealth from reaching most residents. Eighty-five percent of the population engages in subsistence agriculture, and the United Nations estimates that 54 percent of the population lives on less than $1.25 a day". With specific regard to political rights and civil liberties, Angola is "not an electoral democracy. Long-delayed legislative elections held in September 2008, while largely reflective of the people's will, were not free and fair. The State owns the only daily newspaper and national radio station, as well as the main television stations".

Against this background, by the relevant UPR Working Group Report (See UN Doc. A/HRC/14/11), it emerges as follows: 56 States on the List of Speakers managed to take the floor, 21 more (Kazakhstan, the Libyan Arab Jamahiriya, Saudi Arabia, Nicaragua, Equatorial Guinea, the Niger, Argentina, Burkina Faso, Tunisia, Latvia, Bangladesh, Cameroon, Zambia, South Africa, Cambodia, Mauritius, the United Republic of Tanzania, Ghana, Burundi, Kenya and Mozambique) could not, owing to time constraints. The SuR mainly stressed positive achievements: "la période de 2002 à 2009, a été caractérisée par la conquête de la paix et la consolidation du processus de réconciliation et de reconstruction nationales", including in the field of economic, social and cultural rights. The SuR devoted little attention to civil and political rights, with no specific reference to gaps and problems, such as media freedom, judicial safeguards, and so forth.

During the interactive Dialogue, while G-77 countries praised Angola for its focus on second generation's rights and the fight against poverty, the EU countries raised specific matters of concern relating to first generation's rights, as also mentioned in the above Freedom House Report (See speeches by France, Belgium, Norway, the US, Germany and the UK under paras. 34, 35, 40, 57, 60,61, of the relevant UN Report under reference). In response to this, Angola stated: "(para.48) *S'agissant de la liberté*

de la presse, celle-ci est régie par une loi et existe en Angola. Il y a plusieurs journaux et radios et la loi doit être respectée par tous. La loi sur la liberté d'expression ne doit pas servir de prétexte à des abus"; and "(para.50) Il n'y a plus de détention arbitraire en Angola. La loi prévoit des périodes de détention provisoire pour permettre les investigations dans certains cas particuliers".

On a positive note, Angola provided an explanation for the expulsion of the DRC citizens: "*Pour ce qui est des personnes expulsées d'Angola, il y a eu en septembre et octobre 2009 des incidents entre l'Angola et la République démocratique du Congo concernant des citoyens congolais qui exploitaient de manière illégale le diamant dans une région de l'Angola et dont certains étaient armés. Ce type d'exploitation illicite de diamants peut provoquer des incidents graves et même des conflits politiques comme cela a été le cas par le passé dans un certain nombre de pays en Afrique de l'Ouest. Il a donc fallu expulser ces personnes et le nombre d'expulsions s'est élevé à 60 000. Ce n'était d'ailleurs pas la première fois que des expulsions avaient lieu puisque par le passé, 300 000 personnes avaient déjà été expulsées. Il y a également eu des expulsions de citoyens angolais qui vivaient en République démocratique du Congo. Cette question est aujourd'hui en train d'être traitée sur un plan bilatéral entre la République démocratique du Congo et l'Angola, mais aussi avec la participation du HCR pour ce qui concerne les réfugiés*".

As a result of the above Interactive Dialogue, the Council addressed 166 recommendations to Angola. Despite the lack of a national Addendum Report, during the Dialogue before the Plenary of the Council, Angola rejected, on June 10, 2010, only 10 recommendations. This is an unrealistic target if one considers that in four years Angola is supposed to provide information on the implementation of all the recommendations which it accepted, in full or partly.

During the two-stage Dialogue, it re-emerged the divide between West and the Rest of the World. 19 States of the Western Group out of 77 on the List of Speakers, stressed the existing matters of concern, being not limited to the fight against poverty, while most African countries focused on second generation's rights. The very positive result refers to the request by the SuR of resuming cooperation with the UN Special Procedures (but "within the limits of the UN Charter") and the OHCHR, to re-elaborate a Technical Cooperation Project, after the premature conclusion of the previous one[86].

[86] See UN Press Release available at http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10139&LangID=E.

B. The first State under Review from the Asian Group at the seventh session: Iran

In the 2010 Survey by Freedom House, Iran was scored, as for political rights and civil liberties, six and six, respectively, with the final evaluation indicating a "Not Free State". This Survey reported that: "Iran received a downward trend arrow, due to strong evidence of fraud in the June 2009 presidential election and the violent suppression of subsequent protests". It also reported that: "representing this coalition, former Culture Minister, Mohammad Khatami, was elected president in 1997 with nearly 70 percent of the vote. Under his administration, more than 200 independent newspapers and magazines with a diverse array of viewpoints were established, and the authorities relaxed the enforcement of restrictions on social interaction between the sexes. Reformists won 80 percent of the seats in the country's first nationwide municipal elections in 1999 and took the vast majority of seats in parliamentary elections the following year, with student activists playing a major role in their success".

"….The Council of Guardians similarly rejected the candidacies of popular reformists ahead of the June 2005 presidential election, though the victory of Tehran mayor Mahmoud Ahmadinejad over other approved candidates reflected popular desires for change. As Iran's first non-clerical president in more than two decades, he had campaigned on promises to fight elite corruption and redistribute Iran's oil wealth to the poor and middle class. Nevertheless, his hard-line administration oversaw a crackdown on civil liberties and human rights, and a stricter enforcement of the regime's morality laws".

Against this background, by the relevant UPR Working Group Report (See UN Doc. A/HRC/14/12), it emerges as follows: 53 States on the List of Speakers managed to take the floor, while other 27 States (Equatorial Guinea, Belarus, DPRK, Bhutan, Myanmar, Uruguay, Finland, Lithuania, the DRC, Argentina, Switzerland, Sweden, Ukraine, Greece, Lao People's Democratic Republic, Belarus, Norway, Nigeria, Brunei Darussalam, Afghanistan, Oman, the Philippines, Portugal, Bosnia and Herzegovina, Bulgaria, Senegal, Mali) could not intervene, owing to time constraints.

Iran recalled[87] that "the 1979 Islamic Revolution had led to the creation of a new system of democratic polity and social and civil order based on Islamic rationality. It underscored explicit and extensive human rights references in the Constitution, such as chapter 7, on "The right of people". Article 6 provides that all major decisions on all

[87] See http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10139&LangID=E

matters, including representation in high office, should be based on the people's consent. It noted that the judiciary was independent from the executive and legislative branches, with the requisite principles to ensure due process….. In 2005, the High Council of Human Rights, established in 2001 to improve coordination, became the highest institution entrusted with supervision, monitoring and guidance of different sections on human rights… With regard to the challenges facing Iran, the delegation stated that its human rights situation had consistently been used by some Western countries to apply political pressure and advance ulterior political motives. Terrorism supported by foreign countries constituted a serious problem. Following the invasion of its neighbouring countries, the presence and operations of terrorist groups in Iran's border areas had increased considerably, and terrorist groups had killed, threatened or abducted thousands of ordinary citizens and had proceeded to plunder public and private property… The delegation also underlined the negative impact on the realization of all aspects of human rights of unilateral and coercive as well as international sanctions, imposed by certain Western countries and the Security Council, respectively". ".. (para. 42). On questions relating to Baha'is, the delegation stressed that, while Baha'i was not recognized as an official religion, its followers enjoyed citizenship rights. Limitations on some Baha'i students were a result of their failure to meet admission requirements Stressing the values of Iran's democratic system, the delegation noted that more than 32 elections had been held over the previous three decades, permitting the participation of all political parties, which had various orientations. More than 40 million people had cast their votes in the June 2009 presidential elections. Cast ballots had been meticulously collected and counted, with the participation of legal and official inspectors and some 90,000 independent observers…". "(para.47) Legitimate protests would be a post facto symptom of free and democratic elections, but the repercussions of this election were related to foreign powers meddling in Iran's internal affairs. Iran had addressed the protests through various legal and judicial procedures, the delegation stated. All cases were being duly and openly addressed in competent courts, and defendants had access to their chosen lawyers. High-ranking judicial officials meticulously examined allegations of rights violations". The delegation of Iran called for "respect for democracy and ensuring the integrity of the vote of the majority in sovereign States".

During the UPR Interactive Dialogue, the first States on the List of Speakers, the United States expressed concern about the human rights situation, including

detention cases following the 2009 elections; restrictions on freedom of expression; the situation of detainees, including foreign nationals, in particular United States citizens; and violations of religious freedom. It made reference to the situation that Shi'a, Baha'i, as well as Sufi Muslims face. Along these lines, the following countries expressed their views: Canada, France, Slovenia, Israel, Australia, the UK, Spain, Luxembourg, Germany, Ireland, New Zealand, Poland, Hungary, Italy, Chile, Austria, Slovakia, the Netherland, Belgium, Denmark, and Romania.

On the contrary, the following countries took the floor to support Iran: Cuba, Venezuela, Qatar, Kazakhstan, Tajikistan, Russia, Syria, Kyrgyzstan, Armenia, Bangladesh, Sudan, Vietnam, Kuwait and Bolivia, China and Zimbabwe. In particular, Cuba noted "Iranians' work for development, welfare and sovereignty. It stated that the Islamic Revolution has allowed for self-determination and concluded the dictatorship of the Shah, who had received Western armaments and technology, including nuclear technology". It highlighted the strategic plan for integral development, which addressed job creation, education, health, social security, housing and cultural rights. It noted that more than 95 per cent of Iranians has access to primary health-care and that the right to education has been implemented. All of this was the case despite the imposition of coercive, unilateral measures". Along the same lines, Zimbabwe "expressed concern at the politicization of Iran's review". It recognized the country's achievements in science and technology, culture, politics, economics and international cooperation as testimony to Iran's commitment to human rights. Zimbabwe also noted that Iran continued to face challenges.

With a moderate tone, Nicaragua, Brazil, Lebanon, Pakistan, Libya, Algeria, Bahrain, Japan, Indonesia, Malaysia, Sri Lanka, Estonia, Mexico and India took the floor to acknowledge only few existing matters of concern.

Iran accepted 123 out of 188 recommendations. In particular it rejected recommendation No.33 concerning women's rights and the judicial system, by stating: "(para.20 of Iran's Addendum UN Doc. A/HRC/14/12/Add.1) Paragraph 1 of Article 2 of the Charter of the United Nations emphasizes the sovereign equality of all Member States. In light of the above principle, any kind of intervention in domestic courts of any Member State of the United Nations is a clear breach of the undisputable and generally accepted principles of law and obligations of Member States emanating from the Charter of the United Nations [..]. In practice, all trial procedures are observed, the defense lawyers are present in the trial and after the ruling becomes final, the

proceedings are reflected in the press in full transparency". Along these lines, in its concluding remarks, Iran observed that "(para.29) After the elections, certain events took place in the country which were properly investigated by the relevant and competent legal authorities". As for any follow-up, Iran only stated that "some contacts and meeting would be taken with the OHCHR".

At the thematic level, no response nor commitment by Iran on the following issues: torture, juvenile death penalty, freedom of religion and the situation of Bah'ai.

C. The first State under Review from the Western Group at the seventh session: Italy

In the 2010 Survey by Freedom House, Italy was scored, as for political rights and civil liberties, one and two, respectively, with a final evaluation indicating "a Free State". This Survey reports that "Berlusconi, the first head of Italian government to take legal action against Italian and European media, continued to interfere in journalists' efforts to cover conflicts between his private and political life. A national media group, L'Espresso, which owns La Repubblica newspaper, sued Berlusconi for defamation in July for calling the newspaper "subversive" and encouraging businesses to boycott advertising with the paper. Berlusconi's private life came under further scrutiny in May 2009 when his wife accused him of "consorting with minors" and filed for divorce. La Repubblica subsequently began investigating the prime minister's personal life, alleging that he had also paid for sex. On October 3, 2009, between 150,000 and 300,000 people assembled in Rome for the "Right to Know, Duty to Inform" protest against Berlusconi's attacks on the media".

"..Twenty-two CIA agents, one U.S Air Force colonel, and two Italian secret agents were convicted in November in an Italian court for the 2003 kidnapping of a Muslim cleric in Milan. The cleric had been transferred to Egypt where he was allegedly tortured as part of the U.S. policy of "extraordinary rendition."

"…Corruption remains an issue in politics despite the changes in government over the past decade. Italy was ranked 63 out of 180 countries surveyed in Transparency International's 2009 Corruption Perceptions Index, the second lowest rating for Western Europe".

"… Freedoms of speech and of the press are constitutionally guaranteed. However, the prime minister controls up to 90 percent of the country's broadcast media through state-owned outlets and his own private media holdings."

"….The judicial system is undermined by long trial delays and the influence of organized crime. A bill backed by Berlusconi's government that would place a six-year cap on the length of trials in Italy's three-tier justice system was pending before parliament at year's end. The bill, which does not apply to mafia crimes, has been criticized by the opposition as it would apply retroactively and annul Berlusconi's current trials for tax fraud and corruption. Despite legal prohibitions against torture, there have been reports of excessive use of force by police, particularly against illegal immigrants". This Survey also reported about "Some prison overcrowding".

"…Italy is a major entry point for undocumented immigrants trying to reach Europe, and the government has been criticized for holding illegal immigrants in overcrowded and unhygienic conditions and denying them access to lawyers and other experts. The government began a crackdown on illegal immigration in 2008, including the arrests of hundreds of suspected illegal immigrants in May. In July 2009, a new immigration law was passed that fines illegal immigrants and gives authorities the power to detain them for up to six months without charge. A number of human rights groups raised concerns that the new law undermines the rights of asylum seekers".

"….In July 2009, Italy became the last European country to approve the abortion pill. However, unlike in the United States and other European countries, the pill can only be administered in hospitals, where the patient must remain until the pill has taken effect".

Against this background, by the relevant UPR Working Group Report (See UN Doc. A/HRC/14/4), it emerges as follows: 51 States on the List of Speakers managed to take the floor, while 13 more (Bulgaria, Croatia, Ecuador, Ethiopia, Ghana, Iraq, Mauritius, Moldova, Montenegro, Nigeria, China, Portugal and San Marino) could not intervene, owing to time constraints.

The SuR reported on both positive achievements and shortcomings[88]: "the national report, prepared with the participation of civil society organizations, with past and future meetings organized by the Inter-Ministerial Committee on Human Rights". "…Italy's engagement in universal periodic review is part of its commitment to the promotion of human rights in the UN and other international for a". Italy declared its intention "to ratify the Optional Protocol to the Convention against Torture once a relevant independent national preventive mechanism is put in place in connection with the establishment of a national human rights institution. The bill to ratify the Council of Europe Convention against Trafficking in Human Beings has been approved and will

[88] Available at http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10132&LangID=E.

now be submitted to Parliament. While remaining attentive to the needs of migrants, Italy is not in a position to ratify the Convention on the Rights of All Migrant Workers and Members of Their Families, which does not make a distinction between regular and irregular migrant workers and whose provisions fall within the European Union domain. With regard to the domestic process aimed at establishing a national independent commission for the promotion and protection of human rights in accordance with the Paris Principles, the inter-ministerial working group is currently concluding draft legislation and the governmental process should be finalized in a few months". "In relation to the Roma and the Sinti, Italy acknowledged that the integration had proved more difficult for groups that have arrived over the past 10 - 15 years. The stigmatization of minorities has always been a source of concern, and the recent episodes of violence against Roma communities had been condemned by all political forces and were subject to judicial investigation. However, with regard to forced evictions of people living in unauthorized camps, Italy noted that they were sometimes necessary to ensure appropriate and legal living conditions and that, wherever possible, the persons involved were consulted in advance. Regarding the treatment of migrants, Italy affirmed its full compliance of the recent legislative and administrative acts, known as the "security package" and their implementing procedures, with human rights principles and obligations". "…Over the past few years, the country had been exposed to a massive inflow of migrants, which increased by 250 per cent over the last few years, and could, in some instances, affect public order. Italy is at the forefront of efforts to rescue migrants and asylum-seekers on the high seas. It affirmed that, in cases of human trafficking, international law permitted the return of migrants to their countries of origin, unless they were in need of urgent medical assistance and had not expressed the intent to apply for asylum or other forms of international protection". "…an area of the informal economy had emerged, in which workers, and in particular migrant workers, were not protected as they were not officially employed. New measures to counter this phenomenon had been adopted in 2009 to extend social protection to all workers, and more than 300,000 non-EU workers had now been regularized. At the same time, measures aimed at the stable integration of migrants were being envisaged with the provision of long term residence permits after a test period". "..The stigmatization of certain ethnic or social groups remained a matter of serious concern for the Government and local authorities, which are fully aware of the challenge faced in this field, and strongly committed to eradicate racist or xenophobic attitudes from

society. The Italian legal framework contains a wide range of legal provisions to combat racism, and incitement to racial hatred is severely punishable by law". At the same time, Italy noted that "the fight against racism and xenophobia was a long-term process and that legislative and judicial measures had to be complemented by efforts at all levels, particularly through the education system, which is why the Ministry of Education had developed specific educational programmes with a marked intercultural approach". "The Government expressed its commitment to gender equality, the human rights of the individual, prevention and removal of discrimination for reasons directly or indirectly based on sex, racial or ethnic origin, religion or belief, age or sexual orientation. Following recent incidents of homophobia, the first national awareness-raising campaign was launched. In this framework, Italy mentioned the Project "Diversity is a value" run by a group of relevant non-governmental organizations". "…Italy stated that, in recent years**,** owing to the active public denunciation and condemnation of organized crime of some journalists, they have been victims of acts of intimidation by organized crime groups. The Italian authorities have promptly taken adequate measures to ensure the highest possible level of protection by Police forces while the judicial authorities have initiated two investigations". "…In order to overcome overcrowding in prisons, a plan of action was recently adopted envisaging the building of new wings and prisons together with an increase of 2,000 units in the Penitentiary police staff and other measures aimed at reducing the prison population. Through this intervention, there will be 21,000 new places for a total prison capacity of about 80,000 places".

For sake of completeness, it is worth-mentioning that Freedom House focused on corruption, media freedom, women under-representation, abortion pill, and immigration law without properly addressing, for instance, the situation of Roma people. On the other hand, the Italian Authorities reiterated the standing invitations for all Special Procedures and reported updated information on individual cases and on the situation of Roma people.

States' delegations from all regional groups, in particular Cuba, Pakistan (Report's paras. 23-24), Canada, Norway and the UK (Report's para.30), focussed on the application of the principles of non discrimination and the rise of racist episodes. During the Interactive Dialogue, Italy was also targeted by specific countries for political issues referring to bilateral agreements, as was the case with the speech by Slovenia claiming inadequacy vis-à-vis the treatment of Slovenian minority in Italy

(para. 25 of the above Report), and Iran, claiming inadequacy and mismanagement, inter alia, of the judicial system and the security sector.

By its Addendum (See Un Doc. A/HRC/14/4/Add.1), Italy accepted, in full or partly, 80 out of 92 recommendations and committed itself to promptly follow-up. The above Dialogue shows that various countries put forward specific issues, politically motivated, such as Iran and Slovenia. Despite the need to refer to the three UPR documents (see paragraph 4), UN Member States often elaborate questions and recommendations which do not reflect the situation on the ground or do not relate to existing implementation gaps. Further the variety and tone of recommendations should be better channelled by using human rights benchmarks or qualitative and quantitative indicators which might help to objectively monitor the situation on the ground[89].

D. The first State under Review from the GRULAC at the seventh session: Nicaragua

In the 2010 Survey by Freedom House, Nicaragua was scored, as for political rights and civil liberties, four and four, respectively, with the final evaluation indicating a "Partly Free State". This Survey reports that: "Nicaragua's civil liberties rating declined from 3 to 4 due to President Daniel Ortega's continued use of violent intimidation and politicized courts to overcome obstacles to his plans for re-election. The political and civic climate is affected by corruption, political pacts, violence, and drug-related crime. Corruption cases against opposition figures often raise questions about political motivation. The 2007 Law on Access to Public Information requires public entities and private companies doing business with the State to disclose certain information. However, it preserved the government's right to protect information related to state security, and in 2009 government-run enterprises failed to publish financial information in accordance with the law. The Administration of President Daniel Ortega has created a network of private businesses under the auspices of the Bolivarian Alliance for the Americas (acronym, ALBA), a regional economic association through which the Venezuelan government provides Nicaragua with 10 million barrels of oil annually".

According to Freedom House, the matters of concern refer to corruption, press freedom, freedom of association and assembly, and the judiciary.

Against this background, by the relevant UPR Working Group Report (See UN Doc. A/HRC/14/3), it emerges as follows: 47 States on the List of Speakers managed to

[89] Op.cit in supra note 29.

take the floor, while 19 more (Denmark, Uruguay, Japan, Poland, Switzerland, Argentina, Luxembourg, Iraq, Guatemala, China, Angola, Slovakia, Nigeria, Costa Rica, Ecuador, Peru, Palestine, Ghana and Portugal) could not intervene, owing to time constraints.

By its national report and the relating introduction statement before the UPR WG, Nicaragua reported as follows: “Nicaragua is fostering strategies to promote human development, thereby eradicating the poverty inherited from exclusionary social and economic policies. However, a nation deprived of the right to development is condemned to living in poverty and underdevelopment. States would not be able to achieve the Millennium Development Goals as long as international cooperation was limited and politically conditioned. The full enjoyment of human rights could not be provided as long as international trade continues to be unjust. As long as there were multinationals more powerful than States themselves, nations such as Nicaragua would continue to be impoverished. The capitalist system had failed the entire world, as could be seen from the financial and economic crisis”. “…In 2007, the Government successfully promoted a programme of food production vouchers to benefit 75,000 rural families over a period of five years through a mechanism of transfers, which provides them with means of production. The programme was extended to the “zero usury” financing programme”. “Education is totally free of charge. Between 2006 and 2009, in solidarity with Cuba, Nicaragua supported the programme, “Yes, I can!”, with which it has reduced illiteracy in the country to less than 5 per cent, a situation certified by UNESCO. It has established five educational policies to improve the quality of the educational system and to decentralize it. Nicaragua has also a sustainable school food programme cited as model programme by the Food and Agriculture Organization of the United Nations”. “..Nicaraguans has equal access to the right to health. The State prohibits all charges for health services”. “Nicaragua has managed to reduce the mortality from tuberculosis to half of the level recorded in 1990. Since 2007, Nicaragua has reached a low-risk level category for malaria. It has recorded 78 municipal areas out of 153 where there was no transmission of malaria. Since 2008, it guarantees anti-retro-viral treatment for 734 HIV positive people”. “…Social security was a constitutional right. Through the national plan for human development, the Government was currently working on a proposal for further changes to the current system”. “..With regard to civil and political rights, the Government is focused on strengthening the rule of law and legal security. It is promoting a national agreement in the area of criminal justice, with

policies and strategies to strengthen the criminal justice system. Nicaragua is seeking a fair and accessible criminal justice system that would preserve and foster the principles of legal security. Through this important process, the new criminal procedural code had gone from inquisitorial to an adversarial system. The prison system is based on the penitentiary regime law and the law on execution of sentences, which provides that their activities be carried out in conformity with constitutional principles, laws and regulations, the code of conduct and international human rights instruments ratified by Nicaragua". ".. Gender equality and the proper position of women in all sectors of society are fundamental and have a cross-cutting foundation. Priority is given to the role played by women in decision-making and in the development of public policies allowing women to be empowered, thus helping to eradicate violence against women. The State has decided to establish units within its institutions to monitor women's rights through the "love programme". ".. Nicaragua is striving to ensure that children are given the right to a happy life and to guarantee to them free social services. The State has enacted a code on childhood and adolescents, implementing a new model for juvenile criminal justice system, which guarantees due process of law and is orientated towards integrating adolescents into families and the society". "..Nicaragua had a model of media ownership that allowed for the existence of small and medium-sized owners, with full freedom of expression and no censorship. There are 340 radio broadcasts and more than 70 television channels and cable companies". "…Regarding abortion, legal amendments reflect the exercise of sovereignty, and have been adopted by the parliamentary majority in the national assembly. This was clearly an issue of sovereignty, not a religious one. The majority of Nicaraguans believe that the right to life of the unborn is important".

During the interactive Dialogue, the focus was on food insecurity, poverty and right to education.[90] Cuba took advantage of its intervention to express its national position against Great Powers. In particular it stressed that: "the Sandinista Revolution had granted Nicaraguans access to human rights, but a criminal war financed and led by the Empire and several neo-liberal Governments had deprived the country of it". Cuba congratulated the initiatives taken by the Government and denounced the illegal actions against Nicaragua, particularly the denial of international assistance owing to interference and intents of domination. It commended the poverty reduction strategy and progress on the right to food, health, education and for combating discrimination. It

[90]See speeches by Bahrain, Algeria and Qatar, available at: http://www.ohchr.org/EN/HRBodies/UPR/PAGES/NISession7.aspx

highlighted the free and universal access to education and health attained since 2007, noting that illiteracy was eradicated in 2009. Along these lines, Venezuela (Bolivarian Republic of) noted that Nicaragua was part of the Bolivarian Alliance of the Peoples of Our America, a space of encounter to face common challenges, under socialist principles of solidarity and mutual complementarity. It recognized policies to guarantee economic, social and cultural rights, particularly education, access to which was guaranteed to all in equality of conditions and free of charge. It noted the successful national literacy campaign "Yes, I can!", leading to recognition by UNESCO of Nicaragua as a territory, free of illiteracy. It highlighted programmes such as "more education", "better education" and "all education". Similarly, the Democratic People's Republic of Korea (DPRK) appreciated the measures taken in civil, political, economic, social and cultural rights. It highlighted the policies to foster services for people, create a fair market free from exploitation and unlawful practices, and to develop networks of economic entities. It noted the measures aimed at improving the condition of vulnerable groups. Bolivia, Sri Lanka, Vietnam, Iran, Egypt, Uzbekistan, Kyrgyzstan, Laos, the Russian Federation, Panama, Nepal, Spain, Colombia, Malaysia, Dominican Republic, and India took the floor to merely support Nicaragua.

Mexico, the Netherlands, Sweden, Bangladesh, Italy, the US, and Germany took note of some positive steps forward without commending the work by the current Government. .

On the contrary, inspired by the same sources of Freedom House, Canada, Slovenia, Belgium, Finland, Israel, France, Czech Republic, and Ireland stressed the main problems relating to the political situation and civil liberties.

In June 2010, Nicaragua - that did not provide any additional Addendum - merely recalled three/four requests which could not enjoy its national support out of 110 recommendations. It was rather vague with regard to all the other recommendations[91]. Nicaragua just recalled that "civil society had full freedom to express its opinion but because of the respect for national sovereignty, this right was deserved for nationals only and foreigners were precluded from interfering in domestic affairs". Rather than being focused on the promotion and protection of human rights, it is clear from this sentence the mere political intent and content of the dialogue which, under its concluding phase, was merely marked by a specific focus on the human rights of women and the new legislation on abortion.

[91] Available at: http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10132&LangID=E.

E. The first State under Review from the Eastern European Group at the seventh session: Kazakhstan

By the 2010 Survey by Freedom House, Kazakhstan has been scored, as for political rights and civil liberties, six and five, respectively, with the final evaluation indicating a "Not Free State". This Survey reports that "Kazakhstan received a downward trend arrow due to a spate of politically motivated libel suits against critical media outlets, a restrictive new internet law, arbitrary arrests of officials and businesspeople, and the grossly deficient judicial proceedings against human rights activist Yevgeny Zhovtis". In terms of overview, Freedom House reported as follows: "President Nursultan Nazarbayev and his Nur Otan party maintained almost complete control over the political sphere in 2009, using tactics including arbitrary arrests, restrictive new laws, and politically motivated prosecutions to muzzle critical media outlets and individuals. These long-standing authoritarian practices continued even as Kazakhstan prepared to assume the chairmanship of the Organization for Security and Cooperation in Europe in 2010".

Against this background, by the relevant UPR Working Group Report (See UN Doc. A/HRC/14/10), it emerged as follows: 54 States on the List of Speakers managed to take the floor, while 18 more (Chile, Slovakia, Iraq, Italy, the Syrian Arab Republic, Switzerland, Austria, Afghanistan, Angola, the Libyan Arab Jamahiriya, Saudi Arabia, Bosnia and Herzegovina, Argentina, Tunisia, Mongolia, the Republic of Moldova, Palestine and Maldives) could not intervene, owing to time constraints.

The SuR focussed on reporting the achievements: "Since the early days of its independence, Kazakhstan has recognized the centrality of its people and of human rights and freedoms. It has made steady progress in the transition from a country with a command economy controlled by a totalitarian political system to a modern State with an open market economy and a liberal political system. Structural reforms, including the privatization of State property, land and housing, ensured robust economic growth over the past 10 years, which in turn contributed to a fourfold decline in the number of people with incomes below the poverty line, from 50 to 12 per cent. Economic growth, poverty reduction and policy reforms have increased the well-being of citizens in many respects, including the enjoyment of the right to affordable housing, increased life expectancy, 100 per cent enrolment in secondary schools, a modern pension system and social assistance for families living below the poverty line. Kazakhstan allocates more

than 50 per cent of its annual State budget to education, health and social welfare. Social and political changes have been enshrined in the Constitution, adopted through a nationwide referendum, which recognizes and guarantees human rights and freedoms. Kazakhstan has 10 political parties and has enhanced civil society as represented by non-governmental organizations. There are more than 15,000 registered non-governmental organizations, and Kazakhstan annually commissions them to provide social services worth more than $13 million. There are more than 8,000 registered media outlets, representing a wide range of views, and more than 85% of them are non-State entities". The delegation noted that "inter-ethnic and interfaith harmony is considered to be one of Kazakhstan's greatest achievements, and that representatives of more than 140 ethnic groups and 45 religious denominations coexist peacefully in the country. The development of Kazakhstan's model of multi-ethnic society has been promoted through the establishment of the Assembly of the People of Kazakhstan. Newspapers and magazines are published in 11 languages, radio programmes are broadcast in 8 languages and television programmes are broadcast in 7 languages. All people have the right to a fair and transparent judicial system. Kazakhstan has had a jury trial system for criminal cases since 2007, and it has established specialized courts such as administrative, economic, military and juvenile courts to improve the efficiency of judicial proceedings. Juvenile courts carry out their functions in Almaty and Astana, and they will soon be established in all regions. As a result of the recent changes made to legislation, only a court can authorize an arrest".

During the Interactive Dialogue, numerous States congratulated Kazakhstan on its national human rights action plan and the priority given to the promotion and protection of human rights.

Kyrgyzstan, Uzbekistan, Bahrain, the Sudan, Cuba, Brasil, Algeria, Pakistan, Malaysia, Indonesia, Egypt, Qatar, Iraq, China, Iran, Yemen, Venezuela, Nigeria, Belarus, Turkey and the Russian Federation welcomed: Kazakhstan's commitment to ending domestic violence and gender discrimination; its measures to strengthen law enforcement and the judicial system by addressing impunity; and its decision to accelerate the ratification of the Convention on the Rights of Persons with Disabilities.

By contrast, the United States, Hungary, France, Canada, Ireland, Belgium, Czech Republic, Norway, the UK, the Netherlands, and Australia recommended that Kazakhstan continues to work, inter alia, towards unrestricted freedom of press and the establishment of an independent monitoring mechanism on torture.

By its national Addendum, in the course of the final dialogue before the Plenary of the Council, it accepted 121 out of 128 recommendations, in full or partly. The delegation ensured that Kazakhstan would intensify measures to protect the rights of children and promote the juvenile justice system, fight domestic violence, and improve human rights education and awareness and that it would "continue to regularly accept" visits from the Special Procedures of the United Nations Human Rights Council, in accordance with the standing invitation practice (by which, in principle, once extended invitations, States should accept *de plano* this kind of missions by the Special Procedures). The reform of the judicial and law enforcement systems would continue with due regard to the recommendations received[92]. No real follow-up was envisaged by the SuR.

Like the preceding reviews, it emerged the divisive approach which usually characterizes the inter-governmental debate. Scholars stress that: "The dominance of Groups' blocs remains an enormous challenge."[93]

During the Dialogue before the UPR Working Group, the SuR illustrates its national position by reporting updated information and/or indicating future "commitments". In the course of this Dialogue, States can pose further questions and comments, while "other relevant stakeholders" can only attend. From the above it emerges the quite long lists of recommendations, sometimes being not consistent with international human rights standards, the lack of indicators to adequately assess each country.

Usually the State under Review does not respond immediately to the recommendations. The practice shows that States prefer to respond to recommendations, at a later stage, by means of a national written Addendum. In accordance with paragraph 32 of the Annex to Council's Resolution 5/1, States can reply prior to the final Outcome report is adopted by the Plenary[94]. As discussed, recommendations can be rejected or accepted, in full or partly[95]. However there is no indication prescribing States to explain their national position vis-à-vis those recommendations, partly accepted or rejected.

As recalled, this procedure concludes with the adoption of the Outcome Decision. During negotiations, it was long-debated the content of this Decision, which

[92] See http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10135&LangID=E.
[93] See Terlingen, Y., The Human Rights Council: A New Era in the UN HR Work (2007), 21 (2) Ethics and International Affairs, p.167.
[94] Again the political nature of the process was noted as long as the country under review has the faculty – of course – of rejecting recommendations.
[95] Despite the case of Iran that during its Review merely "took note" of various recommendations, available at: http://www.ohchr.org/EN/HRBodies/UPR/PAGES/IRSession7.aspx

reflects a standardised formula applicable to all States reviewed. The Outcome Decision merely refers to "views, voluntary commitments and replies". There is neither binding wording nor indications of follow-up activities[96].

As for the adoption of the Decision, to be taken before the Plenary, the Council has never rejected or challenged any UPR Outcome, apart from some harsh moments prior to the adoption of the Outcome Decision on Israel, in March 2009.[97]

In brief, from the above it might be inferred that the political nature of the exercise strongly impacts on the Dialogue. The list of speakers, the lack of objective quantitative and qualitative human rights indicators, the high number of recommendations, sometimes inconsistent with the international human rights standards, makes difficult the implementation of the Outcome Decisions, However among the positive notes, mention has to be made of: the increase in the ratifications of international human rights binding treaties by UN member States and the recommendations or at least the focus on the practice of the "standing invitations" to the UN Special Procedures. As a way of example, it might be recalled the following UN UPR Report on: Cuba (A/HRC/11/22, para.79); on Cote d'Ivoire (A/HRC/13/9, para.79); on Israel (A/HRC/10/76, para.54); on China (A/HRC/11/25, para.27); and on the Russian Federation (A/HRC/11/19, para.16). As for all these cases, Member States, mainly from the WEOG, requested to ratify human rights binding treaties and more frequently to extend standing invitations to Special Procedures, without any distinction between country or thematic ones (During the Review of Iran, the relevant delegation stressed that since long time the country has extended invitation to all "thematic" procedures (A/HRC/14/12) so as to prevent any possible visit by a future country Special Rapporteur).

7. The UPR follow-up, within the UN system of promotion and protection of human rights

[96] As a way of example it might be recalled the Outcome Decision adopted at the conclusion of the Review of Italy - Decision 14/103: "The Human Rights Council, Acting in compliance with the mandate entrusted to it by the General Assembly in its resolution 60/251 of 15 March 2006 and Council resolution 5/1 of 18 June 2007, and in accordance with the President's statement PRST/8/1 on modalities and practices for the universal periodic review process of 9 April 2008; Having conducted the review of Italy on 9 February 2010 in conformity with all the relevant provisions contained in Council resolution 5/1; Adopts the outcome of the universal periodic review on Italy which is constituted of the report of the Working Group on Italy (A/HRC/14/4), together with the views of Italy concerning the recommendations and/or conclusions, as well as its voluntary commitments and its replies presented before the adoption of the outcome by the plenary to questions or issues that were not sufficiently addressed during the interactive dialogue in the Working Group (A/HRC/14/37, chapter VI and A/HRC/14/4/Add.1) 20th meeting, 9 June 2010, [Adopted without a vote]".

[97] See Council's session Report A/HRC/10/29.

This new monitoring system has been designed to monitor the situation of human rights in any country, on the basis of a dialogue among peers, with a view to promoting cooperation if the country concerned requests it.

As discussed, by the IB Package UN Member States have strengthened the wording of GA Res. 60/251. Para.33 of the Annex to Council's Resolution 5/1 envisages that "The outcome of the Universal periodic review, as a cooperative mechanism, should be implemented primarily by the State concerned and, as appropriate, by other relevant stakeholders; (para.34) The subsequent review should focus, inter alia, on the implementation of the preceding outcome; [..] (para.36) The international community will assist in implementing the recommendations and conclusions regarding capacity-building and technical assistance, in consultation with, and with the consent of, the country concerned; (para.37) In considering the outcome of the universal periodic review, the Council will decide if and when any specific follow-up is necessary, (para.38) After exhausting all efforts to encourage a State to cooperate with the universal periodic review mechanism, the Council will address, as appropriate, cases of persistent non-cooperation with the mechanism".

From the above, it emerges that UN Members do acknowledge the importance of the implementation of the Outcome Decision in view of the second cycle of the UPR. The above wording sets a teleological nexus between the implementation phase and the following UPR cycle.

While stressing the State-driven nature of this process, the IB Text also acknowledges that in the implementation phase the "other relevant stakeholders" might be involved, "as appropriate (para.33)". Both NGOs and NHRIs may be engaged in implementing with the State's Authorities the recommendations which enjoy the support by the SuR[98].

The above provision reduces the impact of the limitations that NGOs and other stakeholders face, in particular, during the Interactive Dialogue. Their effective involvement might ensure efficacy, inclusiveness and transparency[99].

More importantly, it is envisaged that the international community is supposed to assist the State in the implementation of recommendations regarding capacity-building: (para.36) "The international community will assist in implementing the

[98] For instance, relevant stakeholders may raise awareness of the UPR Outcome, at the national level (See "INFORMATION AND GUIDELINES FOR RELEVANT STAKEHOLDERS1 ON THE UNIVERSAL PERIODIC REVIEW MECHANISM *[as of July 2008]*, available at: http://www.ohchr.org/EN/HRBodies/UPR/Documents/TechnicalGuideEN.pdf).

[99] In this regard it has been argued that "they keep the system honest". See Brett, R, Neither Mountain nor Molehill. UN Human Rights Council, One Year On, Quaker United Nations Office, 2007, p.1-18, available at http://www.quno.org/geneva/pdf/humanrights/NeitherMountainNorMolehill200707.pdf.

recommendations and conclusions regarding capacity-building and technical assistance, in consultation with, and with the consent of, the country concerned". To this end, an ad hoc Fund has been established by Council Resolution 6/17 of September 2007. The IB Text recognizes that the Council can also decide on any specific follow-up that it might consider necessary, including in the event of "persistent non-cooperation (para.38 of the Annex to Council's Resolution 5/1)".

The above provisions indicate that after the adoption of the Outcome Decision, the implementation phase should be characterised by technical cooperation projects. For sake of completeness, it should be recalled that, during the IB negotiations, most developing countries did not want to enable the Council to address the non-compliance, through specific measures. Besides they firmly rejected all the proposals on the involvement of a possible UPR rapporteur or, alternatively, a Special Procedure Mandate-Holder. In particular two delegations[100] stressed that under this phase it has been accepted the idea of a voluntarily national reporting provided that no standardised practice be developed. Other two delegations[101] suggested that any sort of update/follow-up be postponed to the next UPR cycle.[102]

Beside from the States' views, the IB Text clearly defines the rationale behind this phase: the implementation of recommendations with a view to the following UPR cycle.

Indeed this stage provides the opportunity of involving relevant UN mechanisms, mainly the OHCHR, to develop a country-engagement strategy, as envisioned, for instance, in the 2002 UN Action Two Programme (2002) and, more recently, in the Strategic Management Plan 2010-2011 of the OHCHR[103]. This is the phase under which the OHCHR could assist countries to implement the UPR recommendations. Along these lines, a specific role should be played by the OHCHR field presences, eventually in tandem with the UN resident coordinators, and programs, such as UNDP. Other relevant UN components, such as UNICEF, should be involved, as well[104]. Scholars[105] stress that both the Special Procedures and Treaty Bodies should be extensively involved too.[106]

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[100] China and Cuba
[101] Nigeria and India
[102] File with the Author.
[103] SMP 2009-2011, http://www.ohchr.org/Documents/Press/SMP2010-2011.pdf, p.16 et ff..
[104] During the architectural negotiations, having taken place between 2006-2007, it was proposed to set a follow-up rapporteur. "Persistent non cooperation by a State with the mechanism, including failure to fulfil recommendations accepted, will be considered and addressed by the Council (See A/HRC/Res/5/1, para.36). See Ramcharan, B. G., Human Rights in the 21st century, in International Human Rights Monitoring Mechanisms, Essay in Honour of J.T. Toller, Vol. 35, M. Nijhoff Publishers, 2009, p. 3-8.
[105] Op.cit. in supra note 29 (Papisca, p.15-16); see also Cofelice, A., Consiglio Diritti Umani delle Nazioni Unite: tendenze e prospettive del cantiere di riforme sulle procedure e sui meccanismi di promozione e protezione dei diritti umani, in Pace Diritti Umani, 2, Marsilio Editore, 2007, p.36; see

As discussed, so far there is neither a consolidated practice nor a clear indication about the follow-up activities to be undertaken. However various countries have pledged to effectively follow up on the UPR recommendations. Mention has to be made of: Bahrain, Turkey, the UK, Italy [107]. For instance Italy recently ratified the Warsaw Convention on the protection of the victims of trafficking, as recommended (in particular by NGOs). The Philippines has adopted a legislation on women's rights, the so-called Magna Charta on women's rights; Indonesia undertook an assessment exercise on all the recommendations originating from international human rights mechanisms, including UPR, treaty bodies and Special Procedures; a Malaysian NGOs organized a briefing for Parliamentarians on the UPR[108].

In particular some countries have pledged to submit, on a voluntary basis, a mid-term progress report to the Council, under its Agenda's Item 6. This is also an opportunity to further assess the position and the degree of implementation by States. Provided that there is not yet even the practice to communicate updated information during the UPR cycle. It is not yet possible to collect this datum. However the 2009 OHCHR Report mentions the UK (considered in April 2008), Bahrain (considered in April 2008), Colombia (considered in December 2008), Republic of Korea (considered in May 2008), and Switzerland (considered in May 2008) that have shared information on their follow-up, including on the assistance received from the OHCHR.

The engagement in human rights promotion and protection activities through technical assistance and support has been included among the UPR recommendations to numerous countries, mainly from Africa (See Gabon, Benin, Ghana, Mali, South Africa). Numerous States have underscored that technical assistance and capacity-building are vital components of the follow-up phase. In this perspective,[109] the Council and the OHCHR need to create a tool to assess the impact of the UPR on countries that have been reviewed, by which, it might emerge the need of standardised follow-up

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further Clapham, A., United Nations Charter-Based Protection of Human Rights (Draft chapter for R. Hanski, M. Sheinin & M. Suski (eds) An introduction to the International Protection of Human Rights, A textbook. Third Edition, Institute for Human Rights, Abo Akademi University, 2009 forthcoming), p. 1-23; see Nanda, V. P., The global challenges of protecting human rights: promising new developments, in Denver Journal of International Law and Policy, Vol.34, No.1, 2006, p.1-15 ; see also Bossuyt, M., et Decaux, E. "De la Commission au Conseil des droits de l'homme, un nom pour un autre, in Droits fondamentaux, No.5, 2005, available at www.droitsfondamentaux.org/article.php3?id_article=101, p.5.

[106] See the Dublin Statement of November 19, 2009, drafted by 36 members of the Treaty monitoring bodies, para.17, http://www.nottingham.ac.uk/hrlc/documents/specialevents/dublinstatement.pdf. "It is recommended that treaty bodies, as a central actor in the process of strengthening the treaty body system continue to make all efforts, both separately and in consultation with each other, to enhance and to further harmonize their procedures and working methods, taking into account the evolving needs and challenges of human rights protection and with a view to further systematisation of their functioning. One important area of reform for Treaty Bodies is the sustained strengthening of systems for the follow-up of all forms of treaty bodies recommendations – thus also those incorporated in the UPR recommendations – and for further harmonisation of working methods relevant to follow-up as well as for facilitation of a more systematic involvement on the UN and other actors at the country level."

[107] See Seoul Meeting on the HRC's review of November 2009, available at: http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=9959&LangID=E

[108] See the 2009 OHCHR Report, available at: http://www.ohchr.org/Documents/Publications/I_OHCHR_Rep_2009_complete_final.pdf

[109] See Summary of the Discussion on Universal Periodic Review as prepared by the Secretariat on March 13, 2007 A/HRC/4/CRP.3, para.68

activities, in line with para.37 of the Annex to Council's Resolution 5/1 ("In considering the outcome of the universal periodic review, the Council will decide if and when any specific follow-up is necessary")[110].

Conclusion

Prior to the 1993 Vienna Conference, it was argued that the development of the reporting system is at the core of the international system for the promotion and protection of human rights.[111]

The establishment of an initial system of self-reporting, relating to the provisions of the Charter of the United Nations and Universal Declaration of Human Rights, was envisaged within the United Nations, as early as 1951 (see E/CN.4/517, p. 2). A triennial reporting system was subsequently established within the Commission on Human Rights in 1956, by its Resolution 1 (XII). Besides envisaging a form of accountability for States, the above monitoring system aimed at developing advisory services for those States in need of assistance.

Despite the general broad support, this ad hoc reporting system did not work out in practice due to its complexity and to the introduction of other systems, such as the two main Commission's procedures (in accordance with ECOSOC Resolution 1235/1967 and ECOSOC Resolution 1503/1970) and the human rights conventional/treaty-monitoring system.

The UPR reporting system, if not manipulated by States, may enhance international accountability in the field of human rights. It also provides States with the opportunity to: exchange best practices; review policies and programmes referring to the promotion and protection of human rights; close implementation gaps through follow-up activities and, in this regard, request cooperation by *in primis* the OHCHR.[112]

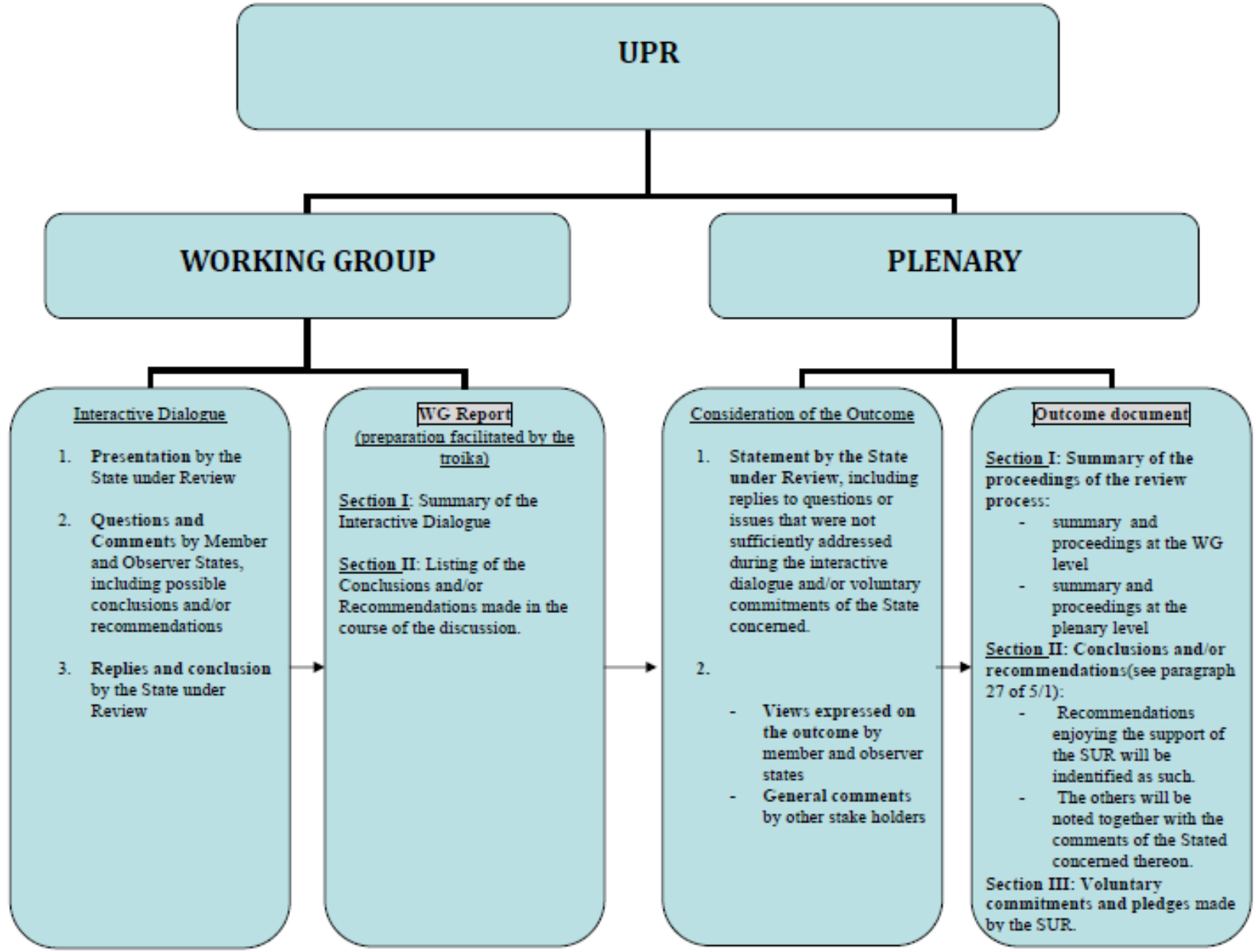
As discussed, it is not possible yet to draw final conclusions (considering the forthcoming Council's Review). The relevant practice triggers various questions: on how to ensure the effective assessment of each country's situation; on whether to introduce benchmarks and human rights indicators to ensure equality of treatment (and

[110] Op.cit in supra note 108 (p.25)
[111] See UN Doc. A/CONF.157/PC/62/Add.11/Rev.1 (22 April 1993), entitled "Status of preparation of publications, studies and documents for the World Conference", paras.90 et sequitur.
[112] Op.cit. supra in note 29, (p.739); see Ghanea, N., From the UN Commission to the UN HRC: One step forwards or two steps sideways?, in ICLQ, Vol. 55, 2006, p.695 et sequitur; see also Scannella, P., and Splinter, P., in Human Rights Law Review, (2007) 7-1, p.41-72, The UN HR Council: A promise to be fulfilled; see further Tardu, M., Le nouveau Conseil des Droits de l'Homme aux Nations Unies: decadence ou resurrection?, Revue Trimestrielle des Droits de l'Homme, No.72, 2007, p. 967 et sequitur; op.cit. in supra note 18. .

overall an objective assessment during the Interactive Dialogue); on how to ensure an enhanced role for TBs and SPs as well as the effective participation of NHRIsx[113] and NGOs;[114] how to ensure feasible and consistent recommendations; and on whether to introduce an automatic follow-up or, at least, a standardised and uniform system of follow-up.

The UPR shows an upgrade of the entire reporting system, as long as it sets specific provisions, involving, to different extent, all relevant stakeholders. It also stresses the importance of follow-up activities. The joint reading of all the above provisions indicates a clear reference to the responsibilities of the UN Member States under Articles 55-56 of the Charter of the UN. Indeed UN Member States must foster the exchange of experiences, the dissemination of good practices and multilateral cooperation to fulfil, in good faith[115], their obligations pursuant to, inter alia, Articles 55-56: "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: [..] universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion"; and "All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55".

[113] Op.cit. in supra notes 3, 13,22, respectively.
[114] Op. Cit. In supra note 105.
[115] See Art. 26 of the Vienna Convention on the Law of the Treaties (1969) "*Pacta sunt servanda*
Every treaty in force is binding upon the parties to it and must be performed by them in good faith"


UPR
WORKING GROUP
PLENARY
Interactive Dialogue
1. Presentation by the State under Review
2. Questions and Comments by Member and Observer States, including possible conclusions and/or recommendations
3. Replies and conclusion by the State under Review
WG Report
(preparation facilitated by the troika)
Section I: Summary of the Interactive Dialogue
Section II: Listing of the Conclusions and/or Recommendations made in the course of the discussion.
Consideration of the Outcome
1. Statement by the State under Review, including replies to questions or issues that were not sufficiently addressed during the interactive dialogue and/or voluntary commitments of the State concerned.
2.
- Views expressed on the outcome by member and observer states
- General comments by other stake holders
Outcome document
Section I: Summary of the proceedings of the review process:
- summary and proceedings at the WG level
- summary and proceedings at the plenary level
Section II: Conclusions and/or recommendations(see paragraph 27 of 5/1):
- Recommendations enjoying the support of the SUR will be indentified as such.
- The others will be noted together with the comments of the Stated concerned thereon.
Section III: Voluntary commitments and pledges made by the SUR.

CHAPTER IV

The Advisory Committee of the Council: an "Expert Advice[1]"?

"The Human Rights Council Advisory Committee [..] will function as a think-tank for the Council"

INTRODUCTION

"[The Commission] recognized not only the valuable contribution made by this body [the Sub-Commission] to the work of the United Nations over the past 58 years but also its important contribution to the development of a better understanding of human rights through the study of important issues, the elaboration of international standards and the promotion and protection of human rights throughout the world", Ambassador Makarim Wibisono[2]

By GA Resolution 60/251 of 15 March 2006[3] establishing the Human Rights Council, the UN General Assembly decided that it "shall assume, review and, where necessary, improve and rationalize all mandates, mechanisms, functions and

[1] See operative paragraph 6 of GA Resolution 60/251. See also para.65 of the Annex to Council Resolution 5/1 of June 18, 2007.
[2] In his capacity of Chairman of CHR61 (2005).
[3] See also Chapter I.

responsibilities of the Commission on Human Rights, in order to maintain [..] expert advice and a complaint procedure; the Council shall complete this review within one year after the holding of its first session" (Operative paragraph 6).

Formally the Council has "maintained a independent collegial advisory body" (in charge, inter alia, with screening "the communications" under the complaint procedure), as recommended by the Sub-Commission itself, in August 2006[4].

As outlined by the former High Commissioner, in the course of the 62nd session of the Commission (March 2006), the Council decided, in June 2006, to extend, by Decision 1/102, "all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights" for one year in order to avoid any protection gap.

By Council Decision 1/104 of June 2006, the Council also decided to set up an ad hoc institution-building Working Group. By Decision 2/102 (September 2006), the Council further decided: "(*a*) To transmit the views of the Sub-Commission on Promotion and Protection of Human Rights on the Human Rights Council's future expert advice mechanism to the Working Group established pursuant to Human Rights Council Decision 1/104"; and "(*b*) To take note of the draft decisions transmitted by the Sub-Commission pertaining to previously authorized activities, with a view to allowing their continuation in accordance with Council's Decision 1/102".

The relevant Institution-Building Working Group was initially intended to "review" (which alternatively means, "to re-assess") the Sub-Commission. However, as inferred by the Annex to Council Resolution 5/1 of June 2007, the Advisory Committee results in a totally brand new body.

Considering the higher status of the Council within the UN framework, one would expect the same applies to the newly introduced Advisory Committee. In the following paragraphs, it will be indicated how this new body has been reviewed and to what extent its work impacts on and contributes to the protection ability of the Council.

1. Historical background

As for the origin of the then Sub-Commission on Promotion and Protection of Human Rights (hereinafter, the Sub-Commission), the then Commission on Human Rights (hereinafter, the Commission) was authorized to establish, by ECOSOC

[4] See the last Report of the Sub-Commission of August 2006, in UN Doc. A/HRC/2/2- A/HRC/Sub.1/58/36, p.90.

Resolution 9 (II), a Sub-Commission on the Protection of Minorities (see para.9) and a Sub-Commission on the Prevention of Discrimination (see para.10). The ECOSOC also provided the then Commission with some guidance on the functioning of the Sub-Commission[5]. In particular it envisaged (lett.b of paras.9-10 of ECOSOC Resolution 9 (II)): "Unless the Commission otherwise decides, the function of the Sub-Commission shall be, in the first instance, to examine what provisions should be adopted in the definition of the principles which are to be applied in the field of protection of minorities [and prevention of discrimination, respectively] and to deal with the urgent problems in this field by making recommendations to the Commission (the same wording was reflected in para.10 with regard to the prevention of discrimination)".

Accordingly, at the first session (in 1947), the Commission decided to establish the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

Considering its status of subsidiary organ of the then Commission, the Sub-Commission was governed by the Rules of Procedure for the functional commissions of the Economic and Social Council, as applicable (Rule 24 of the Rules of Procedure of the Functional Commissions of the Economic and Social Council).

Since its inception the Sub-Commission was intended as a think-tank for the Commission, mandated to produce studies and expert reports on a wide range of issues.

The mandate, as subsequently enhanced, included the following tasks:

i. To undertake studies and to make recommendations concerning the prevention of discrimination and the protection of minorities;
ii. To review developments in the field of slavery, through its working group and to make recommendations to the Commission;
iii. To prepare reports for use by the Commission in its examination of questions of violations of human rights (Commission's Resolution 8 (XXIII);
iv. To bring to the attention of the Commission by Commission's Resolution 8 (XXIII) of the Commission, any situations which might reveal a consistent pattern of gross violations of human rights;

[5] See Zaru, D., Which role for the expected HR Council expert advice mechanism in the framework of the reforming UN HR system?, in Pace e Diritti Umani, 3/2006, p. 102-103; See also Ramcharan B.G, Lacunae in the law of international organizations: the relations between subsidiary and parent organs with particular reference to the Commission and the Sub-Commission on Human Rights, in Nowak M., Steurer D., and Tretter H., Fortschritt in Mewubtsein der Grund-und Menschenrechte, Progress in the Spirit of Human Rights, 1989 (HRSG/Editors), p.37-49.

v. To perform the duties, provided for by Council Resolutions 1235 (XLII) and 1503 (XLVIII), relating to the procedures for dealing with communications containing allegations of violations of human rights;

vi. To perform any other functions entrusted to it by the Commission or by the Economic and Social Council[6].

Within this framework, the Action Plan launched in the mid 1950s (See Chapter I) envisaged seminar activities, as later developed, in the 1970s, by the Sub-Commission.

Between 1956 -2006, the Sub-Commission delivered, over 70 studies, on a broad range of human rights issues which became the basis for various international standards, such as the studies on human rights and extreme poverty and on indigenous peoples, respectively[7].

Procedurally, over the last years, the Sub-Commission carried out its studies through eight internal Working Groups:

i. The Working Group on Administration of Justice;
ii. The Working Group on Communication (for the first phase of the complaint procedure);
iii. The Working Group on Contemporary Forms of Slavery (as subsequently converted into an ad hoc Special Rapporteur of the Council);
iv. The Working Group on Indigenous Populations;
v. The Working Group on Minorities;
vi. The Social Forum (as subsequently upgraded by the Council as a new subsidiary body);
vii. The Working Group on Transnational Corporations;
viii. The Working Group on Terrorism.

On the occasion of its last session in August 2006, the Sub-Commission recalled all the issues which it had dealt with[8], such as the fight against apartheid, the right to self-determination, inequality and discrimination, gender-based discrimination, the administration of justice and the juvenile justice system, the rights of minorities, the rights of indigenous peoples, in particular indigenous peoples' permanent sovereignty

[6] See UN Doc. E/CN.4/Sub.2/1982/3, Annex I, para. 9.
[7] See Chapter I.
[8] For an historical overview, see Eide, A., "The Sub-Commission on Prevention of Discrimination and Protection of Minorities, in Alston , P. (ed), The UN and HR, Oxford, Clarendon Press, 1995.

over natural resources, the relationship between peace and human rights, the right to restitution, compensation and rehabilitation for victims of gross violations of human rights, terrorism and human rights, extreme poverty, impunity, small arms and light weapons, the rights of migrants, religious freedom, corruption, the right to drinking water and sanitation, human rights and the human genome, TNCs and Human Rights (See for instance the Sub-Commission 55th session's Report, UN Doc. E/CN.4/2004/2-E/CN.4/Sub.2/2003/43) and the relationship between State sovereignty and human rights.

As discussed, the Sub-Commission provided a major contribution to standard-setting activities on various issues from the International Covenants on Human Rights (ICCPR and ICESCR) to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), from the Second Optional Protocol to the ICCPR (relating to the abolition of the death penalty) to the United Nations Declaration on the Rights of Indigenous Peoples, from the International Convention for the Protection of All Persons from Enforced Disappearance to the Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

Against this background, the newly established Council decided (See OP.4 of Council Decision 2/102) in September 2006: "[..] To take note of the draft decisions transmitted by the Sub-Commission pertaining to previously authorized activities, with a view to allowing their continuation in accordance with Council's Decision 1/102". At its first session (August 2008), the newly established Advisory Committee requested the Council, by Recommendation 1/13, to decide on the pending studies of the then Sub-Commission[9]. In response to this, the Council requested the Advisory Committee to focus on: 1. Elaborating an international Draft Declaration on Human Rights Education and Training (See Council's Resolution 6/10); 2. Various issues related to the right to food (See Council's Resolution 7/14); 3. Gender mainstreaming (See Council's Resolution 7/30); 4. Leprosy (See Council's Resolution 8/13); 5. Missing persons (See Council's Resolution 7/28)[10].

2. The transition from the Sub-Commission on Promotion and Protection of Human Rights to the Advisory Committee of the Council

[9] See UN Doc A/HRC/AC/2008/L.11.
[10] No comparison with the number of studies carried on by the then Sub-Commission (in August 2006, it was dealing with 27 different issues).

To reflect the increasing variety of human rights issues, the then Sub-Commission[11] was renamed, in 1999, "the Sub-Commission on the Promotion and Protection of Human Rights". This formal change did not affect its status of subsidiary body of the then Commission; and its 26 independent experts continued to provide studies and advice, mainly in the field of human rights standard-setting.

As discussed, the 2000 Selebi Report[12] recommended the then Sub-Commission not to adopt anymore country resolutions.[13] On various occasions, the then Commission reminded the Sub-Commission that it could not deal with geographic situations, in particular through ad hoc Resolutions (See Commission's Decision 2000/109).

On the contrary, given the magnitude of the human rights issues (and situations), the Sub-Commission further enhanced its working methods and the scope of its mandate, including in the event of emerging country situations.

During the last years, its relation with the then Commission worsened. Two specific issues caused the splitting point: 1. On the basis of the studies carried out, in particular, by Prof. Weissbrodt, the Sub-Commission elaborated, closely with NGOs, the Draft Norms[14] on the "[social] responsibilities of Transnational Corporations and other business enterprises with respect to human rights". The UK delegation to the Commission led a cross-regional campaign which culminated in a Decision by which the Commission prevented the Sub-Commission from finalising a draft Text on "The Human Rights Principles and Responsibilities for Transnational Corporations and Other Business Enterprises[15]". The Commission stressed: "that Document E/CN.4/Sub.2/2003/12/Rev.2 has not been requested by the Commission and, as a draft proposal, has no legal standing, and that the Sub-Commission should not perform any monitoring function". In this regard it might be argued that there were other precedents such as the draft International Declaration on Indigenous Peoples; 2. At its 58th session, in August 2006, the Sub-Commission adopted a presidential Statement concerning the situation of human rights in Lebanon: "Bound by its mandate to promote and protect respect for human rights, the Sub-Commission: Expresses its deep grief and outrage at the massive violations of human rights in Lebanon.[16]"

[11] Op. cit in supra note 5 (Zaru, p.103).
[12] See Chapter I- Chapter II.
[13] Op. cit in supra note 5 (Ramcharan, p.37)
[14] See UN Doc. E/CN.4/Sub.2/2003/12/Rev.2.
[15] See Commission's Decision 2004/116.
[16] See Sub-Commission Report under UN Doc. A/HRC/Sub.1/58/36, p.113.

Within the Reform of the UN HR Machinery (2005-2006), the Sub-Commission stressed the need for maintaining a collegial independent expert body which might continue to work in the field of standard-setting of both primary and secondary sources, namely draft Conventions and texts of soft law (See UN Doc. E/CN.4/Sub.2/2005/L.11/Add.2). By Decision 2006/112, the Sub-Commission also stressed the importance of retaining the inter-sessional working groups on indigenous people, minorities, contemporary forms of slavery, and the Social Forum (the latter is not technically a working group)[17].

In response to the above, the Council transferred all these bodies under its direct direction.[18]

Prof. E. Decaux, one of the most experienced experts of the Sub-Commission, stressed that the Advisory Committee should become a "*carrefour, à la junction des organs conventionels and des procedures speciales*[19]". At present this expectation is far from being met.

The tension between UN Member States and Sub-Commission experts persisted throughout the institution-building process (June 2006 through June 2007). During informal negotiations[20], States' delegations put forward differing proposals. At the Lausanne Seminar (May 2006) Bangladesh proposed the maintenance of the Sub-Commission, though with a narrow mandate. Mexico, the Asian Group, and the African Group emphasized the need to improve the relations between the Council and the Sub-Commission. Beside from sporadic statements aimed at abolishing the Sub-Commission, most delegations emphasized the necessity to provide the Council with a think-tank which, "in light of Preambular Para.7 of GA Res. 60/251" could "work towards making the Council more representative of major civilizations, cultures, religions[21]". Some delegations argued that the work of the Sub-Commission should be streamlined, rationalised and focused on standard-setting exercises[22]. Over the months, the majority of Member States emphasized the need for an expert advisory body,

[17] Hampson F.J., An Overview of the Reform of the UN Human Rights Machinery, in Human Rights Law Review, Oxford University Press, 2007, p.24.
[18] In September 2006, it decided the establishment of new mechanisms, with an elevated status, as subsidiary bodies of the Council to continue the important work of the various Working Groups of the Sub-Commission: A new Special Rapporteur on contemporary forms of slavery (by Council Resolution 6/14); A new Forum on Minority Issues (by Council Resolution 6/15); A new Expert Mechanism on the Rights of Indigenous Peoples (by Council Resolution 6/36); and A revitalized Social Forum (by Council Resolution 6/13)
[19] See UN Doc. A/HRC/Sub.1/58/36
[20] File with the Author.
[21] Indonesia Representative.
[22] Mexico, Asian and African Group.

supporting the work of the Council[23] without being under-exploited. More specifically, there were three different visions among States' delegations:

i. States in favour of a "system" similar to the Sub-Commission;
ii. States in favour of a mere roster of experts;
iii. States proposing a new ad hoc system whereby experts would initiate their studies upon request by the Council. In particular many States stressed that, prior to any politically conflicting exercise, the Advisory Committee should [always] get a specific mandate from the Council[24].

The latter option prevailed and was reflected in the IB Package (See the Annex to Council's Resolution 5/1, para.65)[25]. In June 2007, it was decided that the Human Rights Council Advisory Committee, composed of 18 experts, will "function as a think-tank to the Council and work at its direction[26]".

3. The key-features of the Advisory Committee: Composition, Mandate, Modalities, Working Groups, Sessions

UN Member States agreed upon the reduction in the size of this Expert advice body, from twenty-six to eighteen experts (See the above-mentioned para.65). Accordingly, the Council determined the new distribution of seats. Para.73 of the Annex to Council's Resolution 5/1 indicates, as follows:

i. Five seats for the African and Asian Groups, each;
ii. Three seats for the GRULAC and WEOG, each;
iii. and the remaining two seats for the Eastern Group.

[23] The African Group, the EU, Bangladesh, Korea, Switzerland, Thailand, and Tunisia, among others (on October 3, 2006).
[24] OIC Paper on the Review of Mandates, dated September 6, 2006 (file with the Author).
[25] See International Service for Human Rights (2007) N.65, Human Rights Monitor, The Council Institution-building work, the end of a long process, p.21.
[26] Pakistan, on behalf of the OIC "It should be a think-tank of independent experts, subsidiary to the Council. Their work should be normative but not legislative, purely thematic and not geographic" (file with the Author).

By the IB Package, the Council also clarified the selection and appointment procedure to be developed along the lines of the selection procedure of SPMHs.

In particular, the Council elects the experts to the Advisory Committee (See para.70), and States can only nominate candidates from their respective regional groups.

However with the aim of ensuring "that the best possible expertise is made available to the Council", it was decided that (See para.66 of Council's Resolution 5/1): "All Member States of the United Nations may propose or endorse candidates from their own region" and that, in selecting their candidates, States should "consult their National Human Rights Institutions and civil society organizations". It was also decided that the election would be held, by a secret ballot, by Member States of the Council. Again a State-driven process, within which "other relevant stakeholders", namely NHRIs and NGOs are involved, to a reduced extent.

With a view to reforming (and not merely reviewing) the Sub-Commission, many other provisions contained in the IB Package (of June 2007) set strict criteria. In line with the Code of Conduct for SPMH (Council Resolution 5/2), the Council has indicated the general technical and objective requirements for the candidates. Among the criteria, the Council requests (para.67): (*a*) Recognized competence and experience in the field of human rights; (*b*) High moral standing; (*c*) Independence and impartiality. It also mentions the traditional UN principle by which elected experts serve on their personal capacity[27]. By Council's Decision 6/102 (September 2007), the Council has determined the specific objective technical criteria to be matched by candidates applying for either Special Procedures Mandates or for the Advisory Committee (Like thematic Special Procedures, the members of the Advisory Committee serve for a period of three years, to be renewable only once).

As for the mandate, it was decided that the Advisory Committee is to provide expertise to the Council: "in the manner and form requested by the Council, focusing mainly on studies and research-based advice". Specifically this expertise "shall be rendered only upon the request by the latter [the Council], in compliance with its resolutions and under its guidance". "(Para.76) [..] the scope of its advice should be limited to thematic issues pertaining to the mandate of the Council, namely promotion and protection of all human rights". The rationale is clear. States aim at distancing as much as possible the new Expert Advice Mechanism from the past Sub-Commission,

[27] "elected members of the Committee will act in their personal capacity."

while ensuring their strictest control over an area which, by definition, should be dealt with by independent experts.

How to ensure the development of human rights-related issues, without mentioning/dealing with any geographic case? How to ensure independence and effectiveness if the Advisory Committee's mandate can be activated only upon initiative of Member States? More generally, how to match the idea of a think-tank under "the [strict] direction" of 47 States?

During the IB negotiations, there was not a specific focus on the role and concept of the think-tank. In this regard, it might be useful to recall J. Bradbury who indicates in the "Concise Oxford Dictionary of Politics **(**3rd Ed. in Press, 2009)", with regard to policy research institutions, that there are two kinds of think-tanks:

i. "Organizations, which seek to assist in the strategic coordination of government policies, establish relative priorities, offer new policy choices, and ensure that the implications of policy options are fully considered[28];
ii. Organizations of an explicitly partisan interest that seek to offer policy advice to chosen recipients[29]". In both cases think-tanks should maintain some flexibility

By contrast, despite the initial definition contained in para.65 (whereby the Advisory Committee is intended as a think-tank), para.77 of the Annex to Council Resolution 5/1 sets forth: "The Advisory Committee may [only] propose, within the scope of the work set out by the Council, for the latter's consideration and approval" procedural "suggestions as well as further research proposals within the scope of the work set out by the Council". As for the latter, it refers to "research proposals" relating to the continuation of specific studies, as initially requested by the Council. Para. 77 also envisages that the Committee is authorized to address mere recommendations to the Council. Therefore, the Committee is not enabled to adopt either decisions or

[28] They originated in America in the 1960s, and have been copied in the United Kingdom in such institutions as the Policy Studies Institute and the Central Policy Review Staff (CPRS), the government think-tank that existed between 1971 and 1983. The Constitution Unit, established in 1995, provided a major resource for considering the large programme of constitutional reform carried out by the Labour Government after 1997).
[29] They also originated in the United States, with, for example, the Urban Institute or the Brookings Institute for Democrats, and the Heritage Foundation and the American Enterprise Institute for Republicans. UK examples include the Centre for Policy Studies (Conservative-supporting) and the Institute of Public Policy Research (Labour-supporting).

resolutions, nor it can address, unlike its predecessor, the GA through the Council (the Sub-Commission could address the ECOSOC through the Council).[30]

In this regard, some scholars[31] recall that, since the second session, the then Sub-Commission was used to issue Resolutions, which showed its "impressive ability to assess and study human rights issues[32]".

As discussed, the narrow mandate of the Advisory Committee is the result of the last years of tension, when the Sub-Commission claimed more independence from the Commission[33]. Accordingly, in terms of working modalities, the Advisory Committee can only set up "drafting groups," to be recommended to the Council for endorsement (at present, there are: the drafting group on the international declaration on human rights and training; the drafting group on the right of the peoples to peace, and the drafting group on international cooperation in the field of human rights) and its working groups were transferred, in September 2007, under the direct control of the Council,[34] as follows:

i. At the initiative of Brazil and Bolivia, the Council decided to establish a new mechanism providing thematic expertise on the human rights of the indigenous peoples, in the manner and form requested by the Council itself (UN Doc. A/HRC/6/L.42). On a positive note, this "new mechanism", consisting of six members, shall include three indigenous peoples' representatives (The expert mechanism meets for a five-day session, a year and is open to NGOs with or without ECOSOC accreditation);

ii. At the initiative of Austria, the Council decided to establish a Forum on Minority Issues replacing the past Working Group of the Sub-Commission on minorities (The Council decided that the Forum shall provide a platform for promoting dialogue and cooperation on issues

[30] Op. cit, in supra note 17, p.21-25.

[31] Op. cit in supra note 5 (Zaru); see also Boyle, K., The United Nations Human Rights Council: Origins, Antecedents and Prospects, in New Institutions for Human Rights Protection, Oxford, Oxford University Press, Collected Courses of the Academy of European Law, XVIII/2, 2009, p.12 et ff.

[32] Op.cit in supra note 25.

[33] At the first session of this new body, the deputy High Commissioner recalled the key elements of the Advisory Committee, as set in Annex I to Council resolutions 5/1: "in the Annex to Council resolution 5/1, which provides the general architecture and guiding framework for your work…..the Advisory Committee may propose, for the Council's consideration and approval, suggestions for further enhancing the Council's procedural efficiency, as well as further research proposals, within the scope of the work set out by the Council". If one reads carefully the above statement, which was delivered on August 4, 2008, this clearly infers that the Advisory Committee could even deal with geographic situations by tackling them from a thematic perspective, as many special procedures are currently doing. Nevertheless the limit to adopt resolutions or decisions clearly empties the work of the Committee.

[34] Algeria, on behalf of the African Group, stated that the Sub-Commission's WGs on slavery, indigenous populations, and minorities should be part of the new expert body and should meet every year for five days each.

pertaining to persons belonging to national or ethnic, religious and linguistic minorities, which shall provide thematic contribution and expertise to the work of the independent expert on minority issues. The Forum will meet for a two-days meeting and guided by the above independent expert);

iii. At the initiative of Cuba, the Council transferred, under its responsibility the Social Forum (which continues to be the place devoted to an open dialogue between relevant stakeholders, including grassroots NGOs, on poverty eradication and globalisation-related issues);

iv. At the initiative of the UK, the Council has established a Special Rapporteur on Contemporary Forms of Slavery replacing the past Sub-Commission Working Group[35].

As discussed, one of the domino-effects of the above Council's position vis-à-vis the Advisory Committee refers to the participation of NGOs. Para.82 of the Annex to Council's Resolution 5/1 envisages that "in the performance of its mandate, the Advisory Committee is urged to establish interaction with States, national human rights institutions, non-governmental organizations and other civil society entities in accordance with the modalities of the Council[36]". Considering that the then Sub-Commission was used to get input from, and work with, NGOs[37] and NHRIs, human rights practitioners[38] negatively comment on the above provision by arguing that: "this dynamics reflects the attacks against human rights expertise in any aspect of the Council's work".

As for the working modalities, the Council decided a reduction of the duration of the Advisory Committee's sessions that can convene up to two sessions for a maximum of 10 working days, per year (para.79 of the Annex to Council's Resolution 5/1). Additional sessions may be scheduled though, "on an ad hoc basis, with the prior approval by the Council".

[35] See ECOSOC Res. 1982/34, ECOSOC Res. 1996/31, Sub-Commission Res.11/74, and Sub-Commission Res. 2001/24, respectively.
[36] (para.83) Member States and observers, including States that are not members of the Council, the specialized agencies, other intergovernmental organizations and national human rights institutions, as well as non-governmental organizations shall be entitled to participate in the work of the Advisory Committee based on arrangements, including Economic and Social Council resolution 1996/31 and practices observed by the Commission on Human Rights and the Council, while ensuring the most effective contribution of these entities.
[37] See for instance the work on the Responsibilities of Transnational Corporations and Other business enterprises with regard to human rights (UN Doc. E/CN.4/Sub.2/2003/116).
[38] Op.cit in supra note 25.

As for "the periodicity" of the Advisory Committee, the Council decided to fragment the work of the Committee, by envisaging that it shall hold its annual session in two rounds, between August and January. This is a new approach to the work of the Committee which differs from the past. Initially the Sub-Commission was used to meet for a four-week session, per year which was later reduced to three weeks. The choice to further reduce the working sessions besides splitting it significantly hampers any effective results.

Considering the current Council's Review (See Op.1 and Op.16 of GA Resolution 60/251), it is not possible to draw any final conclusions. However it is self-evident that the Advisory Committee does not reflect the nature of the past Sub-Commission which was indeed "the think-tank[39]" of the Commission and, to some extent, of the entire UN HR machinery.

4.1."A complaint procedure"

By Resolution 60/251, the General Assembly decided that the Council: "shall assume, review and, where necessary improve and rationalize" relevant Commission's mechanisms, in order to maintain, among others "[…] a complaint procedure (Operative paragraph 6)".

Despite the very political nature of this procedure, scholars stress that the Sub-Commission did play a prominent protection role within the framework of the 1503 confidential procedure: a unique remedial measure in the event of gross violations of human rights, mainly based on allegations "communicated" by NGOs .[40]

As discussed, the then Sub-Commission could consider and process "communications" concerning cases of gross violations of human rights, by establishing an immediate contact with the government concerned and by inviting the relating competent Authorities to take measures, as appropriate, before bringing the "situation" to the Commission's attention (See Op.1and Op5 of ECOSOC Resolution 1503 (XLVIII) of May 1970).

[39] See Ramcharan, B. G., The Concept and Present Status of the International Protection of Human Rights: forty years after the UDHR. Dordrecht; M. Nijhoff Publishers, 1989 p.520; see also the speech by the Acting High Commissioner, B. Ramcharan, on July 28, 2003, available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=404&LangID=E.
[40] See Weissbrodt D., de La Vega, C., An Introduction to Human Rights Law, University of Pennsylvania Press, 2007, p.253 et ff..

4.2. The origin of the complaint procedure

By Resolution 1503 (XLVIII) of 27 May 1970, the ECOSOC decided that the Sub-Commission on Prevention of Discrimination and Protection of Minorities should devise "appropriate procedures for dealing with the question of admissibility of communications (Op.2)". Accordingly the then Sub-Commission determined the sources and the criteria for the admissibility of communications.[41]

By the above ECOSOC Resolution, the Sub-Commission was intended to work on the confidential procedure through its Working Group on Communications (See Op.1 of ECOSOC Res. 1503) and through its Plenary (See Op.5 of ECOSOC Res. 1503). As discussed, the Sub-Commission was in charge of determining whether a communication appeared to reveal "a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms". In 1990, ECOSOC institutionalised the practice developed, on an ad hoc basis, within the Commission since 1974. It decided that the Commission would be assisted in this endeavour by a Working Group on Situations, "consisting of not more than five of its members" (See op.1 of ECOSOC Resolution 1990/41 of May 1990). Until the year 2000, the Plenary of Sub-Commission decided, though in private sessions, if the case should be referred to the Commission as a "situation, appearing to reveal a consistent pattern of gross and reliably attested violations of human rights requiring consideration by the Commission (Op.5 of ECOSOC Res. 1503)".

[41] See Sub-Commission Resolution 1 (XXIV) of 1970 in U.N. DOC. E/CN.4/1070 at 50-51 (1971), In particular, it was determined as follows: "[..]the following provisional procedures for dealing with the question of admissibility of communications referred to above: (1) *Standards and criteria:* (a) The object of the communication must not be inconsistent with the relevant principles of the Charter, of the Universal Declaration of Human Rights and of the other applicable instruments in the field of human rights. (b) Communications shall be admissible only if, after consideration thereof, together with the replies if any of the Governments concerned, there are reasonable grounds to believe that they may reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms, including policies of racial discrimination and segregation and of *apartheid* in any country, including colonial and other dependent countries and peoples.(2) *Source of communications* (a) Admissible communications may originate from a person or group of persons, who, it can be reasonably presumed, are victims of the violations referred to in subparagraph (1) (b) above, any person or group of persons who have direct and reliable knowledge of those violations, or non-governmental organizations acting in good faith in accordance with recognized principles of human rights, not resorting to politically motivated stands contrary to the provisions of the Charter of the United Nations and having direct and reliable knowledge of such violations. (b) Anonymous communications shall be inadmissible; subject to the requirements of subparagraph (2) (b) of resolution 728 F (XXVIII) of the Economic and Social Council, the author of a communication, whether an individual, a group of individuals or an organization, must be clearly identified. (c) Communications shall not be inadmissible solely because the knowledge of the individual authors is second-hand, provided that they are accompanied by clear evidence. (3) *Contents of communications and nature of allegation*s (a) The communication must contain a description of the facts and must indicate the purpose of the petition and the rights that have been violated. (b) Communications shall be inadmissible if their language is essentially abusive and in particular if they contain insulting reference to the State against which the complaint is directed. Such communications may be considered if they meet the other criteria for admissibility after deletion of the abusive language. (c) A communication shall be inadmissible if it has manifestly political motivations and its subject is contrary to the provisions of the Charter of the United Nations. (d) A communication shall be inadmissible if it appears that it is based exclusively on report disseminated by mass media. (4) *Existence of other remedies* (a) Communications shall be inadmissible if their admission would prejudice the functions of the specialized agencies of the United Nations system. (b) Communications shall be inadmissible if domestic remedies have not been exhausted, unless it appears that such remedies would be ineffective or unreasonably prolonged. Any failure to exhaust remedies should be satisfactorily established. (c) Communications relating to cases which have been settled by the State concerned in accordance with the principles set forth in the Universal Declaration of Human Rights and other applicable documents in the field of human right will not be considered. (5) *Timeliness.* A communication shall be inadmissible if it is not submitted to the United Nations within a reasonable time after the exhaustion of the domestic remedies as provided above. For a comprehensive overview, please refer also to paragraphs 7.1. in Chapter I and 1. in Chapter II, respectively.

ECOSOC Resolution 2000/3 amended the relevant procedure by eliminating the stage before the Plenary of the Sub-Commission (See operative paragraph 10): "The Working Group on Communications [..] shall henceforth meet annually for two weeks [..] to examine the communications received [..], with a view to bringing to the attention of the Working Group on Situations [of the then Commission] any particular situations which appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms […][42]". ECOSOC Res. 2000/3 concluded by reiterating that: "The procedure as amended may continue to be referred to as the 1503 procedure (16 June 2000)".

Indeed in the year 2000, the 1503 confidential procedure was reviewed along the lines of the Selebi Report (UN Doc. E/CN.4/2000/112). Aside from the above amendments, the ECOSOC reiterated that the procedure would continue, under terms defined in 1970.

In comparing the ECOSOC Resolution 2000/3 with GA Resolution 60/251, it is self-evident that by operative paragraph 6 of the latter, UN Member States have reshaped, and not merely reviewed, the relevant procedure so as to refer to it as: "a complaint procedure". As discussed, GA Resolution 60/251 does not mention either ECOSOC Resolution 1235 or ECOSOC Resolution 1503 as a clear indication to cut with the past.

4.3. The ad hoc segment of the relevant institution-building Working Group

The Council decided, at its first session (June 2006), to extend, for one year, the "1503 procedure", in order to avoid any protection gap[43]. The Council also decided[44], on 30 June 2006, to establish a Working Group on the implementation of operative paragraph 6 of General Assembly Resolution 60/251 (Council's Decision 1/104), to formulate concrete recommendations on the issue of "reviewing and, when necessary, improving and rationalizing" all mandates, mechanisms, functions and responsibilities of the former Commission on Human Rights, including the 1503 procedure.

[42] By ECOSOC Res. 2000/3, it also decided to preserve the confidentiality of this procedure: "all actions envisaged in the implementation of the present resolution by the Working Group on Communications, the Working Group on Situations and the Commission on Human Rights shall remain confidential until such time as the Commission may decide to make recommendations to the Economic and Social Council."
[43] See UN Doc. A/HRC/DEC/1/102.
[44] See Chapter I.

A segment of said Working Group, under the chairmanship of the Permanent Representative of Switzerland, was mandated to negotiate the Terms of Reference of "a complaint procedure," whose relevance, in terms of protection, can be inferred from the relevant data: about 27,000 complaints are processed, per year; and a total of 84 countries, such as Bolivia, Iran, Uzbekistan, Turkey, were examined by the then Commission.

At the negotiations level, a consensus emerged, in November 2006, in favour of retaining Economic and Social Council Resolution 1503 (XLVIII), as "a basis of work while improving it where necessary"[45].

During the initial rounds of negotiations it was stressed the importance to ensure that the "complaint procedure" be impartial, objective, efficient, victim-oriented and conducted in a timely manner (as requested in particular by the EU and Mexico).

Throughout the relevant IB negotiations, it was also stressed (Ecuador, Argentina, Brazil and Canada on that specific issue) the importance of the 1503 procedure among the protection tools, in particular of the confidentiality as a means to build confidence and thus to help States to cooperate. In this regard, various States, including Bangladesh, Malaysia, and the Philippines, requested the maintenance of the confidentiality (file with the Author).

As for the composition of the two relevant Working Groups dealing with relevant "communications", by assuming that they would maintain their original size, a vast majority of delegations requested that the Working Group on Communications should be composed of qualified and independent experts and that the Working Group on Situations would be made of States' representatives.

As for the admissibility criteria[46], this was a contentious issue. After a long debate, the past criteria were mainly maintained. However, different approaches to this issue emerged (para.87 of the Annex to Council's Resolution 5/1). In particular it was stressed that communications:

1.1 Have to be not inconsistent with the UN Charter. In this regard, it was argued in favour of this reference as long as the procedure would consider

[45] From the "Seminar on the UN HRC", organised by the World Federation of UN Associations (WFUNA) and the OHCHR on July 2006.

[46] See Resolution 1(XXIV) of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, entitled "Question of the violation of human rights and fundamental freedoms, including policies of racial discrimination and segregation and of apartheid in all countries, with particular reference to colonial and other dependent countries and territories" of 13 August 1971. See also Sullivan, D., Overview of the rule requiring the exhaustion of domestic remedies, under the optional protocol to CEDAW, IWRAW Asia Pacific, p.3-8, 2008. See further
Crawford, J., The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries, Oxford University Press, Oxford, 2002, p.264-265.

States' responsibility. By contrast, some other delegations emphasized that the Charter only applies to States and not to individuals submitting the complaints;

1.2. Have to be not inconsistent with the Universal Declaration of Human Rights and "other applicable instruments in the field of human rights". By this clause, it was argued, the procedure would allow the consideration for violations relating to those human rights being not mentioned in the Universal Declaration, such as migrants, persons with disabilities, the right to development, and so forth;

2. Have to be not manifestly politically motivated;

3. Have to refer to a case not being dealt with by a Special Procedure or a Treaty Body.

4. Domestic remedies have to be exhausted: "unless it appears that such remedies would be ineffective or unreasonably prolonged [Para.87, lett.g]." This final clause was indeed the most positive innovation, since ECOSOC Resolution 1503 generically mentions the rule of the prior exhaustion of domestic remedies, by requiring that "[Op.6, lett.b, (i) of ECOSOC Resolution 1503] All available means at the national level have been resorted to and exhausted." In this regard Council's Resolution 5/1 has been introduced a specific safeguard. During the negotiations, it was argued that a remedy must be available *de jure* and *de facto.* In Commenting the International Law Commission's Articles on State Responsibility for Internationally wrongful acts (2002), Crawford stresses: "The responsibility of a State may not be invoked if: [..] The claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted [..] The mere existence on paper of remedies under the internal law of a State does not impose a requirement to make use of those remedies in every case. In particular there is no requirement to use a remedy which offers no possibility of redressing the situation, for instance, where it is clear from the outset that the law which the local court would apply, can lead only to the rejection of any appeal. Beyond this, Article 44 (b) does not attempt to spell out comprehensively the content and the scope of the exhaustion of local remedies rule, leaving this to the applicable rule of international law."

As for "the relevant stakeholders", various views were expressed on the inclusion of and the role to be played by National Human Rights Institutions (acronym, NHRIs). Some delegations, being contrary to a specific role for NHRIs, argued that only legally-recognized remedies should be included and that NHRIs would not qualify in this regard. It was also underlined the fact that NHRIs do not exist in all countries and not all of them work effectively.[47] However, most delegations[48] recalled Operative Para. 11 of GA Resolution 60/251 which should guide any decisions in this regard.[49] In the end, unlike other provisions of Section IV (paras.85-109) of the IB Package, para.88 indicates that NHRIs, established and operating under the Paris Principles, "may serve as effective means of addressing individual human rights violations. In this case Member States have acknowledged a specific ability for NHRIs which has not been extended to NGOs.

Several months of informal and formal negotiations (See Documents A/HRC/3/CRP.3, A/HRC/4/CRP.6 and A/HRC/5/CRP.6) led to a final proposal (See UN Doc. A/HRC/5/15), which was submitted by the Facilitator before the Plenary of the Council, in June 2007.

In light of this proposal, Section IV of the Annex to Council Resolution 5/1 (paras.85-109) envisages: "A complaint 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".

Prima facie, the "complaint procedure" reflects the 1503 confidential procedure of the Commission. Like the 1503 procedure (See Op.8 of ECOSOC Resolution 1503 (XLVIII) of May 1970), para.100 of the Annex to Council's Resolution 5/1 envisages the confidentiality. It also stipulates the need to ensure a victim-oriented mechanism (To this end many delegations, mainly from the EU, requested a specific time-limit which has been set to 24 months - see below).

4.4. The proceeding

[47] See A/HRC/4/CRP.6 of 13 March 2007.
[48] See A/HRC/3/CRP.1 of 30 November 2006.
[49] "The Assembly, *Decides* that the participation of and consultation with observers, including (*omissis*) National Human Rights Institutions shall be based on arrangements, including ECOSOC resolution 1996/31 of 25 July 1996 and practices observed by the Commission on Human Rights, while ensuring the most effective contribution of these entities."

On a preliminary note, it might be argued that the IB Package contains few contradictions on which to reflect: 1. The Working Group on Communications has maintained its previous mandate, though with some variations (See below). How can this Group match its "geographic" mandate with the limitation upon the Advisory Committee that cannot deal with geographic situations (Paras.85-109, of A/HRC/Res/5/1)? This remains a pending issue. 2. With regard to the need to ensure a timely and more efficient mechanism, "the communication" - when it is not screened out - goes through a very complex procedure which results in a time-consuming exercise. Para. 105 envisages that "the period of time between the transmission of the complaint to the State concerned and consideration by the Council shall not, in principle, exceed 24 months". How to guarantee an effective form of protection for the individuals or groups of individuals concerned? In this regard it might be inferred that this tool results in an additional political pressure tool rather than a protection tool. Scholars[50] argue that the relevant IB Working Group missed the opportunity to "improve" this procedure, as envisaged by operative paragraph 6 of GA Res. 60/251. In particular it has not been subject to any corrections inspired by the adversarial model. Considering the context within which the complaint procedure functions, the IB Package envisages that the identity of the complainant is not to be kept confidential *de plano* but only if it is expressly requested (para.108). How to effectively protect the sources, given the gross violations framework? No concrete corrections has been made, in particular to reduce the unbalance between the complainant and the State concerned. The latter may even be questioned by the WG on Communications (para.94), while the complainant (para. 107) is only informed when his/her communication is registered. The principle of "The equality of arms" has not been even considered as an option for this procedure. Para.106 only envisages that "The complaint procedure shall ensure that both the author of a communication and the State concerned are informed of the proceedings".

On a more specific note, para.86 indicates ECOSOC Resolution 1503 (XLVIII) of 27 May 1970 (as revised by Resolution 2000/3 of 19 June 2000) "as a working basis". Throughout Section IV of Council's Resolution 5/1 there is no other reference to the above ECOSOC Resolution.

Procedurally, a communication shall be deemed admissible, provided that it matches all the following criteria (para.87): "(*a*)It is not manifestly politically

[50] In this regard some scholars emphasize the limited instrumental role played by the complainant in submitting the communication/complaint. See Marchesi A., Diritti Umani e Nazioni Unite, diritti, obblighi e garanzie, Ed. Franco Angeli, 2007, p. 82-83; see also Op. cit. in supra note 5.

motivated and its object is consistent with the Charter of the United Nations, the Universal Declaration of Human Rights and other applicable instruments in the field of human rights law; (*b*) It gives a factual description of the alleged violations, including the rights which are alleged to be violated; (*c*) Its language is not abusive. However, such a communication may be considered if it meets the other criteria for admissibility after deletion of the abusive language; (*d*) It is submitted by a person or a group of persons claiming to be the victims of violations of human rights and fundamental freedoms, or by any person or group of persons, including non-governmental organizations, acting in good faith in accordance with the principles of human rights, not resorting to politically motivated stands contrary to the provisions of the Charter of the United Nations and claiming to have direct and reliable knowledge of the violations concerned. Nonetheless, reliably attested communications shall not be inadmissible solely because the knowledge of the individual authors is second-hand, provided that they are accompanied by clear evidence; (*e*) It is not exclusively based on reports disseminated by mass media; (*f*) It does not refer to a case that appears to reveal a consistent pattern of gross and reliably attested violations of human rights already being dealt with by a special procedure, a treaty body or other United Nations or similar regional complaints procedure in the field of human rights; (*g*) Domestic remedies have been exhausted, unless it appears that such remedies would be ineffective or unreasonably prolonged".

Similarly to the previous pattern, two Working Groups (paras.89-90-94-95) continue to be mandated "to examine the communications", to be brought to the attention of the Council if they reveal "a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms"[51]. Both Working Groups shall, to the greatest possible extent, work on the basis of consensus. In the absence of consensus, decisions shall be taken by a simple majority of votes.

In particular, the Chairperson of the Working Group on Communications is requested, together with the secretariat, to filter the communications by undertaking the initial screening before transmitting those communications deemed admissible to the State concerned. Manifestly ill-founded and anonymous communications shall be screened out by the Chairperson and therefore will not be transmitted to the State concerned.

[51] The Working Group on Communications consists of five members, one from each Regional Group, as appointed by the Advisory Committee. The Working Group on Situations is composed of five representatives of Member States of the Council: Each Regional Group shall appoint a representative of a member State of the Council, with due consideration to gender balance, to serve on the Working Group on Situations. Members shall be appointed for one year. Their mandate may be renewed once, if the State concerned is a member of the Council).

As a matter of transparency and accountability, the Chairperson of the Working Group on Communications shall provide all its members with a list of all communications rejected. This list should indicate the grounds for each decisions by which a communication has been rejected (All the other communications, which have not been screened out, shall be transmitted to the State concerned, so as to obtain the views of the latter on the allegations of violations).

The members of the Working Group on Communications then decide on the admissibility of a communication and assess the merits of the allegations of violations, including whether the communication alone or in combination with other communications appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms.

"The Working Group on Communications shall provide the Working Group on Situations with a file containing all the admissible communications as well as the recommendations thereon. When the Working Group on Communications requires further consideration or additional information, it may keep a case under review until its next session and request such information from the State concerned. The Working Group on Communications may decide to dismiss a case".

The Working Group on Situations is requested (para.98), on the basis of the information and recommendations provided by the Working Group on Communications, "to present the Council a report on consistent patterns of gross and reliably attested violations of human rights and fundamental freedoms and to make recommendations to the Council on the course of action to take, normally in the form of a draft resolution or decision with respect to the situations referred to it. When the Working Group on Situations requires further consideration or additional information, its members may keep a case under review until its next session. The Working Group on Situations may also decide to dismiss a case.

All decisions of the Working Group on Situations shall be duly justified and indicate why the consideration of a situation has been discontinued or action recommended thereon.

Decisions to discontinue should be taken by consensus". However if consensus cannot be reached, it will be sufficient the simple majority of the votes.

By comparing the activities carried out by the above Working Groups, it emerges a disparity in terms of accountability. While the Working Group on

Communications and its Chair have to motivate their decisions,[52] it is questionable the exemption applied to the Working Group made of States' representatives. In particular para.94 envisages: "In a perspective of accountability and transparency, the Chairperson of the Working Group on Communications shall indicate the grounds and motivate the rejection of a communication". Accordingly para.95 envisages: that all decisions of the Working Group on Communications shall be "duly justified". On the contrary, para.99 mentions a collegial responsibility and requests the Working Group on Situations to duly justify and indicate why either the consideration of a situation has been discontinued or action has been recommended thereon.

In accordance with paras.103-104, the Working Group on Situations may recommend the Council to consider a "situation" in a public meeting, when the case under consideration shows manifest and unequivocal lack of cooperation . Theoretically the Council shall consider such recommendation "on a priority basis at its next session". However the above provisions contains too many requirements and thus raise by far the threshold for consideration by the Council in case of lack of cooperation.

Beside from the above worst case scenario, the Working Group on Situations proposes "measures" to be taken up by the Council. In this regard, para.109 of the IB Package enlists all the tools at disposal of the Council. Therefore, "one of the following options[53]" may be adopted at the end of the confidential procedure (para.109):

> "i. To discontinue considering the situation when further consideration or action is not warranted;
> ii. To keep the situation under review and to request the State concerned to provide further information within a reasonable amount of time[54];
> iii. To keep the situation under consideration and appoint an expert to monitor the situation and report back to the Council;
> iv. To refer the matter to the public procedure established under Economic Social Council resolution 1235 (XLII); and
> v. To recommend that OHCHR to provide technical and capacity-building Assistance to the country concerned".

[52] There was a cross-regional groups view expressed in favour of both working groups presenting clear justifications of every decision (see A/HRC/4/CRP.6.
[53] See the de Alba Package (A/HRC/RES/5/2).
[54] In the previous version, there was a vague reference to "wait for further information". There has been a clear improvement, but it would have been important to include a fixed time, more than "within a reasonable amount of time".

All the above options were clearly inspired by the principle contained in para.85: the procedure retains "*its confidential nature*, with a view to enhancing *cooperation* with the State concerned". In this perspective it should be stressed the positive reference to the assistance by the OHCHR as independent expertise that can really assist the country concerned.

However, of this final stage, it has been argued[55], what needs to be clarified and defined is the follow-up[56] and for instance the linkage between the complaint procedure and the Universal Periodic Review, provided the complementary nature of the latter with other relevant mechanisms, such as TB[57]. It has been argued that the above proceeding fails to consider that those findings deemed admissible, could be used by Council publicly either in line with OP.3 of GA Resolution 60/251 or in the context of the UPR[58]. In the perspective of an early warning mechanism, this would have been the best way to reach the goal of the promotion and protection of human rights[59].

The current practice seems to justify the above criticism. In the period June 2006–September 2007, the Council's workload referring to the complaint procedure (the former 1503 procedure) amounted to 10,000 communications; and in March 2007 the Council decided to discontinue the consideration on Uzbekistan and Iran. So far it has not proved to be effective so that various delegations have put forward the proposal to abolish it.

Considering the evolving nature of the system, despite the above arguments, there are positive notes to be stressed, such as: i. A specific role for the NHRIs under para.88 in which "National human rights institutions, established and operating under the Principles Relating to the Status of National Institutions (the Paris Principles), in particular in regard to quasi-judicial competence, may serve as effective means of addressing individual human rights violations"; ii. (save the previous specific arguments on the real need to ensure a timely victim-oriented mechanism) A specific time-bound limit for the entire process, which cannot exceed 24 months (para.105)[60]; iii. The assistance of the OHCHR through its TCP projects.

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[55] Op. cit in supra note 5.

[56] A follow-up to the process, if the State fails to comply with Council decisions, should include: referring to a special procedure, by establishing a fact-finding commission, by recommending to the General Assembly, or by suspension of the rights of membership in the Council (A/HRC/3/5).

[57] To recommend that the country be urgently reviewed through the UPR.

[58] See Kalin W. C., Jimenez, C., Kunzli, J., Baldegger, M., The Human Rights Council and Country Situations, Framework, Challenges and Models", Study on behalf of the Swiss Ministry of Foreign Affairs, on June 7, 2006, p.22 et ff.

[59] The complaint mechanism will have its primary objective of addressing consistent patterns of gross and reliably attested violations of HR and will act as an early warning mechanism (file with the Author).

[60] This was indeed a positive result if comparing it to the 1503 procedure, under which the examination of a relevant situation could take, up to four years.

Conclusion

With regard to the transition from the Sub-Commission to the Advisory Committee, scholars stress the political use of relevant procedures[61].

The Advisory Committee, composed of 18 experts, in replacement of the former Sub-Commission, is supposed to be "the think-tank (para.85 of the Annex to Council's Resolution 5/1)" of the Council and, to some extent, its "quasi-legislative" tool[62]. During the debate concerning the relevant reform, one of the Sub-Commission member, Prof. Decaux, stressed the need to ensure that policies, strategies and generally new issues should be primarily discussed by an independent expert body [the Sub-Commission] and then confirmed and legitimized by a political body [the Commission]". If this pattern is not followed, there will be "a real danger that the legislation" will be inadequately considered[63].

The Council has shaped a specific narrow mandate, under which the Council has to authorize each and every task, to the maximum extent possible. Without the endorsement by the Council, the Advisory Committee cannot even initiate studies.

The above choice, it has been argued[64], curtails the role of the Committee. The practice shows that, over the last three years (the first session of the Advisory Committee took place in August 2008), the Committee adopted only 23 recommendations (UN Doc. A/HRC/AC/3/L.8), mainly focused on: the protection of human rights of civilians in armed conflict (issue facilitated by Egypt on behalf of the African Group within the Council); non discrimination and the right to food (Resolution facilitated by Cuba within the Council); and the right of peoples to peace (Resolution facilitated by NAM and African Group within the Council). The above framework is contrary [65] to the expectations to create a Forum for dialogue on thematic issues regarding, theoretically, "all human rights".

As for "a complaint procedure", what will differentiate the Council's complaint mechanism from other human rights protection mechanisms, it was argued, is its ability to address violations of all human rights and fundamental freedoms in all parts of the

[61] See Alston, P. "Re-conceiving the UN human rights regime: Challenges confronting the new UN Human Rights Council. Melbourne Journal of International Law, 7, 2006, p. 185 et sequitur.
[62] See Salama, I., Institutional Re-engineering for Effective Human Rights Monitoring: Proposals for the Unfinished Business under the new Human Rights Council, in International Human Rights Monitoring Mechanisms, Essays in Honour of Jakob Th. Möller, 2nd Revised Edition, 2009, p188.
[63] See p.42 of UN Doc. E/CN.4/Sub.2/2005/L.11/Add.2.
[64] Saito Y. Sweeney G., 2009, An NGO Assessment of the New Mechanisms of the UN Human Rights Council, ***Human Rights*** Law Review, 9(2) Oxford University Press, Nottingham University, 2009, p.220.
[65] However, considering its "quasi-legislative" nature, it finalised, in May 2010, the first take of the Draft International Declaration on Human Rights Education and Training, as requested by Council's Resolution 13/15 of March 2010.

world, in particular its ability "to address consistent patterns[66] of gross and reliably attested violations of all human rights and all fundamental freedoms[67], occurring in any part of the world,[68]under any circumstances.[69].

The amendments to the previous procedure fail to acknowledge the role played by the Sub-Commission's experts. There would have been scope to recuperate the procedure in force up to the year 2000 (as also considered by the Sub-Commission in the course of its last session of August 2006). On the contrary, the current procedure reflects GA Resolution 60/251, in which no mention has been made either of ECOSOC Resolution 1503/1970 or of ECOSOC Resolution 1235/1967. The IB Package ultimately shows the lack of interest in one of the historical protection tools of the UN system, besides reducing the Council's ability to protect human rights, especially in the event of gross violations.

As noted, it is worrisome that, within the 2011 Council's Review Process, various States are proposing the abolition of both the Advisory Committee and the complaint procedure[70]. Should this option be pursued, it would affect the entire system. The Advisory Committee remains an important component of the relevant UN system of promotion and protection of human rights[71]. If this component is challenged or overestimated, it risks to affect the balance of the entire Machinery.

[66] In a Facilitator document (A/HRC/3/5), it was proposed to include within the objective and the scope of the complaint procedure, the word "emerging" to qualify the consistent patterns of violations of human rights. An early warning role of the complaint procedure was deemed by most as inconsistent with the current procedure and diverging specifically with the concept of "reliably attested" violations. It was stressed that this function would constitute a fundamental change of the existing complaint procedure and would go beyond its mandate. Injecting such new elements – it was said - into the procedure would have ultimately leaded to politicization. Theoretically speaking, an early warning role of the complaint procedure would have been important to achieve the goal of fostering its victim-orientation.

[67] The traditional reference to "fundamental freedoms" was added, following recommendations made by many delegations (A/HRC/3/5 as of December 1, 2006).

[68] The qualification "occurring in any part of the world" was included with a view to broaden the scope of the complaint procedure to actions of States outside their jurisdiction.

[69] It was thus considered necessary to keep high the threshold, i.e. gross human rights violations must reveal a consistent pattern (non-opportunity of referring to "serious human rights violations" as proposed during the negotiations (A/HRC/3/5).

[70] See Chapter VI.

[71] See the Introduction to the Thesis.

CHAPTER V

The role of Non-Governmental Organizations, National Human Rights Institutions, and the Office of the High Commissioner for Human Rights

"Every individual and every organ of the society [...] shall strive [..], to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance" from the Preamble to the UDHR (1948).

"Increasingly wide circle of actors", from the June 2004 Cardoso Report [1]

[1] See Un Docs. A/58/817 and A/58/817/Corr.1.
[2] See UN Doc. A/HRC/RES/5/1, para.15, lett.c ff.

Introduction

"The other relevant stakeholders"

One of the corollaries of the principle of State sovereignty is the principle of "non-interference in internal affairs of States[3]", alternatively defined, "principle of domestic jurisdiction (Article 2, para.7 of the UN Charter)[4]".

On one hand, when dealing with human rights situations or specific human rights issues, reluctant States continue to claim the non interference in internal affairs. As a way of example, in November 2007, the UN GA Third Committee resumed to address the issue of the "moratorium on the use of the death penalty", upon initiative of the EU, further to the proposal (and the conduct of both bilateral and multilateral negotiations) by Italy[5]. Prior to the adoption of the relating Resolution (UN Doc. A/C.3/62/L.29), the debate lasted over eight hours (something being unusual for that body). Countries such as Barbuda, Trinidad and Tobago, and Singapore, among others, invoked the principle of non interference in internal affairs, and voted against[6].

On the other hand, it might be noted that the rate of the ratifications of international human rights binding treaties is steadily increasing with the result that a significant number of States accept the monitoring by UN Treaty-Bodies.[7] There is also the trend, within the UPR, of recommending to the States under Review (SuR) to extend "standing invitations" to UN Special Procedures Mandate-Holders[8]. Within this framework Non-Governmental Organizations (acronym, NGOs) and National Human Rights Institutions (acronym, NHRIs), though to a different extent, are the primary sources of information for the work of both TB and SP through their own monitoring activity[9].

In parallel, UN Member States keep referring to the principle of "dialogue and cooperation (Pp.10 of UN Doc. A/HRC/RES/60/251[10]) in the relevant decision-making processes so that the requests for assistance by the OHCHR have steadily increased.[11]

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[3] See Conforti, B., Mauale di Diritto Internazionale, ESI, 2005, p.147 et ff, Napoli, 2002; see also Boyle, K., (ed.), New Institutions for Human Rights Protection, 2009, Oxford, Oxford University Press, Collected Courses of the Academy of European Law, XVIII/2, 2009, p.11- 47.

[4] Conforti, B., Manuale di Diritto Internazionale, ESI, 2005, p.194-197.

[5] The Italian initiative was the result of a campaign launched, at both the national and international levels, by an Italian NGO, called: "Hands off Cain (Nessuno Tocchi Caino)."

[6] as later adopted by the Plenary of the Assembly under UN Doc. A/RES/62/149, with 104 votes in favor, 54 against, 29 abstentions

[7] See Chapter III.

[8] See UN UPR Report on: Cuba (A/HRC/11/22 (para.79)); on Cote d'Ivoire (A/HRC/13/9 (para.79)); on Israel (A/HRC/10/76, para.54); on China (A/HRC/11/25, para.27); and on the Russian Federation (A/HRC/11/19, para.16).

[9] See Marchesi, A., Diritti Umani e Nazioni Unite, diritti, obblighi e garanzie, Ed. Franco Angeli, 2007,.

[10] "*Recognizing further* that the promotion and protection of human rights should be based on the principles of cooperation and genuine dialogue and aimed at strengthening the capacity of Member States to comply with their human rights obligations for the benefit of all human beings."

[11] Requests for assistance increasingly refer to the implementation of human rights commitments, such as the establishment or

According to some scholars[12], the current situation seems to indicate "a highly connected if not yet a single system" within which a specific protection and promotion role is played by "other relevant stakeholders[13]", namely NGOs and NHRIs.

Since the inception, the UN provided for and recognized forms of cooperation with civil society[14], in particular Non-Governmental Organizations, in accordance with Article 71 of the Charter of the United Nations[15].

At its second session, the ECOSOC established[16] a specific NGOs Committee (UN Doc. E/43/Rev.2) mandated mainly to review the applications for consultative status by interested NGOs (ECOSOC Resolution 16 (III)) besides envisaging "the desirability of establishing information groups or local human rights committees" within the UN countries in order to further the work of the Commission on Human Rights (ECOSOC Resolution 9 (II)).

By a UN classification[17], the civil society includes, among others, non-profit making organizations and "associations of citizens that entered into voluntarily to advance their interests, ideas and ideologies", the private sector, mass organizations (such as organizations of peasants, women or retired people), indigenous people's organizations, religious and spiritual organizations, academics, trade unions, professional associations, and social movements.[18]

With specific regard to NGOs, provided that there is not yet a common definition, they may be meant as all those organizations that are not funded by Governments and have been not created by inter-governmental decision.[19] "Elsewhere,

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the improvement of the legislation referring to NHRIs. See paras. 119-131 of GA Resolution 60/1 of 2005; see also OHCHR's Report and SMP, available at: http://www.ohchr.org/EN/PublicationsResources/Pages/AnnualReportAppeal.aspx; Op.cit in supra note 9 (p.5, 92-94).

[12] Op.cit supra in note 3 (Boyle); See also Ziccardi Capaldo, G. ,The pillars of Global Law, Ashgate, 2006, p.1-3

[13] See para.3,lett.m, para.15, lett.a, para.17, lett.c, para.18, lett.c, para.31, para.33, para.42, para.82,para.83, para.87, lett.d of the Annex to Council's Resolution 5/1; See also Chapter IV with regard to the contribution by NGOs to the work of the Advisory Committee.

[14] Civil society falls within the category of "Non State Actors (NSA)". The Cotonou Agreement (signed in Benin in June 2000 and entered into force in 2003) between the EU and the Africa, Caribbean and Pacific countries provides a useful indication. Article 6 of the Cotonou Agreement (entitled "definitions" and referring to "cooperation actors") lays down, as follows: "1. The actors of cooperation will include: (a) State (local, national and regional); (b) Non-State: Private sector; - Economic and social partners, including trade union organisations; - Civil Society in all its forms according to national characteristics. 2. Recognition by the parties of non-governmental actors shall depend on the extent to which they address the needs of the population, on their specific competencies and whether they are organised and managed democratically and transparently.

[15] The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned

[16] See ECOSOC Decision of June 21, 1946, in UN Doc. E/222

[17] See the Cardoso Report, in UN Doc. A/58/817

[18] See also Muller, A., F. Seidensticker, German Institute of Human Rights, Handbook on The Role of National Human Rights Institutions in the United Nations Treaty Body Process p. 33, also available at: http://www.nhri.net/default.asp?PID=47&DID=0.

[19] "The private sector comprises firms, business federations, employer associations and industry lobby groups. Philanthropic foundations stemming from industrial endowments could also fit here, although some see them as part of civil society. The media are another grey area. Commercial media organizations are undoubtedly private firms. But free speech is an essential foundation of a strong civil society, and some modern communication channels, such as weblogs and alternative news services available through the Internet, have characteristics of civil

NGOs have become shorthand for public-benefit NGOs — a type of civil society organization that is formally constituted to provide a benefit to the general public or the world at large through the provision of advocacy or services. They include organizations devoted to environment, development, human rights and peace (See UN Doc. A/58/817).[20]"

Some scholars note that NGOs are usually private, non-profit-making organizations with a certain degree of stability[21]. Other scholars refer to NGOs by defining "the third sector" vis-à-vis either the State-system and the International Organization-system[22]. According to Oberleitner, the ambiguity characterising the status of NGOs under international law connotes them. Charnovitz underlines that, despite various attempts to grant international legal personality to NGOs dating back to 1910, no progress has been made to this end, to date.[23] Other scholars[24] observe that the debate on the status of NGOs under international law is still ongoing.

With specific regard to human rights NGOs, scholars argue that international human rights NGOs differ for size, area of "concern", and composition[25]. From a functional standpoint, they can be divided into Development Cooperation NGOs, which aim at advancing economic and social rights, and human rights NGOs which focus on the protection of civil and political rights.[26] Prof. Alston argues that the search for defining human rights NGOs risks of "marginalizing" them.[27] In 2004 the Year-Book of International Organizations reported a total number of 7,306 international NGOs, of which it is not clear yet the number of human rights NGOs. The ultimate result is that, despite some rights[28], they can be classified as subjects of international law along the lines of individuals, and thus with very limited rights.[29]In particular scholars stress that the lack of a clear-cut distinction between human rights NGOs and other NGOs affects their status and degree of participation within the relevant UN machinery[30].

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society. Although the category includes small and medium-sized enterprises, some of these are supported by non-governmental organizations or are cooperatives and may also have characteristics closer to civil society (See UN Doc. A/58/817)".

[20] The present Thesis will focus on the role of NGOs vis-à-vis the Council. Therefore it will not contain a specific analysis of the difference between international and national NGOs nor of the different categories of NGOs.

[21] Op.cit. supra in note 9 (p.60).

[22] See Otto, D., NGOs in the UN System: The emerging role of international civil society, HR Q 18, 1996, p.126.

[23] See Oberleitner, G., Global Human Rights Institutions, between remedy and ritual, Polity Press Eds., 2008, p. 164-177; See also Charnovitz, S., NGOs and international law, in American Journal of International Law, 100 (2), 2006, p.348-372 (p.348-355)

[24] See Tomuschat, C., Human Rights: Between idealism and realism, Oxford University Press, 2008, p. 216-229 (218).

[25] Op.cit in supra note 9 (p.93).

[26] Ibidem (p. 31, p.93); see also Wouters J., and Rossi, I., Human Rights NGOs: Role, Structure and Legal Status, Louvain Institute for International Law, November 2001, p.1-15, available at: *www.law.kuleuven.be/iir/nl/onderzoek/wp/WP14e.pdf.*

[27] See Alston, P., Non State Actors and Human Rights, Eds. Alston, Oxford University Press, 2003, p.3-33.

[28] For instance with the consent of the individual concerned they can lodge a complaint to TB or they can send a communication within the framework of the Council's complaint procedure (See para.87 of Council's Resolution 5/1).

[29] Op.cit.in supra note 23 (Charnovitz).

[30] See Normand, R. and Zaidi, S., HR at the UN: The political history of universal justice, Indiana University Press,2008, p.107-177; See also Cassese, A., The General Assembly: Historical perspective 1945-1989, in Alston, P., ed., The United

Against this background, NGOs hold the merit to move initiatives dealing with emerging or present international needs[31]: from the economic, social and cultural rights-related area to the advancement of the indigenous peoples' issue, from the issue of human rights and transnational corporations to human rights to water and other environmental issues.[32] Given their protection mandate, NGOs have thus become more relevant in both the domestic and international dimensions.[33] In particular scholars[34] emphasize their contribution to the international monitoring system, by providing reliable information for the debates of the Council, for the complaint procedure and for the supervisory work of Treaty-monitoring Bodies.

Of relevance to the UN work are also the independent NHRIs. Unlike NGOs, scholars[35] place them within the State-institutional framework, since they have to be established by Constitution or national legislation. However their independence from the Government, which is one of the main "constitutive elements,[36]" indicates their hybrid nature so as to make them closer to civil society entities rather than to State-Institutions (in this regard the IB Package define both NGOs and NHRIs, under the same category "other relevant stakeholders").

After the fall of the Berlin Wall (1989), there has been a growing influence of NGOs and NHRIs[37]. In 2002, by his "Agenda for Further Change", the former Secretary-General stressed the need to open up the United Nations to a plurality of actors.[38]" To this end, he established an ad hoc Panel of Eminent Experts on "United Nations–Civil Society Relations, We the peoples: civil society, the United Nations and global governance,[39]" to take stock of the role of civil society in the early XXI century (UN Doc. A/58/817).

In this regard the creation of the Human Rights Council has impacted on both NGOs and NHRIs, though to a different extent. The aim of the following paragraphs is

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Nations and Human Rights: A critical appraisal, Oxford University Press, 1992, p.25-54.

[31] As a positive acknowledgement of their work, it may be recalled the increasing trend of elaborating Optional Protocols to relevant human rights binding treaties, enabling also NGOs to file complaints before Treaty Bodies (See OPICCPR, OPICESCR, OPCEDAW, OPCRPD, OPCAT and so forth).

[32] Op.cit. in supra note 30 (Normand Zaidi, p.127). See also United Nations, Office of the UNHCHR. Working with the Office. A Handbook for NGOs. (HR/PUB/06/10), Geneva, Switzerland, 2006.

[33] Van Boven, T, The role of NGOs in International HR standard-setting: Non-governmental participation a prerequisite of democracy, 20 Cal. Western Int'l L.J. 207, 1989, p- 214-15 (see also in Casterman et al , p. 53-69). In this regard Prof. Van Boven recalls the adoption by the GA of the International Declaration on Human Rights Defenders, on the Right and Responsibility of Individuals, Groups, and Organs Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms - GA Res. A/RES/53/144 – which has become the Charter of NGOs. See also op.cit.supra in note 9 (p.92)

[34] Ibidem (p.94).

[35] Gomez, M., Sri Lanka's New Human Rights Commission, Human Rights Quarterly,1998, p.281-302.

[36] Op.cit.in supra note 9 (p.57)

[37] so that citizens increasingly express their concerns through civil society mechanisms.

[38] See his 2002 Report on "The Strengthening of the United Nations: an agenda for further change (UN Doc. A/57/387)

[39] that had been appointed by the Secretary-General in 2003 and chaired by the former Brazilian President, Mr. F. H. Cardoso.

to assess to what extent and the change, if any, in the relation between State and other relevant stakeholders.[40]

1.1. The Non-Governmental Organizations (NGOs) within the relevant UN framework

Article 71 of the UN Charter sets forth: "The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence [..]". This Article does recognize a role for NGOs within the UN.[41] The practice confirms the implementation of the above Article, though to different extents, within: the ECOSOC; *de facto,* the Security Council; the General Assembly (especially with the establishment of the Human Rights Council); [42] and the Secretariat.

After the fall of the Berlin Wall, the new international scenario showed the need to better define the role of the non-governmental sector. Accordingly, the Economic and Social Council adopted Resolution 1996/31, to update the relevant arrangements[43] for the conferral of consultative status to NGOs, including the admission criteria and the rights relating to it.

By ECOSOC Resolution 1996/31, the UN envisaged differing rights of participation, including the right to United Nations passes, to speak at designated meetings, and to have documents translated and circulated as official UN documents in the ECOSOC and its subsidiary bodies (e.g. ECOSOC's Functional Commissions).

Procedurally there are three classes of Consultative Status, namely General, Special and Roster, which correspond to the three categories defined by the previous relevant ECOSOC Resolution 1296 (XLIV) of 1968, Category I, Category II and Roster, respectively.

In accordance with para.22 of ECOSOC Resolution 1996/31, the General Consultative Status is recognized to those "Organizations that are concerned with most of the activities of the [Economic and Social] Council and its subsidiary bodies and can demonstrate to the satisfaction of the Council that they have substantive and sustained

[40] As for the purpose of this Thesis, the role of the OHCHR has been considered in this Chapter, as a way to stress its independence from the Council (even though the Office is strictly connected to the Council by a functional linkage. See paras.2.1. et ff.).
[41] Op.cit supra in note 22.
[42] either the rules of procedures of the General Assembly – See A/520/Rev.15 - or the Security Council do not envisage the participation of civil society – S/96/Rev.7.
[43] The previous arrangement dated back to ECOSOC Resolution 1296 (XLIV) of 1968 when the Cold War had made the international scenario totally different and, to some extent, less complex.

contributions to make to the achievement of the objectives of the United Nations in fields set out in paragraph 1 above, and are closely involved with the economic and social life of the peoples of the areas they represent and whose membership, which should be considerable, is broadly representative of major segments of society in a large number of countries in different regions of the world shall be known as organizations in general consultative status."

In accordance with para.23, Special Consultative Status is recognized to those "Organizations that have a special competence in, and are concerned specifically with, only a few of the fields of activity covered by the Council and its subsidiary bodies, and that are known within the fields for which they have or seek consultative status shall be known as organizations in special consultative status." Within this category, it falls human rights NGOs.

In accordance with para.24, Roster Consultative Status is granted to "Other organizations that do not have general or special consultative status but that the Council, or the Secretary-General of the United Nations, in consultation with the Council or its Committee on Non-Governmental Organizations, considers, can make occasional and useful contributions to the work of the Council or its subsidiary bodies or other United Nations bodies within their competence shall be included in a list (to be known as the Roster) [..][44]."

The consultative status is thus conferred[45] by ECOSOC, upon a recommendation of its Committee on NGOs. Accredited NGOs should submit a quadrennial report on their activities (although a very low number performs this duty[46]).

The above arrangements remain the last comprehensive normative framework referring to NGOs (as acknowledged by Op.11 of GA Res. 60/251). Historically, since the first sessions of the ECOSOC, UN Members adopted specific Resolutions on the role and the admission of NGOs, such as the above mentioned ECOSOC Resolution 9 (II) and ECOSOC Resolution 16 (III). Scholars recall that at the table of the drafters of the Universal Declaration of Human Rights (1948), Mrs. E. Roosevelt took over many proposals by NGOs which were particularly concerned about economic, social and cultural rights-related issues. In that juncture the number of NGOs amounted to approx. 45 NGOs[47]. Throughout the era of decolonization up to the fall of the Berlin Wall

[44] The three sub-categories relating to the Roster Status have been supplemented by a fourth category for those "NGOs accredited to the Commission on Sustainable Development")".

[45] See Burci, G., The UN HR Council, in the Italian Yearbook of International Law, Vol. XV, 25, 2005, p.25-41.

[46] See UN Secretary-General Report, UN Doc. A/59/354.

[47] Data available at http://www.un.org/esa/coordination/ngo/faq.htm), see also Glendon, M.A., A World made New: Eleanor

(1960-1989), the number of UN Member States and accredited NGOs steadily increased.[48]

As discussed, the then Commission evolved into a more geographically representative body. Accordingly, an increasing number of NGOs applied for accreditation and consultative status[49]. Through their participation in both the Commission and the Sub-Commission's work, NGOs contributed to broaden the human rights agenda beyond the inter-state-related issues by drawing the international attention to areas which originally were deemed to fall within the domestic jurisdiction. In this regard it has been argued that the Commission[50] had the merit to be the first UN body allowing NGOs to address it. The Commission was also the forum where NGOs mainly reported on their work[51].

Over the years, in light of the above arrangements and practice, UN Members have extended the NGOs' participation in other organs.[52]

Within the Security Council, the "informal" entry of NGOs has taken place by means of the so-called "Arria formula", referring to off-the-record briefings[53] with NGOs. This practice was successfully created in 1992, upon initiative by the then President of the Security Council, Amb. Diego Arria (Venezuela) who wanted that a Croatian priest could provide testimony about the allegations of gross violations of human rights occurring in Yugoslavia. From 1995 onwards, the Security Council has

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Roosevelt and the universal declaration of human rights. New York, Random House, 2001, p.45 -173; see further Mitoma, G.T., Civil Society and International Human Rights: The Commission to Study the Organization of Peace and the Origins of the UN Human Rights Regime, in Human Rights Quarterly, Vol. 30, No.3, 2008, p.607 et sequitur; and Hunt, L., Inventing Human Rights, a History, eds. w.w. Norton, 2007, p. 202-203

[48] As noted, within the Commission, the number of States increased as follows: From 18 to 21 members in 1962, 32 in 1967, 43 in 1980 and 53 in 1992, respectively. See ECOSOC Res. 1990(48).

[49] See Salmon, E., Indirect power: a critical look at civil society in the new HRC, in UN Reform and a New Collective Security, EIUC ed, Cambridge University Press, 2010, 343-364; see also Kalin, W., Towards a UN Human Rights Council: Options and Perspectives, 2004, p.1-8, available at: http://www.humanrights.ch/home/upload/pdf/050107_kaelin_hr_council.pdf; see further Forsythe D.P., Turbulent Transition: From the UN HRC to the Council, in "The United Nations, Past, Present and Future, Proceeding of the 2007 Francis Marion University – UN Symposium, Global Political Studies Series, Nova ed., 2007 (pamphlet).

[50] In 2005, at the last substantive session of the Council (61st session of the Commission), there were 261 accredited NGOs, a number which does not find any comparison. See Schrijver, N. J., UN Reform: A Once-In-A-Generation Opportunity?, IOLR 2, 2005, p.271-275.

[51] In parallel the UN Conferences, from the Vienna Conference (1993) to those of the early XXI century, including their review conferences (i.e. the 2000 Millennium Summit and the 2005 Millennium Summit+5 and the 2001 Durban Conference and the 2009 Durban Review Conference), have contributed to the accreditation of an increasing number of NGOs, so that it has been noted the steeply rise of NGOs seeking entry into the United Nations. Ibidem; See also op.cit.in supra note 49.

[52] As recalled in the Introduction, in 2002, the former Secretary-General had widely stressed in his report "Strengthening of the United Nations: An Agenda for Further Change (See paras. 11 et ff. of A/57/387)" the potentiality of NGOs. In 2003 the former Secretary-General, Annan, appointed a committee under the chairmanship of the former President of Brasil, Mr. Cardoso, to review the relationship between the UN and civil society. The panel proposed a greater role for civil society organizations in the UN system, by expanding the relation with NGO to strengthen both the UN and the inter-governmental debates on issues of global importance. The Report of the Panel of Eminent Persons on United Nations-Civil Society Relation (published in June 2004) strongly endorsed the wider participation of civil society in all aspects of the UN's work, both at the headquarters and country levels. The June 2004 Cardoso Report (See UN Doc. A/58/817) was a consequence of the openness of the 2002 Secretary-General report A/57/387. However the Cardoso recommendations were not followed up. The December 2004 HLP report on Threats, Challenges and Change (See A/59/565) paid very little attention to the role of NGOs, as results from paras. 99,103 of said Report (out of approximately 300 paras). For a more negative position, see Prof. Natalino Ronzitti, The Report of the High-level Panel on Threats, Challenges and Change: The Use of Force and the Reform of the United Nations, p. 15, in Italian Yearbook of International Law, Volume XIV, 2004, Ed. M. Nijhoff Publishers. See also the so-called Cardoso Report, Doc. A/58/817 of June 11, 2004..

[53] meaning no verbatim of the meetings. For a detailed description, see www.globalpolicy.org.

routinely resorted to this practice. In 2004, it invited NGOs and business sector's representatives to participate in two open debates on the role of civil society in post-conflict peace-building, and of the business sector in conflict prevention, peacekeeping and post-conflict peace-building, respectively. The Security Council has also recognized the role of NGOs, by operationally mentioning them in landmark Resolutions, such as Resolution 1325 (2000) on "Women, Peace and Security.[54]" In the course of country missions, Security Council's members hold meetings, among others, with key NGOs.

Within the General Assembly framework, Resolution 606 (VI) of 1952 sets forth that accredited NGOs can only attend the public sessions of its Main Committees. In this regard the former Secretary-General[55] argued that: "Article 71 does not preclude the General Assembly from inviting NGOs to participate in its sessions and its work". In November 21, 2006, it was established the Forum on General Assembly and NGOs Relations.

Formally, NGOs cannot address either the Plenary or the main Committees of the Assembly yet. Informally, NGOs already address it, by: participating in parallel events, panels, round-table meetings; attending main Committees' public meetings; and contributing to the preparatory work of the international Conferences as well as of the special sessions of the Assembly.

In this evolving scenario, questions arise from the abolition of the Commission, as a subsidiary body of the ECOSOC and the following replacement with the Human Rights Council as a subsidiary body of the General Assembly.

GA Resolution 60/251 recognizes the role of NGOs. In preambular paragraph 11, it is acknowledged "that non-governmental organizations play an important role at the national, regional and international levels, in the promotion and protection of human rights[56]". In operative paragraph 11, the General Assembly decides that "[…] the participation of and consultation with observers, including [….] non-governmental organizations, shall be based on arrangements, including Economic and Social Council Resolution 1996/31 of 25 July 1996 and practices observed by the Commission on Human Rights, while ensuring the most effective contribution of these entities". This provision has been subsequently incorporated in Council Resolution 5/1, under "the rules of procedure of the Council (Rule 7, lett.a)," which thus sets out the relevant normative and operational framework.

[54] See Ops.8-15 of S/RES/2000/1325.
[55] See UN Doc. A/59/354.
[56] See Terlingen, Y. , The role of non-governmental organisations, in Almqvist, J. and Gomez, F. (eds), The Human Rights Council: Challenges and Opportunities, Madrid, Fride, 2006, p. 71-72.

Despite the criticism by many delegations on the role of NGOs at the then Commission, scholars argue that the reference to ECOSOC Resolution 1996/31, in both Op.11 of GA Resolution 60/251 and Rule 7, lett.a, of Council's Resolution 5/1, has preserved the NGOs' right of participation.[57]

NGOs participate as "observers" in the work of the Council, as was the case with the then Commission. In line with the relevant ECOSOC rules of procedure (Arts. 75 – 76 of the rules of procedures of ECOSOC's functional commissions), NGOs are in a position to: submit written statements; provide knowledge and expertise; raise issues and address human rights violations. These activities reflect their broad range of tasks: from the supply of information to advisory services, from lobbying and advocacy to monitoring and investigating human rights violations.[58]

Operationally, NGOs organise parallel events and participate in the work of subsidiary bodies, such as the Social Forum and the Advisory Committee. They contribute to and informally assist States in drafting relevant thematic and geographic Resolutions or new international standards, such as the newly adopted UN Guiding Principles on Alternative Parental Care[59] (although they do not enjoy any right of initiative). They also lobby, inter alia, for convening panel debates[60] or against the re-election of top offenders[61]. Pursuant to Council's Resolution 5/1 they participate in the selection procedure of the independent experts for both the Advisory Committee and the Special Procedures, by nominating candidates (paras.42 et ff. of Council Resolution 5/1). They can: deliver "general comments" during the UPR sessions, under Item 6 of the Council's Agenda; participate in the interactive dialogue with special procedures after the intervention of the state concerned and Council Members; and take the floor during the General Debates of the regular sessions of the Council. They also participate in the negotiations relating to the architecture of the Council, as was the case with the institution-building process.[62]

Along these lines, they have developed a specific channel of communication with UN Special Procedures and Treaty-monitoring Bodies, by submitting, inter alia,

[57] Op.cit.supra in note 45 (p.41); see also op.cit.supra in note 49 (Forsythe).
[58] Op.cit.supra in note 9 (p.93).
[59] http://www.ifsw.org/cm_data/9.9_UN_Geneva.pdf
[60] Op.cit in supra note 33
[61] The case of Sri Lanka to an Asian vacancy based on its human rights records. See HRC press release of May 21, 2008 on htpp: www.hrw.org/effective HRC/sri Lanka/). See for instance the Brazilian Guidelines on parental care – A/HRC/11/L.13 -, as adopted by the Council on June 15, 2009, available at http://ap.ohchr.org/documents/sdpage_e.aspx?b=10&se=92&t=4. During the introduction of this initiative before the Human Rights Council, the Brazilian representative publicly thanked two children rights-related NGOs that had also participated in the negotiations, available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=9201&LangID=E.
[62] Since the first seminars on the 2011 Council's Review they have participated and put forward various proposals.

individual cases, complaints and shadow reports[63] as well as by providing information on specific human rights issues and situations. In this regard it would be more appropriate to reverse the order. UN Treaty monitoring Bodies and Special Procedures Mandate-Holders rely, in particular, on the findings of the NGOs' work, in order to: better shape their constructive dialogue with States; prepare their reports and recommendations,[64] send communications, issue joint communiqués; prepare their country missions, transmit urgent appeals, and so forth.[65] Similarly, the UN Secretariat, in particular the OHCHR work with the civil society, on a daily basis, inter alia, by means of seminars, brainstorming, and exchange of views.[66]

Against this background, there is a conflicting practice developed in the relevant deliberative process. Over the years, UN Member States have not been always eager to share their traditional domains with "the other relevant stakeholders", especially NGOs. During the sessions of the past Commission, developing countries challenged NGOs' as alleged promoters of the so-called "Northern agenda" of the WEOG[67]. Criticism originated from those States wishing to preserve the *status quo* and their "affairs" against any influence on international decision. The practice consisted of questioning the neutrality and independence of NGOs from the Governments' Agenda.

As discussed, among the achievements of the Commission, the Council has inherited the participation of NGOs pursuant to Op.11 of GA Res. 60/251[68] and thus in accordance with Article 71 of the Charter of the United Nations. However developing countries continue to consider NGOs as an extension of the Western Group. In response to this, NGOs claim a broader space[69] and denounce their little impact on decision-making.[70] Generally, human rights NGOs, though describing

[63] This term refers to the non-governmental report. It may be considered as a sort of counter-report, whose information de facto "supplements" the governmental report. Both reports will be used by the TBs in their consideration and examination of the State Party's periodic report.
[64] Constructive dialogue indicates the work of TB and SP with UN Member State to enhance the promotion of the respect for human rights (See for instance the Manual on the Operations of the Special Procedures Mandate-Holders, paras.94-96, available at: http:// www.escr-net.org/resources_more/resources_more_show.htm?doc_id=425392&parent_id=425208#_Toc136667484.

[65] Brett, R., "Neither Mountain nor Molehill. UN Human Rights Council, One Year On", Quaker United Nations Office, 2007, p.1-18, available at http://www.quno.org/geneva/pdf/humanrights/NeitherMountainNorMolehill200707.pdf).

[66] See last SMP 2010-2011, available at www.ohchr.org
[67] Ibidem, see also op.cit. supra in note 45.
[68] Op.11 stipulates: "*Decides* that the Council shall apply the rules of procedure established for committees of the General Assembly, as applicable, unless subsequently otherwise decided by the Assembly or the Council, and also decides that the participation of and consultation with observers, including States that are not members of the Council, the specialized agencies, other intergovernmental organizations and national human rights institutions, as well as non-governmental organizations, shall be based on arrangements, including Economic and Social Council resolution 1996/31 of 25 July 1996 and practices observed by the Commission on Human Rights, while ensuring the most effective contribution of these entities")
[69] See Scannella, P., and Splinter, P., The UN HR Council: A promise to be fulfilled, in Human Rights Law Review, 7-1, 2007 p.41-72
[70] See also A/HRC/8/52.

themselves as non political, are perceived by most States as political entities. It has been argued that: "The very act of appealing to governments for changes in their human rights policies is very much a political one". This argument might explain the resistance of Member States, particularly when approaching the interpretation and application of Article 71 of the UN Charter.[71]

In response to the above situation, the former Secretary-General noted that, under no circumstances,[72] Non-State Actors, including NGOs, can diminish the intergovernmental characteristic and the inner coherence of the UN Organization. They can only enhance it. To confirm this argument, the term "Non-State Actor" indicates that those entities falling within this category are positioned outside the strict group of actors determining the outcome of the inter-governmental decision-making process. The constructive engagement of NGOs can only strengthen inter-governmental deliberations by providing information, expertise, and analysis of the situation. To paraphrase what an international NGOs stated recently, "they keep the system honest.[73]"

Turning to the practice developed within the Council, save the first session (June 2006), when the Council's President de Alba ruled about the possibility of NGOs to take the floor during the opening High Level Segment,[74] they have gone through many and various difficulties:

i. The unpredictability of the Programme of Work of the Council, including the special sessions;
ii. The quasi-standing nature of the Council which impacts on their scarce human and financial resources [75] - only the main international NGOs, including Amnesty International, FIDH and Human Rights Watch, which are based in Geneva, can easily follow the daily work of the Council;
iii. The lack of strong partnership among NGOs;
iv. (and overall) The States' reluctance.

[71] See O'Byrne, D.J., An Introduction to Human Rights, Prentice Hall Ed., 2003, p.97.

[72] See his 2002 Report, UN Doc. A/57/387

[73] Alfredsson, G., Concluding Remarks: More Law and Less Politics, in G. Alfredson et al. International Human Rights Monitoring Mechanisms, Kluwer Law International. 2001, p.925 (and updated in 2009); See also Brett, R., The Role of NGOs – An Overview, in International Human Rights Monitoring, vol.7, 2009, p. 845-854.

[74] Op.cit.supra in note 69.

[75] Op.cit. supra in note 65 (p.14).

As discussed, various States challenge the studies and the work of the Special Procedures. This criticism affects at least indirectly their main sources, namely NGOs. Strict rules refer to the participation of NGOs in the UPR.[76] Many countries, mainly Egypt, on behalf of the African Group, and Cuba, claim that geographic situations have to be dealt with by peers. When NGOs attempt to tackle human rights situations during the regular sessions of the Council, various States continue to challenge them on the ground of their alleged affiliation to Western countries.[77]This approach has affected the time at the disposal of NGOs which results slightly shorter than in the times of the Commission.[78]It also shows that there is a "disparity between the formal role permitted to NGOs[79] and the real role that they actually play.

Op.11 of GA Resolution 60/251 concludes with a clause: "while ensuring the most effective contribution of these entities". This wording entails the need to explore new modalities for the relation between NGOs (and NHRIs[80]) and UN Member States within the Council's framework.[81] In this regard, many countries, particularly from the Western Group, have stressed the need to reformulate the relevant provisions within the 2011 Council Review.[82]

1.2.1. The National Human Rights Institutions (NHRIs)

The increasing development of National Human Rights Institutions (acronym, NHRIs) is a relatively recent phenomenon. NHRIs vary from one State to another. Therefore there is not a precise definition, to date.

Scholars[83] underline that NHRIs "can be generally described as permanent and independent bodies, which governments have established for the specific purpose of

[76] In particular, during the UPR process, NGOs can submit to the OHCHR, within a specific deadline, their reports which are summarised in "a compilation of information".
[77] Op.cit.supra in note 49; see also op.cit. supra in note 3.
[78] See E/CN.4/1990/WG.3/WP.4.
[79] Op.cit.supra in note 69; see also op.cit.supra in note 65.
[80] The States' resistance does not entirely apply to NHRIs whose nature of "quasi-governmental bodies places them in a different position vis-à-vis the UN membership). See Bossuyt, M., The New Human Rights Council: a first appraisal, Netherlands Quarterly of Human Rights 24(4), 2006, p.551-555.
[81] It also entails that a number of practical and theoretical problems, including the legal status of NGOs, the level of participation. See Baehr, P.R., Non-Governmental Human Rights Organizations in International Relations, Palgrave, 2009, p.54), their inputs and expertise in law-making and overall their legitimacy, should be solved or better defined)
[82] See Chapter VI.
[83] See Pohjolainen, A-H., The Evolution of National Human Rights Institutions - The Role of the United Nations'; Denmark, The Danish Institute for Human Rights, 2006, p. 1-123.

promoting and protecting human rights". Other scholars stress that NHRIs should be considered as quasi-governmental bodies.[84]

From an historical standpoint, ancient Romans created the forerunner of the above Institution, the ancient roman *tribunatus plebis*, aimed at protecting the rights of the plebeians.[85] However, as per tradition, it is usually reported that the first model of NHRIs dates back to the early XIX century, when Sweden established the first Ombudsman.[86]

While the Scandinavian traditional institutions referred to individual Ombudsmen (a current example can be provided, mutatis mutandis, by the Europena Mediator), in other parts of the world, countries established, according to their needs, National Commission for Human Rights. In this regard some scholars[87] argue that the term, "NHRI" refers to human rights mechanisms whose mission is the implementation of all human rights, while the Ombudsman mechanism refers to a specific institution dealing with specific cases of maladministration, in the event of alleged injustice caused by governmental bodies.

Generally, the Human Rights Commissions differ from the ombudsmen for the size and the broadness of the mandate, as exemplified by the broad mandate of the French Commission on Human Rights, "Commission Nationale Consultative des Droits de l'Homme.[88]"

From the above models, it might be inferred that NHRIs includes ombudsmen and human rights commissions whereby the former refers to a single person (See for instance the Swedish Ombudsman or, *mutatis mutandis*, the European Parliament Mediator) and the latter refers to committees. The UN also mentions a third category of NHRIs, namely the "specialized" Institutions, aimed at protecting the rights of a given vulnerable group, such as indigenous populations, children, refugees or women.[89]

As reported, the Ombudsman model mainly works on complaints about administrative irregularities. National Commission for Human Rights are usually entrusted with a broad human rights-mandate, which might include advisory services,

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[84] See Alston, P., and Crawford, J., The Future of UN HR Treaty Monitoring, Cambridge University Press, 2002, p.501-526; See also op.cit.supra in note 49 (Kalin).

[85] See De Giovanni, L., Storia del diritto romano (cura A. Schiavone), Torino, 2000, Giappichelli, p.10 et ff. ; See also the definition provided in the Treccani online, available at: http://www.treccani.it/Portale/elements/categoriesItems.jsp?category=Scienze_sociali_e_Storia/storia/storia_antica/&parentFolder=/Portale/sito/altre_aree/Scienze_sociali_e_Storia/storia/&addNavigation=Scienze_sociali_e_Storia/storia/storia_antica/&lettera=T&pathFile=/sites/default/BancaDati/Enciclopedia_online/T/ENCICLOPEDIA_UNIVERSALE_3_VOLUMI_3_vol_022234.xml)

[86] The term "ombudsman" originates from the old Swedish expression, "umboosmaor", meaning "one who has the power to act for another."

[87] See de Beco, G., NHRIs in Europe, in Human Rights Law Review, 2007, p..331-370.

[88] available at: http://www.cncdh.fr/rubrique.php3?id_rubrique=132

[89] See UN OHCHR Factsheet No.19, available at www.ohchr.org; see also op.cit. supra in note 83 (p. 16-30)

human rights education and training, research, monitoring and awareness-raising activities and - optionally, according to their statutes – the investigation of individual complaints.[90]The specialized Institutions have a very specific mandate. In this regard States can also include ad hoc units within their National Commission on Human Rights.[91] As a way of example, States Parties (See for instance, Argentina, Cyprus, France, Denmark, Togo and the UK) that ratify or accede the Optional Protocol to the UN Convention Against Torture have to establish National Preventive Mechanisms, inter alia, to monitor detention conditions in both administrative and penal detention facilities. Article 17 of the OPCAT sets forth: "Each State Party shall maintain, designate or establish, at the latest, one year after the entry into force of the present Protocol or of its ratification or accession, one or several independent national preventive mechanisms for the prevention of torture at the domestic level. Mechanisms established by decentralized units may be designated as national preventive mechanisms for the purposes of the present Protocol if they are in conformity with its provisions.[92]"Therefore various and differing Institutions fall within the category of NHRIs. However scholars[93] and practitioners agree that NHRIs have to meet the requirements laid down in the so-called Paris Principles.[94] As of June 2010, there are approximately 110 NHRIs across the world (out of 192 UN Member States), of which 65 have been accredited with A-Status by the International Coordination Committee of National Human Rights Institutions.

1.2.2. The increasing role of NHRIs in the Cold-War and in the aftermath of the fall of the Berlin Wall

Since the outset of the UN Organization, there has been an increasing international interest in these mechanisms. The Nuclear Commission on Human Rights considered that local groups could collaborate with the relevant UN mechanisms.[95]The ECOSOC

[90] In this event it emerges their quasi-judicial nature, which may result in a degree of tension with national authorities
At present, there is a strong network of Commissions in the Asia-Pacific Region, led by the New Zealand.
[91] For instance the relevant Bill (A.S. 1223) to be soon submitted to the Italian Parliament envisages a specific Unit for the Prevention of Torture.
[92] See Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, entered into force on 22 June 2006.
[93] See op.cit.supra in note 9 (p.57); see also op.cit.supra in notes 83 and 84, respectively
[94] Although no unequivocal definition is given by that document as well. See United Nations Centre for Human Rights, National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights, Professional Training, Series No.4, New York and Geneva: United Nations, 1995; para. 21/UNDP-OHCHR toolkit on NHRIs 2010.
[95] Op.cit.supra in note 83 (p.30-39).

envisaged by its Resolution 9 (II) of June 1946 that: "members of the United Nations are invited to consider the desirability of establishing information groups or local human rights committees within their respective countries to collaborate with them in furthering the work of the Commission on Human Rights (para.5)". The first human rights Commission was set up in Canada, in 1947. However, despite the UN workshops and seminars, such as the so-called "Ceylon seminar", the "Buenos Aires seminar" and the "Stockholm seminar, to raise awareness of NHRIs, no concrete result was achieved during the early Cold War. At the Geneva seminar (in 1978) it was outlined a set of possible standards for the creation of NHRIs[96] which paved the way to convening the first International Workshop on National Institutions for the Promotion and Protection of Human Rights.

Under the aegis of the UN Commission on Human Rights and the French national Commission on Human Rights, relevant stakeholders, namely human rights Institutions, UN Member States, specialized agencies and NGOs gathered in Paris, on 7-9 October 1991, inter alia to explore ways to enhance the effectiveness of NHRIs.

As discussed, the early 1990s was a revolutionary period for the advancement of human rights, including the establishment of ad hoc protection mechanisms relevant to the national framework for the promotion and protection of human rights[97].

At the above-mentioned Paris Conference (1991), it was developed a set of Principles aimed at setting basic criteria/international minimum standards on the status and role of NHRIs, namely the "Principles relating to the Status of National Institutions".

Shortly after, the UN Commission on Human Rights endorsed the so-called "Paris Principles" (See for instance Commission's Resolution 1993/55 of March 1993). At the 1993 Vienna Conference, world leaders stressed the need to strengthen the international system of promotion and protection of human rights. In particular, they recognized the Paris Principles as the international standard for effective and independent NHRIs[98]. They also recognized the key role that NHRIs can play in ensuring respect for human rights: "The World Conference on Human Rights reaffirms the important and constructive role played by national institutions for the promotion and protection of human rights, their role in remedying human rights violations, in the

[96] See United Nations Centre for Human Rights, National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights, Professional Training Series No.4, New York and Geneva: United Nations, 1995; para.21).
[97] Op.cit.supra in note 9 (Marchesi, p.57).
[98] UN Docs. A/CONF.157/23 and A/CONF.157/NI/6).

dissemination of human rights information, and education in human rights". Besides "The World Conference on Human Rights encourages the establishment and strengthening of national institutions, having regard to the Paris Principles and recognizing that it is the right of each State to choose the framework which is best suited to its particular needs at the national level.[99]"

Accordingly, the UN General Assembly "welcomed" and adopted the above Principles, by Resolution 48/134 of December 1993.[100] By this Resolution, UN Member States have thus acknowledged the Paris Principles as "the bedrock standard for the creation of independent NHRIs."[101]

1.2.3. The "Paris Principles"[102]

Among the various purposes, the Paris Principles aim at classifying and scaling NHRIs, in accordance with a set of criteria whose compliance with determines their degree of participation within the relevant UN framework. Under the Paris Principles, the mandate of NHRIs has a two-fold aim:

1. The protection of human rights (para.1 of the Annex to GA Resolution 48/134), including by receiving and considering complaints, seeking an amicable settlement through conciliation, advising governments on relevant legislation and measures, and monitoring their activities;
2. The promotion of human rights (para. 1 of the Annex to GA resolution 48/134) through education, publications, training and capacity-building activities.

To perform the above mandate, NHRIs shall:

i. Have a broad mandate (para.2);
ii. Have autonomy from other State entities;[103]

[99] See para.36 et ff. of the Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23.
[100] "11. Welcomes also the Principles relating to the status of national institutions, annexed to the present resolution; 12. Encourages the establishment and strengthening of national institutions having regard to those principles and recognizing that it is the right of each State to choose the framework that is best suited to its particular needs at the national level"
[101] See Burdekin, B., National Human Rights Institutions in the Asia-Pacific Region, Leiden, Boston: Martinus Nijhoff Publishers, Vol.27, 2006, p. 4-20; see also Muller, F. S., Handbook entitled, The Role of National Human Rights Institutions in the United Nations Treaty Body Process, German Institute of Human Rights, 2007, p.33-36, also available at http://www.nhri.net/default.asp?PID=47&DID=0; op.cit.supra in note 83 (p. 6-14, 58-77).
[102] See UN Doc. A/RES/48/134.

ii. Have independence guaranteed by national legislation or Constitution;

iii. Ensure pluralism, including through membership and/or effective cooperation[104];

iv. Have adequate resources (the financial independence is a guarantee for the independent performance of their work[105])

v. (Have an adequate powers of investigation[106]).

From the above, it may be inferred that NHRIs cannot be viewed as an alternative to the ordinary justice system. Rather they can be defined as "special domestic protection mechanisms" vis-à-vis the ordinary protection bodies and mechanisms.[107]

Considering their domestic role of quasi-governmental bodies, it is generally acknowledged that the role of NHRIs may change in accordance with the needs of the Government, provided that their core mandate is not altered. In this regard, preambular paragraph 4 of Commission's Resolution 74/2005 (the last Commisison's Resolution on NHRIs) stipulates: " [..]that it is the prerogative of each State to choose, for the establishment of a national institution, the legal framework that is best suited to its particular needs and circumstances to ensure that human rights are promoted and protected at the national level in accordance with international human rights standards".

To be relevant, in particular to the UN HR machinery, NHRIs have to be "independent entities.[108]"To this end, the Paris Principles have to be formally recalled and observed. To monitor the compliance with the above principles, it was established, in 1994, the International Coordinating Committee of the National Human Rights Institutions (acronym, ICC). This body has a global mandate, to monitor the status of NHRIs, their compliance with the Paris Principles and any relevant variation. In particular with the support by the OHCHR, its Bureau (the ICC Bureau) decides, upon recommendation by the Sub-Committee on Accreditation, whether a National Institution meets or continues to comply fully with the Paris Principles. At the end of this

[103] According to Prof. Ramcharan, this criterion is the minimum standard by which to ensure the effectiveness of NHRIs. See Ramcharan, B.G., The protection role of national human rights institutions, Leiden, Boston, Martinus Nijhoff Publishers, 2005.
[104] It also results that the key factors connoting NHRIs are the independence and pluralism. However the only guidance by the Paris Principles in this regard is that "the appointment of commissioners or other kinds of key personnel shall be given effect by an official Act establishing the specific duration of the mandate, which may be renewable".
[105] Op.cit.supra in note 9 (p.57).
[106] See OHCHR toolkit on NHRIs: these Principles also contain "additional" or optional principles applying only to Institutions with "quasi-jurisdictional competence". These additional principles apply to Institutions authorised to receive individual complaints and to render decisions on them.
[107] Op.cit.supra in note 9.
[108] Op.cit.supra in note 83

assessment process, a NHRI may be granted one of the following three statuses ("A," "B," or "C" status):

(1) "A status": compliant with the Paris Principles;[109]
(2) "B status"; observer status - not fully in compliance with the Paris Principles or insufficient information provided to make a determination;
(3) "C status"; not compliant with the Paris Principles.[110]

The OHCHR stresses that when NHRIs are compliant with the Paris Principles, they are "integral parts of the national human rights protection systems.[111]"

From the above, it is necessary to underline that, though established by Governments, NHRIs have a hybrid nature because of their peculiar mandate, independence and ability to interact with both national and international stakeholders.[112] As a bridge between international and national dimensions, their role is increasingly expanding[113].

1.2.4. The NHRIs vis-à-vis the UN HR machinery, particularly the UN Human Rights Council

NHRIs accredited, by the ICC, with "A status (meaning full compliance with the Paris Principles), enjoy specific privileges. This result stems from a long-standing process, particularly developed within the then UN Commission that facilitated a growing linkage between national, regional and international actors.

Following the 1991 Paris International Workshop, the then Commission adopted the first Resolutions on NHRIs between 1992-1993[114]. As noted, the General Assembly confirmed, in 1993, the Paris Principles, by Resolution 48/134.

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[109] A-Status institution**:** A national institution may be afforded this accreditation status by the Bureau of the International Coordinating Committee of National Institutions (ICC Bureau) when it is in full compliance with the Paris Principles. A-Status institutions that can participate fully in the work and meetings of National Institutions internationally and regionally as a voting member, and they can hold office in the ICC Bureau or any Sub-Committee established by the Bureau. A-status institutions are also able to participate in HRC sessions and take the floor under any agenda item, submit documentation and take separate seating.)

[110] The secretariat to the review process (for initial accreditation, and reaccreditation every five years) is provided by the National Institutions and Regional Mechanisms Section of the OHCHR.

[111] (See the 2009 OHCHR-UNDP toolkit on NHRIs, available at: www.ohchr.org)

[112] Op.cit. supra in note 84; see also op.cit.supra in note 101; see further Carver, R., A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law, in Human Rights Law Review, 2010, p.1-31.

[113] Through the above-mentioned long process, it is currently accepted the following definition of an NHRI: "a National Human Rights Institution is an Institution with a constitutional and/or legislative mandate, to protect and promote human rights".
NHRIs also serve as a bridge between international human rights norms and the domestic implementation.

[114] See UN Doc.E/CN.4/RES/1992/54- E/CN.4/RES/1993/66.

Over the years the Commission decided to devote an entire Agenda's sub-item (Item 18, lett.b) to NHRIs, up to its last substantive session, in 2005.

By Resolution 2005/74, the Commission updated the previous arrangements for the NHRIs' participation. In particular the Commission welcomed the relevant Secretary-General Report (UN Doc. E/CN.4/2005/107), by which it decided as follows (Op.11 et ff.):

> "(*a*) Permitting national institutions that are accredited by the Accreditation Sub-Committee of the International Coordinating Committee of National Institutions [..], to speak, as outlined in the report, within their mandates, under all items of the Commission's agenda,;
> (*b*) Continuing the practice of issuing documents from national institutions under their own symbol numbers; […] the continuation of the practice of national institutions convening regional meetings and encourages national institutions, in cooperation with the Office of the High Commissioner, to continue to organize similar events with Governments and non-governmental organizations in their own regions; [..] the important role of national human rights institutions, in cooperation with other mechanisms for the promotion and protection of human rights, in combating racial and related forms of discrimination and in the protection and promotion of the human rights of women and the rights of particularly vulnerable groups, including children and people with disabilities; [..] the important and constructive role that national institutions can play in human rights education, including by the publication and dissemination of human rights material and other public information activities [..]; the priority accorded [by the High Commissioner] to the establishment and strengthening of national human rights institutions, including through technical cooperation [..]".

The Commission also welcomed "efforts, through the Secretary-General's Action Two Programme (see A/57/387 of 2002), to ensure effective UN engagement with national institutions [..].[115]"

The above Commission's Resolution marked a significant step towards the strengthening of the role of the accredited NHRIs within the UN. Unlike the past, it was

[115] By the Action Two Programme, the UN has put emphasis on "human rights country engagement".

allowed the right to participate under all Agenda's Items. More importantly, it was envisaged a specific role within the framework of the Action Two Initiative, aimed at raising the country engagement in the field of human rights. In this regard the former Secretary-General called for joint UN actions, to strengthen human rights-related measures at the country level. He also called for enhancing support for the efforts of interested Member States in establishing and strengthening national human rights promotion and protection systems, to be consistent with international human rights norms and standards (UN Doc. A/57/387).

In this wake, by GA Resolution 60/251 establishing the Human Rights Council, UN Member States have decided to preserve the modalities – practice - set out by Commission's Resolution 74/2005. Operative paragraph. 5, lett.h, of GA Res. 60/251 indicates that the Council shall "work in close cooperation in the field of human rights with national human rights institutions and civil society". Op.11 indicates that [the General Assembly] "*Decides* that the Council shall apply the rules of procedure established for committees of the General Assembly, as applicable, unless subsequently otherwise decided by the Assembly or the Council, and also decides that the participation of and consultation with observers, including [..] national human rights institutions [….]shall be based on arrangements, including Economic and Social Council resolution 1996/31 of 25 July 1996 and practices observed by the Commission on Human Rights, while ensuring the most effective contribution of these entities". Rule 7, lett.b of Council's Resolution 5/1 reiterates it.

Some scholars[116] argue that, on the basis of Commission Resolution 2005/74, NHRIs have significantly impacted on the work of the Council and its relating mechanisms (See Para. 15 of the de Alba Package). Within the Council, the practice concerning NHRIs has led to specific *de facto* privileges for fully accredited NHRIs, namely those with "A status". According to the last Secretary-General Report (UN Doc. A/HRC/13/44 of January 2010), NHRIs with A Status are entitled to participate in: "the Council with a speaking right under all Agenda Items".

By the above Report (paras.74-77), it is acknowledged that the Human Rights Council Resolution 5/1 provides a specific role for National Institutions and their regional coordinating mechanisms, by allowing the participation in the Human Rights Council and the engagement with its various mechanisms. Specifically, the relevant wording stresses the role of those Institutions, being in line with the Paris Principles:

[116] Op cit.supra in note 3 (Boyle).

"those Institutions accredited with A-Status by the ICC, the Committee itself, and regional coordinating bodies speaking on behalf of A-status accredited Institutions may participate and address the Council on all agenda Items. They can also submit written statements, issue documentation (with a United Nations document symbol) and have separate seating arrangements at the Council sessions (para.74)."

The current normative and operational framework confirm their growing role, within the UN Human Rights machinery:[117]

i. With specific regard to Special Procedures and the Advisory Committee, NHRIs may participate in the selection procedure, by proposing candidates (provided that these candidates match the objective and technical requirements set by Council's Decision 6/102).

ii. With specific regard to the UPR mechanism, Council's Resolution 5/1 allows NHRIs to submit information for inclusion in the summary prepared by OHCHR of information provided by "other relevant stakeholders"; They attend the dialogue with the UPR Working Group; and can make "general comments" before the adoption of the relating Outcome (In 2008, 64 countries were reviewed under the universal periodic review. Of these, 28 have established a national human rights institution. 27 NHRIs submitted information for inclusion in the stakeholders' report).

iii. With specific regard to the work of the Advisory Committee it has to set forms of interaction, among others, with NHRIs (See para.82 of the de Alba Package).

iv. With regard to Council's Special Sessions, in this event immediate communication has to be secured by the Council Secretariat to relevant NHRIs that can submit specific information on the situation under consideration (para.125).

For sake of completeness, it might be also briefly recalled their work vis-à-vis the Treaty-monitoring Bodies. Almost all relevant Treaties contain specific provisions on the establishment of specific national focal points that would serve as a domestic

[117] although Council's Resolution 5/1 generically indicates both NGOs and NHRIs under the term, "other relevant Stakeholders."

agent reporting to the treaty committee on the implementation of international human rights obligations by the relating country. Shortly after the adoption of the 1966 Covenants, UN Member States were requested to give comments on the establishment of national commissions. Since then, in considering the States' reports, Treaty Bodies avail themselves of NHRIs – where they exist - as a unique source of independent information.

In this regard, the Paris Principles refer to the NHRIs' contribution "to the reports which States are required to submit to United Nations bodies and committees, and to regional institutions, pursuant to their treaty obligations." By General Comment XVII, CERD recommends States to establish national commissions or other appropriate bodies in order to promote respect for the enjoyment of human rights without any discrimination. ESCR is clearer in this regard. It indicates that NHRIs have a crucial role to play in promoting and ensuring the indivisibility and interdependence of all human rights. CRC also calls upon States to establish a national body for monitoring the implementation of CRC provisions. More importantly, the last Treaties, such as the above-mentioned OPCAT[118] and the recently entered into force Convention on the Rights of Persons With Disabilities (CRPD),[119] indicate a specific role for NHRIs.[120]

On a general note, scholars argue that such Institutions can follow-up to the recommendations of both the Treaty-monitoring Bodies and Special Rapporteurs.[121]

Indeed NHRIs prove to be an essential actor in the domestic protection system as well as a key stakeholder within the UN HR machinery. The work of NHRIs at the local level has contributed to significant achievements, as shown by the existing Institutions in France, Colombia, Ghana, Uganda, Indonesia. In the last Secretary-General Report to the GA (See UN Doc. A/65/340 of August 2010), NHRIs are considered as the ideal local partners for international human rights mechanisms, in order to further promote and protect human rights.

At the last session of the Council (September 2010), Member States have adopted a Resolution (UN Doc.A/HRC/RES/14/5), by which the Council stresses, inter alia, the role of NHRIs in preventing human rights violations. Specifically it stipulates, as follows (See its Op. 3): "Welcomes the role of national human rights institutions to the prevention of human rights violations, and encourages States to strengthen the

[118] See Articles 17 – 19.

[119] as entered into force on May 3, 2008)

[120] It is, indeed, the current practice of Treaty-monitoring Bodies to request States Parties, to establish or strengthen NHRIs. Each Treaty-Body (CAT, CCPR, HRC) that has considered Italy, over the last years, has recommended the prompt establishment of an independent NHRI, to be in accordance with the PP.

[121] See Kjærum, M., National Human Rights Institutions Implementing Human Rights, Martinus Nijhoff Publishers, Danish Institute for Human Rights, 2003, p. 1-26, available at: http://nhri.nic.in/pdf/NHRI-Implementing%20human%20rights.pdf.

mandate and capacity of national human rights institutions, where they exist, as necessary, to enable them to fulfil this role effectively in accordance with the Paris Principles". Council's members have thus decided to acknowledge and eventually strengthen the preventive role of NHRIs. It is thus self-evident that NHRIs are entering a relatively new stage within the UN HR machinery.

Against this background, NHRIs are subject - like NGOs, - to specific questions by States that cast doubts on their role, by claiming the need to better define it.[122] With a view to the 2011 Council Review Process, there are ongoing debates on whether: NHRIs should have separate powers and be distinguished from NGOs; NHRIs with A Status should be differentiated, in terms of privileges (such as the speaking right), by those being not fully accredited.

2.1.1. The origin of the post of the High Commissioner and the Office of the High Commissioner for Human Rights, within the UN framework

Within the framework of the UN system of promotion and protection of human rights, it is generally acknowledged that the UN High Commissioner for Human Rights and her Office significantly contribute to advancing "all human rights (See the Vienna Declaration and Programme of Action – Section II, para.18)", internationally, regionally and domestically.

The need for this post within the UN was stressed in 1947 when one of the drafters of the Universal Declaration of Human Rights, René Cassin, proposed to set up an Attorney-General for Human Rights.[123] But the "inaction doctrine" of the Cold War did not allow to comprehensively tackle this issue.[124] Throughout that period, human rights were dealt with by various UN Secretariat departments and programs, such as the UN Centre for Human Rights.

In the course of the prep-activities to the Vienna World Conference, the idea of this post was resumed by Amnesty International.[125]The 1993 Vienna World Conference

[122] See Brett, R., Digging Foundations or Trenches?U N Human Rights Council: Year 2, Quaker United Nations Office, August,2008, p.10-16, available at: http://www.upr-info.org/IMG/pdf/RachelBrett_DiggingFoundationsorTrenches.pdf; see also Human Rights Monitor ISHR, No.65/2007, p.26.

[123]Op.cit.supra in note 23 (p.11,88); see also Wille, P.F., The UN HR machinery: developments and challenges, in international human rights monitoring mechanisms, Vol. 35, M. Nijhoff Publishers, 2009, p.9; See further Clapham A., Creating the High Commissioner for Human Rights: the outside story, in European Journal of International Law 5, 1994, p.556-568

[124] See General Assembly Resolution 2333(XXII) 1967 by which the Assembly could not follow-up on the Commission/ECOSOC recommendations to consider the "creation of the post of High Commissioner for Human Rights", due to its heavy programme of work (December 1967).

[125] Op.cit.supra in note 9 (p.95).

sealed it, by recommending the creation of the post of High Commissioner for Human Rights and the relating Office, within the UN Secretariat.

At that Conference, 171 UN Member States (See Section II, lett.A, paras.17-18 of UN Doc. A/CONF.157/23) recognized "the necessity for a continuing adaptation of the United Nations human rights machinery to the current and future needs in the promotion and protection of human rights, as reflected in the present Declaration and within the framework of a balanced and sustainable development for all people". On that occasions, it was highlighted that United Nations human rights organs improve their coordination, efficiency and effectiveness. "[To this end] (para.18.) They also recommended the General Assembly that, when examining the report of the Conference at its forty-eighth session, it could give, on a priority basis, consideration of the question of the establishment of a High Commissioner for Human Rights for the promotion and protection of all human rights[126]".

At the end of 1993, following lengthy negotiations - and 45 years later the initial proposal by R. Cassin -, it was reached a compromise Resolution. In this regard scholars recall that some countries – and even the then UN Secretary-General, B. B. Ghali – did not look favourably to this post.[127]

At the 48th session, the General Assembly resolved to establish the post of the High Commissioner for Human Rights and the relating Office of the High Commissioner for Human Rights, within the UN Secretariat. By GA Resolution 48/141, UN Member States detailed the relevant functions. It first provides indication on the general mandate of the High Commissioner (and her Office): "[op.3] the High Commissioner for Human Rights shall: (a)Function within the framework of the Charter of the United Nations, the Universal Declaration of Human Rights, other international instruments of human rights and international law[..] to promote the universal respect for and observance of all human rights, in the recognition that, in the framework of the purposes and principles of the Charter, the promotion and protection of all human rights is a legitimate concern of the international community; 4. Decides that the High Commissioner for Human Rights shall be the United Nations official with principal responsibility for United Nations human rights activities under the direction and authority of the Secretary-General."

[126] By GA Resolution 48/141, the High Commissioner is appointed by the UN Secretary-General, following the approval by the GA, and holds the rank of the Under –Secretary General.
[127] Op.cit.supra in note 123 (Wille); See also Ramcharan, B.G., The Future of the UN High Commissioner for Human Rights, in The Round Table, Vol. 94, Issue 378, January 2005, p. 97-112.

The it sets forth the following ten tasks: “within the framework of the overall competence, authority and decisions of the General Assembly, the Economic and Social Council and the Commission on Human Rights, the High Commissioner's responsibilities shall be:

> (a)To promote and protect the effective enjoyment by all of all civil, cultural, economic, political and social rights;
> (b)To carry out the tasks assigned to him/her by the competent bodies of the United Nations system in the field of human rights and to make recommendations to them with a view to improving the promotion and protection of all human rights;
> (c)To promote and protect the realization of the right to development and to enhance support from relevant bodies of the United Nations system for this purpose;
> (d)To provide, through the Centre for Human Rights of the Secretariat and other appropriate institutions, advisory services and technical and financial assistance, at the request of the State concerned and, where appropriate, the regional human rights organizations, with a view to supporting actions and programmes in the field of human rights;
> (e)To coordinate relevant United Nations education and public information programmes in the field of human rights;
> (f)To play an active role in removing the current obstacles and in meeting the challenges to the full realization of all human rights and in preventing the continuation of human rights violations throughout the world, as reflected in the Vienna Declaration and Programme of Action;
> (g) To engage in a dialogue with all Governments in the implementation of his/her mandate with a view to securing respect for all human rights;
> (h)To enhance international cooperation for the promotion and protection of all human rights;
> (i)To coordinate the human rights promotion and protection activities throughout the United Nations system;

(j)To rationalize, adapt, strengthen and streamline the United Nations machinery in the field of human rights with a view to improving its efficiency and effectiveness;

(k)To carry out overall supervision of the Centre for Human Rights[128] [..].”

From the above it emerges that, in accordance with Article 97 of the Charter of the United Nations, the OHCHR has been thus established within the UN Secretariat. In accordance with Article 1, Article 13 and Article 55 of the Charter of the United Nations and the 1993 Vienna Declaration and Programme of Action, it has been decided that the High Commissioner and her Office promote and protect human rights, as guaranteed under international law and stipulated in the Universal Declaration of Human Rights. In particular, it was decided that the High Commissioner would act to help prevent gross violations, coordinate international and regional human rights activities, and contribute to the rationalization of the UN HR machinery.[129]

In 1997, the former UN Secretary-General called for enhancing this area, by the human rights mainstreaming throughout the UN.[130] In this wake, it was stressed, as a matter of priority, the coordination of the relevant UN Human Rights machinery, to ensure efficiency and effectiveness. In this regard, over the years, the High Commissioner and the Office have enhanced their activities, in line with the above requests and more specifically the requests by the Commission on Human Rights. As discussed this body was used to adopt approximately 110/115 Resolutions per year, the majority of which contained requests for specific support and advisory services by the Office. In this regard it seems correct to argue that the more the High Commissioner and her OHCHR are engaged in assisting States “to remove obstacles to the full realization of all human rights and in preventing the occurrence of human rights abuses”, the more it emerges a functional shift from a coordination (See above Op4, lett.i of GA Res. 48/141) to a *de facto* leading role in the field of the promotion and protection of human rights. Alternatively it might be argued that, over the years, the OHCHR has greatly enhanced its activities.

[128] The above-mentioned Centre was later consolidated into the OHCHR.

[129] On September 15, 1997, within the UN reform programme (See UN Doc. A/51/950, para. 79), the Office of the High Commissioner for Human Rights and the Centre for Human Rights were consolidated into a single office: the Office of the United Nations High Commissioner for Human Rights. See also Ramcharan, B. G., The Office of the High Commissioner for Human Rights, in international human rights monitoring mechanisms, Essay in Honor of J.T. Toller, vol. 35, M. Nijhoff Publishers, 2009, p. 199-205.

[130] In 1997, by his report "Renewing the United Nations: A Programme for Reform", the former Secretary-General designated human rights as a "cross-cutting issue" for the whole United Nations (UN) system and asked for human rights to be "mainstreamed" into the programmes, policies and activities of all UN specialised agencies, programmes and funds).

At the beginning of his tenure, the first High Commissioner, Amb. J. Ayala Lasso immediately decided to dispatch, a field mission of his Office in the Great Lakes Region, during the Rwandese genocide.[131]From that experience, the OHCHR has developed an increasing number and variety of technical cooperation projects, upon request by, or with the consent of, the State concerned or upon the requests by means of Commission's Resolutions. It has thus developed its own Field Presences (acronym, FP). As of 2009, OHCHR counted over 50 field presences across the world.[132]

2.1.2. The role of the OHCHR in the early XXI century

As discussed, the 1990s witnessed: the eruption of internal armed conflicts, particularly in Africa and in the Eastern Europe; the 1993 Vienna World Conference, and the launch of the UN reform by the former UN Secretary-General (UN Doc. A/51/950, entitled "A programme for reform").

At the outset of the XXI century, by setting the Millennium Development Goals, the 2000 Millennium Summit (See UN Doc. A/RES/55/2) resulted in an opportunity to effectively mainstream human rights throughout the UN.[133] But the 9/11 events, the US-led operations in Afghanistan and Iraq, the admission of new UN Members and overall the new actors in the international scenario warranted ad hoc self-assessment exercises.[134]

Accordingly, by the UN Report on Strengthening the United Nations (UN Doc. A/57/387 of 2002), the former UN Secretary-General called for initiatives in four areas relating to human rights, namely the enhancement of activities in support of national protection systems within countries, the enhancement of support to the Special Rapporteurs and other Special Procedures, the reform of the Treaty Bodies system, and the improved management of the OHCHR. By the UN Report, entitled "A More Secure World: Our Shared Responsibility (See UN Doc.A/59/565 of December 2004)", the sixteen sages of the High-level Panel on Threats, Challenges and Change proposed to

[131] Op.cit in supra note 129.

[132] Seventeen human rights advisers in Albania, Ecuador, Great Lakes, Guinea, Indonesia, Kenya, the Republic of Moldova, Nicaragua, Niger, Papua New Guinea, Russian Federation, Rwanda, Serbia, South Caucasus, Sri Lanka, Macedonia and West Africa (Dakar); eight country offices in Bolivia, Cambodia, Colombia, Guatemala, Kosovo, Mexico, Nepal, OPT, Togo and Uganda; twelve regional offices in all regions and sub-regions of the world; and sixteen participation in UN peace missions between Asia and Africa.

[133] See See also Cadin, R., Carletti, C., Spatafora, E., "Sviluppo e diritti umani nella cooperazione internazionale. Lezioni sulla cooperazione internazionale per lo sviluppo umano", Giappichelli, 2007, p.190 et ff.

[134]See Schrijver, N.J.,The Future of the Charter of the United Nations, in von Bogdandy, A., and Wolfrum, R., MAX PLANCK YEARBOOK OF UNITED NATIONS LAW, Vol.10, Eds. M. Nijhoff, 2006, p.13; See also Ramcharan, B.G., The Future of the UN High Commissioner for Human Rights, in Round Table, ed. Kent University, 2005, p. 103 et sequitur.

reform the Commission and to strengthen the Office of the High Commissioner for Human Rights.[135] To this end, the former UN Secretary-General requested the then High Commissioner for Human Rights, to submit a Plan of Action, within 60 days (See para.145 of UN Doc. A/59/2005).[136]

Accordingly the OHCHR indicated (UN Doc. A/59/2005/Add.2), in May 2005, the five areas to be strengthened:

i. Greater country engagement;
ii. Enhanced human rights leadership role for the OHCHR;
iii. Enhanced cooperation with UN agencies and the system at large, particularly to ensure a better coordination and a more coherent functioning of the relevant UN machinery;
iv. A closer relationship with civil society, particularly with NHRIs;
v. Building and enhancing the capacity of the Office, at the management and administrative levels (The High Commissioner also emphasized the need to close the current knowledge, capacity and implementation gaps in the field of promotion and protection of human rights).

At the Millennium Summit+5 (September 2005), UN Member States[137]recognized the need to strengthen the OHCHR, to enable it "to respond to the broad range of human rights challenges facing the international community, particularly in the areas of technical assistance and capacity-building, by doubling the OHCHR's regular budget, over the next five years, with a view to progressively setting a balance between regular budget and voluntary contributions, keeping in mind other priority programmes for developing countries and the recruitment of highly competent staff on a broad geographical basis and with gender balance, under the regular budget (UN Doc. A/RES/60/1)".

They also reiterated the support for a closer cooperation between the Office and all relevant UN bodies, including the Security Council, the General Assembly and the Economic and Social Council. In particular they acknowledged that OHCHR might embody interests of all relevant stakeholders and should assist States to close "gaps",

[135] As reported under Chapter I, they focussed on the Commission whose composition had greatly contributed to spread the perception of the over-politicization of the work of this body. As already recalled, in this regard, they indicated as a viable solution the universal membership in lieu of changing the admission criteria. They also considered the option, to be developed in a longer term, of the replacement of the Commission with a Council, on par with the Security Council.
[136] See Nanda, Ved. P., The global challenges of protecting human rights: promising new developments, in Denver Journal of International Law and Policy, Vol.34, No.1, 2006, p.7.
[137] And also dealt with the Responsibility to Protect (R2P).

particularly in implementing the fundamental principles of the international law of human rights, as enshrined in the UN Charter, the international Bill of Human Rights and relevant world conferences, such as the Vienna Conference.[138]

While indicating the role of the OHCHR within the UN, the above normative framework outlines the results to be achieved by the Office, in particular in the field of technical assistance and capacity building.

Since then, the OHCHR has introduced the practice of preparing a Strategic Management Plan, by which to indicate its activities vis-à-vis the priority areas, such as the right to development, the access of women to justice, climate change, extreme poverty, religious and ethnic conflicts, and so forth.

With the establishment of the Council in March 2006, UN Member States have decided in operative paragraph 3 of GA Resolution 60/251 that the Council should: "promote the effective coordination and the mainstreaming of human rights within the United Nations system." In operative paragraph 5, they have decided that the Council shall, inter alia: "(*g*) Assume the role and responsibilities of the Commission on Human Rights relating to the work of the Office of the United Nations High Commissioner for Human Rights, as decided by the General Assembly in its resolution 48/141 of 20 December 1993".

Despite the propositions contained in the 2005 Outcome Document, the wording referring to the OHCHR seems to indicate the willingness of UN Member States to maintain it within the mandate defined in 1993.

Within this framework, the OHCHR remains within the UN Secretariat and, as envisioned in GA Resolution 48/141, works with all other UN bodies and organs. It continues to provide advisory and support services, among others, to the Human Rights Council and its relating mechanisms, such as the Advisory Committee and the UPR. However scholars note that there are some ambiguities. It is argued that the use of the terms "coordination" and "mainstreaming" relating to the Council (See the above Op.3) may be interpreted as an attempt to narrow the mandate of the OHCHR or even worse to affect its independence (See above Op.5, lett.g) [139]. On March 15, 2006, at the adoption of GA Resolution 60/251, the Chinese Ambassador to the UN stated that "According to the Resolution establishing the Council, this will "guide" the work of the Office".

[138] Op.cit supra in note 136; see also Bahrer, P.R., Non-Governmental Human Rights Organizations in International Relations, Palgrave, 2009, p. 62.
[139] See op.cit. supra in note 124 (Clapham); See also Marquez Carrasco and Nifosi Sutton, The UN Human Rights Council: Reviewing its First Year, in Yearbook on Humanitarian Action and Human Rights, University of Deusto and Pedro Arrupe Institute of Human Rights, 2008, p.108.

In response to the above expectation, it should be stressed that the OHCHR falls within the UN Secretariat: It does rely and refer to Article 97 of the Charter of the United Nations, which lays down: "The Secretariat shall comprise a Secretary-General and such staff as the Organization may require". Art.98 of the Charter sets forth: "The Secretary-General [and thus the High Commissioner] shall act in that capacity in all meetings of the General Assembly, of the Security Council, of the Economic and Social Council [.] and shall perform such other functions as are entrusted to him by these organs. The Secretary-General [the High Commissioner] shall make an annual report to the General Assembly on the work of the Organization". *Mutatis mutandis*, the High Commissioner for Human Rights already reports annually to both the Council and the General Assembly. This very element strengthens the position of the Office within the UN Secretariat.

The practice of last years shows that the Council has assigned to the OHCHR an increasing number of activities. As a way of example, since June 2006 the OHCHR has been providing assistance to the President of the Human Rights Council.[140] The OHCHR also assisted the Council during the institution-building process (2006-2007). Rule 14 of Council's Resolution 5/1 of June 2007 envisages: "The Office of the United Nations High Commissioner for Human Rights shall act as secretariat for the Council" The OHCHR also ensures the secretariat for the UPR mechanism (Para.15, lett.b, Para. 15, lett.c, Para.16 of Council's Resolution 5/1), in addition to its traditional support for the Advisory Committee, Special Procedures, Treaty-monitoring Bodies, NHRIs, fact-finding missions, commissions of enquiry, and so forth.

The practice also shows that the Council tends to requests technical cooperation projects and FPs of the OHCHR rather than the creation or the renewal of country Special Rapporteurs and Independent Experts.

As a way of example, mention has to be made of the cases referring to the situation of human rights in the Republic of Guinea and in the Democratic Republic of Congo, respectively. In both cases, the African Group strongly rejected the possibility to establish ad hoc Special Procedures (Council's Resolutions, A/HRC/13/L.14 and A/HRC/13/L.23 of March 2010).

In this context, questions arise with regard to the mandate of the OHCHR.

[140] In this regard the General Assembly has decided that whatsoever final decision on the Office of the President will be decided within the Human Rights Council Review process (See UN Doc. A/RES/64/144). Without predicting the final outcome, it is most likely that the OHCHR will continue this endeavour. Prof. Clapham has recently argued that the office of the Council's President should be established with the support of the OHCHR but under the UNOG umbrella. Should such idea be pursued, it would pave the way to unbundle various Units of the Office with the risk of a domino effect (file with the Author). See also Ramcharan, B.G., The UN High Commissioner for HR, the challenges of international protection, in international studies in human rights, M.Nijhoff Pub., 2002, p.1-100.

2.1.3. The mandate of the OHCHR

By Op.5, lett.g. of Resolution 60/251, the GA has decided, inter alia, that the Council should: "(*g*) Assume the role and responsibilities of the Commission on Human Rights relating to the work of the Office of the United Nations High Commissioner for Human Rights, as decided by the General Assembly in its Resolution 48/141 of 20 December 1993". In accordance with GA Resolution 48/141, the High Commissioner for Human Rights shall perform, inter alia, the coordination of human rights-related initiatives; mainstream human rights across the UN system; offer her good offices; voice the concerns of the victims of human rights violations.

The very issue at stake refers to the enhancement of the mandate of the OHCHR. Over the years, the Office has developed many activities, from awareness-raising campaigns to early warning measures, from the rapid response unit to a broader presence in the field.[141] All the above activities contribute substantially and operationally to advance human rights. Through information, outreach, early warning activities, preventive action, assistance to peace missions and the general provision of advice and assistance to those that request it, the OHCHR aims at assisting Member States in closing implementation, knowledge and capacity gaps in the field of human rights. By its assistance to UN Member States to develop, maintain or enhance a strong national system of promotion and protection of human rights, the OHCHR ensures a better understanding of human rights, internationally, regionally and nationally.

As discussed, the current mandate of the OHCHR specifically includes responsibilities for providing substantive support to other components of the United Nations human rights system, including, among others, the Council, the UPR mechanism, the Special Procedures and nine Treaty-monitoring Bodies[142]. The OHCHR is also responsible for the promotion and protection of over 40 specific human rights, particularly by providing support, advisory and research activities for about 40 Special Procedures and, more broadly, for over 50 Field Presences.[143]„

[141] including by increasing capacity-building initiatives, support for NHRIs and peace missions, support to Special Procedures, Treaty Bodies, Advisory Committee, Human Rights Council and the UPR mechanism and an important research sector (RRD Division, standing for the Research and Right to Development Division).

[142] Human Rights Committee; Committee on Economic, Social and Cultural Rights; Committee on the Elimination of Racial Discrimination; Committee on the Elimination of Discrimination against Women; Committee against Torture; Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Committee on the Rights of the Child; Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families; and Committee on the Rights of Persons with Disabilities).

[143] four types of field presence: country offices, regional offices, human rights advisers and human rights components of peacekeeping missions. In December 2008, there were 50 such field presences.), all over the world (See last SMP of the Office for the biennium 2010-2011, available at www.ohchr.org. See also the OHCHR Annual Reports, available at www.ohchr.org; see also UN OIOS report, A/64/263. See further Ramcharan, B.G., The Office of the High Commissioner for Human Rights, in international human rights monitoring mechanisms, Essay in Honor of J.T. Toller, vol. 35, M. Nijhoff Publishers, 2009, p. 199-205.

From a thematic standpoint, the 2010-2011 OHCHR priorities refer to: "Ensuring the realization of human rights in the context of migration; protecting economic, social and cultural rights in efforts to combat inequalities and poverty, including in the context of the economic, food and climate crises; protecting human rights in situations of armed conflict[144], violence and insecurity; combating impunity and strengthening accountability, the rule of law and democratic societies; and strengthening international human rights mechanism and the progressive development of international human rights law".

To achieve fruitful results in all the above fields, in line with article 55, lett. c of the UN Charter,[145] it should be acknowledged the complexity of the OHCHR's mandate and its need for support. In September 2009, the General Assembly acknowledged that the OHCHR has made important contributions to the promotion and protection of human rights, "by raising the visibility of human rights issues in the international community, providing support to build and embed a human rights capacity in national legislation and institutions and contributing to the implementation of the human rights-based approach across the United Nations system (See UN Doc. A/64/203 of September 2009)". The scope of the Office's mandate has broadened, as the international community demands a more effective presence. There is an increasing trend of UN Member States to request the Office's advisory services (as is the case with Haiti, Cambodia, Uganda, and the DRC, just to mention a few) It might be thus argued that the most visible function of the Office refers to its advisory services (a component initiated in 1996 and under constant expansion). This area has enormously increased. During the 2008-2009 biennium, more than one half of the Office's total staff of 996 and over one half of its budget was allocated to activities and offices in the field.[146]

In terms of technical cooperation, among its tasks, the OHCHR reviews existing legislation and provides support for drafting new legislation (See UNAMI

[144] also meaning the exploration of a closer link with the R2P)

[145] All the above activities primarily indicate the OHCHR engagement to mainstream human rights into the UN system and at the country level, in particular by providing advisory services and technical cooperation projects. For the present biennium 2010-2011, by its last SMP, the OHCHR has identified, among relevant areas of intervention, a greater country engagement and closer partnerships with others within and outside the UN system.

[146] Table 1 compares the proportion of staff and financial resources dedicated to field operations in 1996 - when the first OHCHR field presence was established - and in 2008. As illustrated, the proportion of OHCHR staff in the field has increased fivefold between 1996 and 2008 and the field budget rose even faster.

Table 1. - **Comparison of OHCHR resources allocated to the field, 1996 and 2008**

(Percentage)	1996	2008
Staff in field	9.0	50.3
Budget in field	4.0	51.0

Source: OHCHR data)

mission in Iraq which has helped to draft the legislation on the establishment of an NHRI), to be in compliance with international human rights standards and treaties. It also supports Governments and civil society in the preparation of reports as required under international standards and the UPR mechanism (See its activities in Colombia and Uganda).

Against this very complex background, it persists both the attempt to micro-mange the OHCHR and the criticism against its composition.

As for the budget, at the 2005 World Summit, it was decided to double the OHCHR's resources (See 2005 World Summit Outcome, UN Doc A/60/1 (2005), para. 124 and A/59/2005/Add.3, of 26 May 2005) which, at that time, amounted to approximately 100 million US dollars. In 2006, shortly after the establishment of the Council, scholars[147] stressed that "the credibility of the ongoing reform process relies on the resources to be allocated to the OHCHR [..]".

In 2008 the UN Secretary-General underlined the expansion of the work of the OHCHR. To this end, UN Member States confirmed their commitments. In 2009 the OHCHR budget, including both regular budget and voluntary contributions, amounted to 180 million US dollars.

Notwithstanding the increase in the funding, the amount of resources which are allocated for its work covers only approximately one third of its overall funding needs. The increasing, though insufficient, funding might be explained by the tension arising from the High Commissioner's mandate. As the holder of this post, she is secretary to the UN while also mandated to speak out on human rights violations committed by States.

Almost two-thirds of the Office's budget is financed through voluntary contributions.[148] This voluntariness may undermine the independent performance of the Office's mandate. For instance, while many countries un-earmark the voluntary contributions to the Office, many more States regularly and entirely earmark their voluntary contributions. In 2009, only 35 out of 77 contributors did not earmark in full or partly their contribution. Some countries have also proposed that the allocation of voluntary contributions should be decided by States and not by the High Commissioner. This issue remains outstanding if one considers the wording of Article 100, para.1, of the UN Charter concerning the impartiality and independence of the UN Secretariat: "In

[147] See Marchesi, A., and Palmisano, G., Il sistema di garanzia dei diritti umani delle Nazioni Unite: prospettive di riforma e limiti intrinseci, in www.costituzionalismo.it, 2006, p.18.
[148] See op.cit. in supra note 127 (p.97).

the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization".

The issue of the budget-earmarking remains pending. China and South-Africa, on behalf of the African Group, submitted a relevant Resolution (See UN Doc. A/HRC/4/L.15), in March 2007, on "the strengthening of the OHCHR". By this Resolution, the Council underlined that: "the un-earmarked contributions of donors are on the increase, which gives the Office of the High Commissioner the flexibility in the allocation of resources for its operational activities in accordance with the resolutions of the Council and other relevant UN organs and bodies, and with a view to treating all human rights in a fair and equal manner". As discussed the choice of the terms in relevant Resolutions is not random. The words "flexibility" and treatment of "all human rights in a fair and equal manner" may pave the way to future disputes on the extent of the flexibility and the rights to be considered. On that occasion, the EU called for a vote; and the Western Group voted against (though the Resolution was adopted with 35 votes in favour, no abstention and 12 votes against - again a picture of the divisive approach within the Council).

The independence and the work of the OHCHR is challenged also with regard to its composition. In this regard it should be recalled the traditional Cuban Resolution, on "The composition of the Office", which is usually adopted by a majority of UN Member States, at both the Council and UN GA Third Committee level (UN Doc. A/RES/61/159 and UN Doc. A/HRC/RES/13/1 of April 2010).[149]

This initiative embodies the divisive approach within the Council. Most developing countries claim their under-representation within this Office, which seems to foster, they argue, an unbalanced perception of human rights situations across the world.[150]

In this case it might be argued that there is the risk of undermining the implementation of either Article 100 or Article 55-56 of the Charter of the United,

[149] At the second session of the Council, the Cuban draft Resolution 2/L.16 on the composition of the OHCHR was withdrawn, *in limine*. At the fourth session, China presented a draft Resolution (Resolution 4/L.15) on the strengthening of the OHCHR, which was adopted with 35 votes in favour and twelve abstentions. At the seventh session, Resolution 7/L.8/Rev. 1 was adopted with 34 votes in favor, 10 votes against and 3 abstentions. At the tenth session, the relevant Resolution 10/L.21/Rev.1 was adopted with 33 votes in favor, 12 against and 2 abstentions. At the thirteenth session, the Council adopted the Cuban initiative, 13/L.18, with 31 votes in favor, 12 against and three abstentions.

[150] Along these lines, it is worthy of note the recent cross-regional request, mainly by the African Group and NAM, during the HRC review process (See Chapter VI), of converting the OHCHR into a UN specialized agency (which would diminish somehow the role of the High Commissioner and distance the Office from the UN Secretariat).

devoted to the independence of the UN staff and to cooperation for the realization of the respect for human rights, respectively.

Conclusion

"Human rights must be seen as human institutions kept alive through our collective power", whereby the supra-institutions above human rights can guarantee their existence, Hannah Arendt *(as quoted by Parekh, S., "Hannah Arendt and the Challenge of Modernity: A phenomenology of human rights," 2008*)

Provided that States remain the imperative actors of international law, the development of international human rights law, after WWII, has emphasized the role played by "other relevant stakeholders", including NGOs and NHRIs, within the UN HR machinery.

The relevant intergovernmental processes are developing international goals and norms. But to be meaningful, they require the effective participation - and not only the involvement - of a "wider circle of stakeholders". This scenario does indicate that UN Member States should comply with the broad normative basis as developed over the years, in line with Article 1, para.3, Articles 55-56, and Article 71.

In the early XXI century, the former Secretary-General, Kofi Annan stressed: "Without respect for human rights, neither security, peace nor development is possible[151]". The relevant challenges do remain ahead and refer to the effective implementation of the relevant normative framework set out by the Charter of the United Nations and the Universal Declaration of Human Rights.[152]

[151] See the 2005 Secretary-General Report, A/59/2005, entitled "In Larger Freedom"
[152] Op. cit.supra in note 127 (Ramcharan).

CHAPTER VI

The Review - not a reform - of the Council, "within five years"

"The review offers the opportunity to find ways to hone and better fulfil the high mandate bestowed upon the Council. The Council should find ways to enhance its ability to deal with chronic and emergency human rights situations and increase the impact of its work on the ground. This would enhance the credibility of the Council and would better meet the expectations of the wider human rights community (I will continue to alert the Council on such situation, in line with my mandate, whenever necessary)[1]"

INTRODUCTION

The Preamble to the Charter of the United Nations sets forth "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women". The principle of the promotion of respect for human rights was thus identified as one of the main objectives of the new Organization (See Art.1, para.3).

Unlike the mandate of the past League of Nations, being mainly focused on the protection of the territorial integrity[2], the Charter of the United Nations envisages various and general tasks for the Organization, including the promotion of the

[1] See the speech delivered on September 13, 2010, at the 15th session of the Council, by Mrs. N.Pillay, High Commissioner for Human Rights, available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10317&LangID=E.

[2] See Schrijver, N. J., UN Reform: A Once-In-A-Generation Opportunity?, IOLR 2, 2005, p.271-275; See also Ramcharan, B.G., The Future of the UN High Commissioner for Human Rights, in The Round Table, Vol. 94, Issue 378, January 2005, p. 97-112. With a critical approach, Prof. Nowak observes that the relevant UN Charter's provisions lack of reference to the obligation of protecting human rights. See Nowak, M., Introduction to the International human rights regime, Nijhoff Publishers, Boston-Leiden 2003, p.73, 104, 131, et seq..

international cooperation for the universal realization of human rights (Art.1, para.3). All the Charter's provisions, including references to human rights, generically state that respect for human rights must be promoted. In this regard, it is worth recalling: The Preamble; Article 1, para.3; Article 13, para.1, Arts.55-56, Art.62, para.2, Art. 68.

In particular, the UN founders envisaged that the Economic and Social Council could establish relevant functional commissions "for the promotion of human rights (Article 68)".

At the first session, the past Human Rights Commission, chaired by Mrs. E. Roosevelt, was entrusted to prepare recommendations and reports regarding an international Bill of Human Rights.[3]

Between 1946-1948, the then Commission drafted the Universal Declaration of Human Rights[4]: "the most important UN Resolution of all times (A/RES/217(III) A)"[5].

Since then, the Commission elaborated the human rights *corpus juris* of international human rights law.[6]

In 1968, at the Teheran World Conference on Human Rights, it was stressed the entry into force (in 1948) of "an obligation for the members of the international community". The 1968 Proclamation of Teheran reinterpreted the UDHR: "(para.2) The Universal Declaration of Human Rights states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the international community (UN Conf. A/CONF.32/4)". A merely soft law declaration, "a common standard of achievement" developed in an obligation for the international community[7].

In this vein, new human rights treaties were adopted to better reflect the new stances, mainly stemming from the decolonization process, in the following fields: the elimination of racial discrimination; economic, social and cultural rights; civil and political rights; women's human rights; the prohibition of torture; and the rights of the child[8]. Accordingly, it emerged the need to ensure the implementation of these standards: an activity which gradually developed in one of the major protection tasks of the UN, by Treaty-monitoring Bodies and the Commission itself through its relating

[3] See the Introduction to the Thesis.
[4] See UN Doc. A/810 at 71 (1948).
[5] as adopted by 48 States, zero negative vote and 8 abstentions . Scholars argue that the lack of negative votes showed the commitments towards this document. Op.cit supra in note 2; see also Marchesi, A., Diritti Umani e Nazioni Unite, diritti, obblighi e garanzie, Ed. Franco Angeli, 2007, p.3-102.
[6] This is an incredible achievement if one considers the differing positions of participants at the San Francisco Conference (1945) who did not want to include the issue of human rights in the Charter of the United Nations. See Normand, R. and Zaidi, S., HR at the UN: The political history of universal justice, Indiana University Press, 2008, p. 107-177.
[7] By that Proclamation it was also launched a broader Agenda of the Commission on Human Rights.
[8] And more recently, it is worthy of mention the protection of the rights of migrant workers; the rights of the persons with disability; and the convention on enforced disappearance.

mechanisms such as the Special Procedures. It was thus developed the concept of protection on a double-track: from a legal standpoint the TB are to control and monitor the state of implementation of relevant obligations and more generally the state of compliance of States Parties to the relating international binding Treaty; from a political standpoint, the Commission was entrusted to examine the gross violations of human rights occurring in any part of the world: It could act upon, accordingly, by means of Resolutions, which could envisage the creation of a specific Special Procedure's mandate.

The above standard-setting process was thus instrumental in setting up an extensive network of monitoring mechanisms and tools, such as reporting procedures, working groups, special rapporteurs, independent experts, technical cooperation projects, field operations, urgent appeals and, under strict circumstances, complaints procedures[9].

In 1988, at the 40th anniversary of the UDHR, it was stressed the need to develop training and information campaigns in the field of human rights. The then UN Secretary-General launched a World Information Campaign on Human Rights (E/CN.4/1993/29 and Add.1), by which he mandated the Commission to propose relevant activities to both the UN system at large and UN Member States (E/CN.4/RES/1993/49). It has been argued that the Commission became "the most important policy body in the field of human rights[10].

After the fall of the Berlin Wall, the 1993 Vienna Conference contributed to scale up the development of the UN system of promotion and protection of human rights, based on a new conception of human rights, free from any hierarchy between human rights' generations[11]. The world leaders spelled out the principles of universality, inter-relatedness and indivisibility of all human rights. It was also decided to establish the Office of the High Commissioner for Human Rights within the UN Secretariat[12]. In that juncture, it seemed that the institutional position of the Commission was to be reviewed since a functional small-sized Commission of the ECOSOC could not match anymore the emerging needs in the field of human rights. Its broad Agenda and the adoption of an increasing number of thematic and geographic Resolutions (with an

[9] See Report No.38, available at http://www.aiv-advice.nl)

[10] To better reflect the new geopolitics and stances, the size of the Commission increased in 1962, 1967, 1980 and 1992, respectively: from the initially 18 members to 21, 32, 43 and lastly 53 member States, respectively (See ECOSOC Res. 1990(48). An increasing number of NGOs participated in the work of the Commission, in accordance with Art..71 of the UN Charter. Some scholars recall (See N. Schrijver, op.cit. supra in note 2) that it was the first UN body allowing NGOs to address it; See also Alston, P. The Commission on Human Rights, in United Nations and Human Rights, ed. Alston, The United Nations and Human Rights: A Critical Appraisal, Clarendon Press, Oxford, 1992, p.126. See further ECOSOC Res. 1979/6.

[11] See the Vienna Declaration and Programme of Action (A/CONF.157/23).

[12] See A/CONF.157/24.

average of 110/115 Resolutions, per year) corroborated this perception. During the early years of the XXI century, procedural debates and dilatory practices, such as the so-called "no-action motion", dominated the work of the Commission[13].

Despite various efforts, such as the Selebi Report (See UN Doc. E/CN.4/2000/112), regional blocs' policies conditioned any attempts to comprehensively address the working methods of the Commission. In 2002, the Agenda and the working methods of the Commission were slightly improved[14] although the remedies, introduced by the UN Commission. could not stop the criticism. The early XXI century resulted in a missed opportunity to strengthen the human rights machinery.

The Commission was targeted by many countries, including the US, the OIC and NAM members (Pakistan, Egypt, Cuba, and China, to mention a few[15]), that challenged it on the ground of the politicization and the application of double-standards, as shown by the "naming and shaming" practice under Item 9 of the Commission's Agenda, entitled "Questions of violations of human rights in any part of the world".

As discussed, in 2003, the then UN Secretary-General established the High-Level Panel that delivered, on December 2, 2004, a Report[16], by which it was stressed that the Commission was not credible anymore. Those countries that did not want to undergo any international scrutiny, it was argued, "use this body, as a shield[17]". The (draft) resolutions on the situation of human rights in Belarus, Chechnya, China, and Zimbabwe could not be adopted. Since 2001, session after session, these resolutions were either postponed through no action motions or rejected: the two consecutive draft Resolutions on the situation of human rights in China, (E/CN.4/2001/L.13 and E/CN.4/2004/L.37), as submitted by the US, were postponed, through no action motions (adopted with 23 votes, 17 against and 12 abstentions, and 28 votes, 16 against and 9 abstentions), at CHR 57 and CHR 60, respectively; the EU draft resolution on the situation of human rights in Zimbabwe, E/CN.4/2003/L. 37, was postponed through an African Group-backed no action motion proposal (as adopted with 28 votes in favour, 24 against and one abstention); as for the two consecutive EU draft Resolutions on the situation of human rights in Belarus (E/CN.4/2004/L.22 and E/CN.4/2005/L.32), the Russian Federation proposed a no action motion, in 2004 and in 2005, respectively. The former no action motion was rejected with 22 votes in favour, 22 against and 9

[13] which are an "*escamotage*"/subterfuge to postpone any decision to be taken on the human rights situation in a given country (e.g. China, the Sudan, Zimbabwe, Chechnya). See Chapter I.
[14] See ECOSOC Decision 2002/274
[15] See Alston, P., Re-conceiving the UN human rights regime: Challenges confronting the new UN Human Rights Council. Melbourne Journal of International Law, 7, 2006, p. 185.
[16] UN Doc. A/59/565.
[17] See Chapter I.

abstentions, on the contrary the latter was adopted by 23 votes in favour, 23 against and 7 abstentions; the EU draft Resolution on the situation of human rights in Chechnya, E/CN.4/2004/L.29, was rejected by 12 votes in favour, 23 against and 18 abstentions; and the EU Resolution on the situation of human rights in Zimbabwe, E/CN.4/2004/L.33, was defeated by an African Group-backed no action motion, as adopted by 27 votes in favour, 24 against and 2 abstentions[18].

Given the above context, the former UN Secretary-General proposed to replace the Commission with a Human Rights Council, to be on equal footing with the other UN Councils[19]. He aimed at: "a smaller, standing Human Rights Council", to ensure a more authoritative position for human rights (A/59/2005 (2005), para.182).

To overcome the alleged double-standards practice, he also introduced the concept of the universal peer review, aimed at scrutinizing the enforcement of human rights obligations and commitments by all UN Member-States.[20]

Twelve years after the Vienna Conference (1993-2005), in an international scenario marked by global new threats and challenges, it emerged the need to signal a change in the UN approach. The stark contrast between the relevant work of the UN, particularly through its inter-governmental bodies, and the situation on the ground strongly contributed to emphasize the need for reform[21].

At the eve of the 2005 World Summit (September 2005), reforming the human rights machinery became an important component of the broader UN Reform Agenda. Nevertheless it has been argued[22] that the Summit's Outcome Document devoted only few paragraphs to the human rights sector[23].

While the Commission aimed at merely adjusting itself by enlarging its size and improving its working methods, UN Member States want to "reform" it. It was decided a new body replacing the Commission: "The Council will be responsible for promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner". Procedurally, the States requested the then President of the General Assembly, Amb. J. Eliasson, to conduct open, transparent and inclusive negotiations, to be completed as

[18] For a comparison of the information on the effective situation on the ground, see also the relevant annual survey by Freedom House, available at www.freedomhouse.org.
[19] such proposal would have entailed the amendment of the UN Charter (See Article 7- Article 108)
[20] See Annan's address to the 61st session of the Commission on Human Rights on April 7, 2005 and by a further explanatory note, entitled United Nations Human Rights Council, April 2005, available at http://www.un.org/apps/sg/sgstats.asp?nid=1388.
[21] See Hampson F.J., An Overview of the Reform of the UN Human Rights Machinery, in Human Rights Law Review, Oxford University Press, 2007, p.7-27. See also Tomuschat, C., Human Rights: Between idealism and realism, Oxford University Press, 2008, p.1-24

[22] Op.cit.in supra note 2.
[23] See paras. 119-131 of GA Resolution 60/1.

soon as possible, during the sixtieth session (2006), with a view to determining the mandate, modalities, functions, size, composition, membership, working methods and procedures of the new Council. Six months later, the GA reached, on March 15, 2006, a controversial agreement, meaning a non-consensual Resolution, to establish "the Human Rights Council, based in Geneva, in replacement of the Commission on Human Rights, as a subsidiary organ of the General Assembly (Op.1 of GA Resolution 60/251)".

By replacing the Commission on Human Rights, the Council was set with the aim of being potentially upgraded into a "main UN organ". Though the General Assembly decided to postpone the definition of the final status of the Council. Rather it was decided that it would work, on a transitional basis, up to 2011 (See OP.1 of GA Res. 60/251).

Under no other circumstances, this choice finds a precedent in the field of the UN institutional reform. More generally, at both the international and regional levels, no Organization has ever created a body with such format. Indeed this is a brand new dynamics within the UN system, most likely reflecting the tension between the political will of States to preserve their sovereignty – and the transitional nature of the Council seems to confirm it - and the acknowledgement of the third pillar of the UN, namely human rights, together with economic and social development, peace and security.

The opposite stances have led to postpone the review of the status of the Council "within five years" as a compromise between States, aimed at establishing a subsidiary organ of the General Assembly (Article 22 of the Charter of the United Nations) and those willing to make it a "main organ" of the UN (Article 7 of the Charter of the United Nations).

In June 2007[24], at the adoption of the IB Package (See Council's Resolutions 5/1-5/2), the newly established Council showed no common positions or views on both human rights policies and the role of the United Nations system in this field[25].

As a way of example, it might be recalled that, during the institution-building process (2006-2007), it was raised the issue of better coordinating the "guardians of the UN HR system", namely the Treaty-monitoring Bodies. The aim was to ensure coordination among all Treaty Bodies under the same umbrella.[26] It referred to moving

[24] See Schrijver, N., "The UN Human Rights Council: A New Society of the Committed or Just Old Wine in New Bottles?" in The Protection of the Individual in International Law, Special Issue of the Leiden Journal of International Law, Cambridge University Press, 2007, p.81 et sequitur; See also Burci, G., The UN HR Council, in the Italian Yearbook of International Law, Vol. XV, 2005, 25, p.25-41.
[25] See the modalities of the adoption of the IB Package in Chapter I.
[26] When the relating system had been developing, one TB, namely CESCR, was set up within the ECOSOC and the others under the Commission framework; within the Commission, some TBs were NY-based, while most were Geneva-based.

the Economic, Social and Cultural Rights Committee from the Economic and Social Council to the Human Rights Council framework. When States' delegations gathered in Geneva, in 2007, to discuss this issue, there was a general agreement on the need to make that system more coordinated. However it was argued (The UK, South Africa, among others) that any amendments would require long-standing procedures. No decision was thus taken to solve this problem (See Council's Resolution, A/HRC/RES/4/7 of March 2007). At present, the CESCR Committee still remains under the authority of the Economic and Social Council.[27]

The initial difficulties of the Council prove that the past weaknesses have not been addressed properly yet[28]; and the transitional status of the Council emphasizes that the possibility of a new UN main organ (Article 7 of the Charter of the United Nations) devoted to human rights remain an aspiration *de jure condendo*.

1. Reforming the Institutions

The UN history shows that no wide reform has been introduced, so far. The choice of replacing the Commission with the Council, as a subsidiary body of the GA (Art.22 of the UN Charter), seems to confirm it.

Further, the modalities to amend the UN Charter - which were long-debated at the San Francisco Conference (April 1945) - do not facilitate whatsoever reform process.[29] In particular scholars argue[30] that the introduction of the veto power has affected any reform process.

At the San Francisco Conference, the five Permanent Members of the UN raised the threshold for proposing any amendments to the UN Charter, in order to preserve their prerogative (as inferred by the four requirements of Art.108). More positively it might be argued that the founders of the UN Organization wanted to set a constitutional framework *to prevent the future generations from the scourge of war*[31].

Article 108 of the Charter of the United Nations sets forth an *aggravated procedure,* which is typical in countries that have chosen a rigid Constitution, such as

[27] See Tistounet, E., From the Commission on Human Rights to the Human Rights Council: Itinerary of a Reform Process, in International Law, Conflict and Development, by Kalin, W., Kolb, R., Spenlé, C.A., Voyame, M.D., M. Nijhoff Pub., Leiden/Boston, 2010, p.338.
[28] See Scannella, P., and Splinter, P., The United Nations Human Rights Council: A promise to be fulfilled, in HR Law Review, 2007, p. 41 et sequitur.
[29] See Chesterman S, Franck T.M., Malone D.M., The Law and Practice of the UN, Oxford University Press, 2008. p.5 et ff.
[30] Luck, E.C., Reforming the United Nations: Lessons from a History in Progress, in the united nations: confronting the challenges ahead, ed. Krasno, 2004, p.359 et ff.
[31] Op.cit.supra in note 29. See also Papisca, A., Quod barbari non fecerunt, fecerunt Barberini. L'assalto all'edificio dei diritti umani, Archivio Pace e Diritti Umani, 2/2006, p.7-19. See further Ziccardi Capaldo G., The pillars of global law, Ashgate, 2008, p. 305 et ff.

Italy. It does require: a vote by two-thirds of the members of the GA, the ratification by two-thirds of the members of the UN, and the support ab initio by the P-5. It sets out as follows: "Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council".

This procedure makes extremely difficult any reform's attempt of the UN system, especially if considering the current UN membership (192 Member States) combined with the required aggravated majorities.

As a consequence, only few amendments of a procedural nature have been made so far, referring to: the enlargement of the size of the Security Council (once) and the Economic and Social Council (twice), respectively. Along these lines, the Charter still includes Articles which result to be outdated or never enforced, such as Chapter XIII and Art. 43 et ff**.**[32].

The most evident example of the current difficulties is the long-debated reform of the UN Security Council which, despite the many calls for changes, remains pending on the negotiations table. In this regard the 2004 High-level Panel proposed two models**[33]** for reforming the Security Council. But neither Model A nor Model B has been effectively pursued so far.[34] The 2005 World Summit resulted in a missed opportunity. At that Conference, despite the discussion on both the HLP Report and the Secretary-General's proposal[35], no effective institutional reform process was initiated with regard to the Security Council. As discussed, the only "achievement" of that Conference refers to the establishment of the Human Rights Council, though with a transitional status**.**[36]

At the institutional law level, it has been argued that "when an Institution fails to function as planned, changing the institution blueprint is inevitable". In view of this, one might justify the replacement of the Commission with the Council.

The political theorist, M. Oakeshott, developed and elaborated the theory whereby both Institutions and States reflect and encapsulate the tension between two

[32] See Conforti, B., Manuale Diritto Internazionale, ESI, 2005.
[33] See UN Doc. A/59/565, paras.14, 244-260.
[34] Op.cit.in supra note 2.
[35] See UN Doc.A/59/2005.
[36] For a critical overview of that Conference, see op.cit.in supra note 21.

different conceptions of association: purposive and not purposive, corresponding to the concepts of *universitas* and *societas*, respectively[37].

In the field of International Organisations, the above tension emerges in the inter-governmental bodies.

When considering the UN collegial bodies, it is not so difficult to detect elements of the above stances. The initial years of the Council (June 2006 onwards) reflect the above tension as long as there are States that have attempted to set "a debating club (*societas*) and those that have attempted to create the conditions for an effective mechanism (*universitas*).

In this view, the current negotiations on the Council's review remain unpredictable. Indeed this process is divided between "the idea of institutions as purposive, technical, managerial entities (*universitas*) and the idea of a non-purposive, debating club (*societas*)".

To better define the Council's review framework, it should be considered that, from an institutional standpoint, the composition and terms of reference of any subsidiary organ are always decided and thus changed under the responsibility of the parent body[38]. The Council is not an exception. Thus, from a procedural standpoint, GA Resolution 60/251 triggers a dual negotiations process (as laid down in Op.1 and Op.16), to be carried out in parallel by both the General Assembly and the Council itself.

Within this framework the Council's President presented an oral report, in September 2010, by which he stressed that the two processes, though distinct, are mutually reinforcing.[39]

2.1. The UN Human Rights Council review process: the preliminary stage

By operative paragraph 1 of GA Resolution 60/251 (dated March 15, 2006), UN Member States decided that the General Assembly "review the status of the Council within five years". By operative paragraph 16, the General Assembly also decided that

[37] Klabbers J., 2004, Constitutionalism Lite, International Organization Law Review, Vol. 1, n.1, p.55; See also Oakeshott, M., on Human Conduct, Oxford, Clarendon Press, 1975.
[38] See Article 22 of the UN Charter; see also Ramcharan, B.G., The Quest For Protection, a Human Rights Journey to the UN, eds., 2004, p.7-18, see further Ramcharan B.G, Lacunae in the law of international organizations: the relations between subsidiary and parent organs with particular reference to the Commission and the Sub-Commission on Human Rights, in Nowak M., Steurer D., and Tretter H., Fortschritt in Mewubtsein der Grund-und Menschenrechte, Progress in the Spirit of Human Rights, HRSG/Editors, 1989, p.37-49.
[39] available at : http://www2.ohchr.org/english/bodies/hrcouncil/HRC_review.htm

"the Council review its work and functioning five years after its establishment and report" back to the General Assembly[40].

Procedurally, the above indications refer to three different deadlines:

i. The "within five years" deadline, which clearly indicate that the review of the Council's status is to be concluded – theoretically - by March 15, 2011 (to reflect the date of the adoption of GA Resolution 60/251. However the President of the Council and the President of the General Assembly have already agreed that the GA will conclude its work by July 2011);

ii. The review of the work and functioning of the Council, which has to take place "five years after its establishment", namely by June 19, 2011 (in this regard the President of the Council has assured the President of the GA that this deadline will be respected);

iii. The third review, as inferred by operative paragraph 14-Section D of Council's Resolution 5/1 (the so-called IB Package) referring to the UPR mechanism, which is meant to take place after the conclusion of the first UPR cycle, in October 2011.

In particular, para.14 sets out as follows: "[a] The universal periodic review is an evolving process; the Council, after the conclusion of the first review cycle, may review the modalities and the periodicity of this mechanism, based on best practices and lessons learned."

In March 2006, the General Assembly fixed the year 2011 as the term to re-assess one of the main pillars of the UN, namely the human rights pillar. To do so, UN Member States decided to share the workload between New York and Geneva: the status of the Council is to be reviewed in New York; and the work and functioning of the Council is to be reviewed in Geneva, respectively[41].

At the beginning of the review process, during the human rights segment of the 64th session of the UN General Assembly (October 2009), UN Member States started

[40] See Open-ended seminar at Montreux of April 20, 2010, available at: http://www2.ohchr.org/english/bodies/hrcouncil/Informal_Initiatives.htm; see also Tistounet, E., From the Commission on Human Rights to the Human Rights Council: Itinerary of a Reform Process, p.325 353, in International Law, Conflict and Development, by Kalin, W., Kolb, R., Spenlé, C.A., Voyame, M.D., M. Nijhoff Pub., Leiden/Boston, 2010, p. 336-337-347.

[a] The universal periodic review is an evolving process; the Council, after the conclusion of the first review cycle, may review the modalities and the periodicity of this mechanism, based on best practices and lessons learned.

[41] The latter has to report back to the GA, at the latest by June 2011.

approaching the above deadlines [42]and expressed their preliminary views on the role of the Council. On October 29, 2009, at the presentation of the annual Council's report, Libya, Egypt and Cuba recalled the positive results achieved by the Council since the adoption of the Code of Conduct for Special Procedures Mandate-Holders (Council Resolution 5/2). China and Bangladesh stressed the importance of the Special Sessions' tool and their expectations that the UPR mechanism might replace Item 4 of the Council's Agenda (designed for dealing with country situations), respectively. Other Member States stressed, for differing reasons, the importance of the UPR. On one hand, Western countries expressed their support for this new mechanism as an additional complementary tool within the relevant system; on the other, the Russian Federation emphasized that 70% of the UPR recommendations are being implemented so as to infer that there is no need for other tools. Jamaica underlined that it is the UN Third Committee to be the UN body in charge of dealing with all human rights. Bangladesh also underlined that the UN Third Committee should remain the political body, while the Council should play a more technical role.

Despite the reference in the above oral statements to the forth-coming Reform, GA Resolution 60/251 indicates a different pattern. This Resolution does not mention either a reform or any amendment process (Art. 108 of the UN Charter). The choice of the wording indicates the strong will of UN Member States, both drafters and supporters of this Resolution, not to upgrade the Council. On paper, there is a pending issue relating to the Council, whether to remain a subsidiary body (Article 22 of the Charter) or to become a main organ of the UN (Article 7 of the Charter). Should the GA pursue the upgrade of the Council, the new status of the latter would require a reform of the UN Charter, which does not seem feasible in this juncture (given in particular the current divisive approach between the West and the Rest).

In 2009, UN Member States launched various informal seminars and meetings in all the regions of the world, as follows: the Mexican meeting, in October 2009; the Paris meeting, in January 2010, the Wilton Park meeting (in the UK), in February 2010; the Algiers retreat, in February 2010; the Montreux seminar, in April 2010; the Rabat

[42]See http://www.un.org/News/Press/docs/2009/gashc3956.doc.htm; http://www.un.org/News/Press/docs/2009/gashc3957.doc.htm; http://www.un.org/News/Press/docs/2009/gashc3958.doc.htm; http://www.un.org/News/Press/docs/2009/gashc3959.doc.htm; http://www.un.org/News/Press/docs/2009/gashc3960.doc.htm. See also statements delivered before the Council on September 13, 2010: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10318&LangID=E.

meeting, in May 2010, the Seoul meeting, in July 2010, and the Bangkok meeting, in December 2010.[43]

At the initial seminars, States noted the risk of overlapping and duplicating the negotiations. The coordination efforts between the principal organ and its new subsidiary body are, in fact, under test. Working towards a common goal cannot be taken for granted if one considers the different location and composition between the Council (a small-sized body, based in Geneva) and the GA (with its universal membership, based in New York) and thus the differing majorities and approach to the subject.

The GA is the only "main organ" of the UN with the ability to reflect the view of each and any Member State regardless of the regional group's approach. The universal membership of the General Assembly might provide the opportunity for more transparent negotiations, besides leaving adequate *marges de manoeuvres* to the Western Group, while the smaller size of the Council already puts the EU and its partners, in a minority position.

During the Montreux seminar (April 2010), it was noted that the status of the Council should be –theoretically - defined by the Assembly within March 2011 (five years after the adoption of GA Resolution 60/251), while the Council should assess, review and define its work and functioning, by June 2011 (five years after its inception in June 2006). States' delegations expressed some concern about the timing of the parallel though "distinct processes.[44]"

How to ensure a close coordination between Geneva and New York, provided that instructions on negotiations, as a general rule, are from the capitals? Having regard to the different composition and context, it would have been more logical to consecutively review the status and the work and functioning of the Council, by ensuring an adequate lapse of time between the two processes. On the contrary, in early 2010, the General Assembly President agreed with the Council President that any decision on the status of the Council will be adopted by July 2011, shortly after the

[43] available at: http://www2.ohchr.org/english/bodies/hrcouncil/Informal_Initiatives.htm. In parallel, various NGOs (Amnesty International (Asian Legal Resource Centre (ALRC), Asian Forum for Human Rights and Development (FORUM-ASIA), Association for the Prevention of Torture (APT), Baha'i International Community, Cairo Institute for Human Rights Studies (CIHRS), Canadian HIV/AIDS Legal Network, Centre on Housing Rights and Evictions (COHRE), Conectas Direitos Humanos, Franciscans International, Friends World Committee for Consultation (Quakers), Human Rights Watch (HRW), International Commission of Jurists (ICJ), International Federation for Human Rights Leagues (FIDH), International Federation of Action by Christians for the Abolition of Torture (FIACAT), International Service for Human Rights (ISHR), NGO Group for the CRC, World Organization Against Torture (OMCT)) put forward, The ten principles to guide a successful outcome of the review of the Human Rights Council as it relates to the special procedures, as retrieved on August 26, 2010, at: www. http://www2.ohchr.org/english/bodies/hrcouncil/docs/10_SP_principles4_May_2010.pdf.

[44] See Oral Report of the Council's President on the HRC Review at HRC15, available at: http://www2.ohchr.org/english/bodies/hrcouncil/15session.

relevant Council decisions (to be taken by June 2010).[45] The above decision is questionable, as long as it is the parent body that has the organizational responsibility of the subsidiary body. It is indeed the General Assembly, meaning the entire UN membership, that has to provide guidance. The above choice will impact on the Assembly's decision. Any attempts in Geneva to narrow the Council's mandate and its relating mechanisms will reduce the scope for negotiating a possible upgrade of the Council into a main organ of the UN, in New York.

On the occasion of the Montreux seminar (in April 2010), it was argued that "a specific main organ has been already created to achieve all the purposes of the UN as listed in Article 1 of the Charter of the UN Nations except in the human rights field, which remains relegated to a subsidiary body". In this regard[46], many countries[47] recalled the Secretary-General's proposal to make more effective the linkage among the three pillars of the UN, by establishing three Councils (main organs of the UN) devoted to peace and security, economic and social issues, and human rights, respectively[48].

In addition to the status of the Council[49], States identified the pending issues: the mandate and the resources of the Council, the membership, the added value of the Advisory Committee and the relating complaint procedure, the duration of the mandate of the Special Procedures and the Agenda and annual Programme of work of the Council.[50]

As for the mandate, the Council is responsible for promoting and protecting all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner. However, it has been argued that the Council has not fully lived up to its mandate and potentialities due to its inability to address grave human rights situations in a timely or adequate manner, as was the case with Sri Lanka or Equatorial Guinea. The potentiality of its mandate has not been properly explored with the result that this lack of efficiency decreases the Council's credibility.

Besides, the excessive focus of the Council on specific situations, such as the Palestinian-Israeli conflict confirms the unbalanced approach to human rights situations.

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[45] See the oral progress report by the Council President, available at http://www2.ohchr.org/english/bodies/hrcouncil/HRC_review.htm.

[46] Suisse, Permanent Mission, Summary Report on "The open-ended seminar on the review of the Human Rights Council", Montreux, April 20, 2010, p.4, available at: http://www2.ohchr.org/english/bodies/hrcouncil/Informal_Initiatives.htm

[47] The Chatham House Rule was applied and thus meaning that the source of any proposal or comment cannot be reported save the intervention of the President of the Human Rights Council who spoke in his official capacity.

[48] See UN Doc. A/59/2005.

[49] The Council's status as a subsidiary organ of the GA results in an upgrading of the past position of the Commission in the UN hierarchy. Since it is deemed that human rights is one of the three UN pillars, together with peace and security, and development, the *pendant naturel* of this process should be the ultimate upgrade of the Council to become a principle organ of the UN. Such a decision would, however, require a Charter amendment, potentially opening a 'Pandora's box' for other changes to the Charter. Considering all the remarks put forward throughout this research, this course of action is unlikely to be pursued)

[50] See Wilton Park Conference W1013 Reviewing the work and functioning of the human rights council. What are the priority issues? 14 – 16 January 2010, Page 2 of 14, available at: http://www.wiltonpark.org.uk/news)

The modality to address human rights situations under Item 4 has been reduced because many States claim the full use of new tools such as the UPR, briefings, panels, presidential statements and, in the event of emergencies, Special Sessions[51]

The special attention paid by the vast majority of UN Member States to the UPR risks to endanger a more in-depth analysis on prevention, early-warning tools in the event of frozen conflicts (such as the case of the Nagorno-Karabakh) and long-neglected situations (such as the situation of human rights in Chechnya). Unlike the G-77 Group, the EU has underlined that the scope of Agenda's Item 4 should be broadened by also including a regional focus (See Art.52 of the UN Charter within Chapter VIII on "regional arrangements").

Over the last years, the UPR has been broadly endorsed as long as it has demonstrated its universality of coverage and adherence to the principle of dialogue and cooperation.

By stressing that "Human rights cannot be used as a political weapon,"[52] G-77 States have proposed to only preserve the UPR to the detriment of Agenda's Item 4. Since the introduction of the UPR mechanism, G-77 members and China have constantly stressed the firm conviction that the UPR is the only effective geographic tool of the Council[53]. Provided its relevance to the UN HR machinery as a "complementary mechanism", only the second UPR cycle will allow to test its efficacy.

Apart from the various pending questions on the follow-up to the UPR and on the introduction of benchmarks and indicators, a common position emerged with regard to the insufficient time allocated to UPR sessions ("three hours for inter-active dialogue before the UPR Working Group is perhaps too short"). Many countries (from G-77) have thus proposed to use regular sessions of the Council to compensate it, with the evident negative effect of reducing the regular working time of the Council, in particular when it is supposed "to address situations of violations of human rights", in accordance with Op.3 of GA Resolution 60/251[54].

[51] See p. 7, Seoul seminar, available at: http://www2.ohchr.org/english/bodies/hrcouncil/Informal_Initiatives.htm See also paragraphs 111, 114 and 118 of Resolution 5/1

[52] Op.cit. in supra note 50. See Wilton Park Conference W1013 Reviewing the work and functioning of the human rights council. What are the priority issues? 14 – 16 January 2010 Page 6 of 14.

[53] See the Montreux final report, available at http://portal.ohchr.org/portal/page/portal/HRCExtranet/Pre-workingGroup/ReviewInitiatives/Final%20Repor; see also statements by relevant States delegations during UNGA65, available at http://www.un.org/News/Press/docs/2010/gashc3998.doc.htm; http://www.un.org/News/Press/docs/2010/gashc3999.doc.htm; http://www.un.org/News/Press/docs/2010/gashc4001.doc.htm)

[54] Op.cit.in supra note 50. See Wilton Park Conference W1013 Reviewing the work and functioning of the human rights council. What are the priority issues? 14 – 16 January 2010 Page 8.

From the above, it might be correctly inferred that, like the past Commission, the Council's work[55] is polarized and carried out on a confrontational basis. Most countries, particularly EU members stress the limits to this review exercise as caused by the existing tension among regional blocs. The Western Group has expressed concern about any possible downward result, should the Council re-open the IB Package (See Chapter I). The risk of a polarization throughout this negotiation process might lead, it has been argued, to: weakening the NGOs' participation; eliminating country mandates; favoring an excessive focus on economic, social and cultural rights to the detriment of civil and political rights; and overall endangering the independence of both the OHCHR and the system of the Special Procedures (SPs).

Considering the current Council's membership and size, most countries, particularly the EU Member States, fear that the re-opening of the 2006 negotiations (leading to GA Resolution 60/251) might worsen the current Council's framework.

As for the Special Procedures (SPs), namely "the eyes and ears of the Council", their function is to provide the Council with expert analysis and advice on the human rights situation on the ground. Following the 2007 RRI process, all thematic SPs were maintained. Three new ones were subsequently created, while few country mandates were retained, and two discontinued. Since then, States, mostly from NAM and G-77, have challenged the independence of SPs, by claiming the lack of objectivity and the conduct of their mandate *ultra petita*.

Over the last three years, the Code has been constantly invoked whenever countries were put under the monitoring lens of the Special Procedures.[56] It is alarming the tendency of most States to criticize thematic Special Procedures. At the time of the Commission, this criticism solely targeted geographic special rapporteurs. At present, this negative approach also applies to thematic rapporteurs whenever it occurs that their reports touch upon specific countries. The African Group, NAM, China and OIC have thus put forward the proposal of establishing an ethical Committee judging the work of the Special Procedures.

As for the confidential complaint procedure, differing views have emerged as to its efficacy. Most States deem that it has little impact and should be replaced under strict circumstances by both the Special Sessions and the UPR process or by

[55] See Suisse, Permanent Mission, Summary Report on "The open-ended seminar on the review of the Human Rights Council", Montreux, April 20, 2010, p.4, available at: http://www2.ohchr.org/english/bodies/hrcouncil/Informal_Initiatives.htm

[56] (On the occasion of the Winston Park seminar, it was noted that some States consider that "the Council does not discuss the substance of SPs reports," but only addresses procedural questions, and permits "the mandate-holder no more than a few minutes in which to respond; by comparison the GA's Third Committee holds a much more inter-active dialogue with SPs."

independent expertise. Considering the narrow mandate entrusted to the Advisory Committee, by which it can provide advice only upon Council's request, developing countries want to retain it as it stands. Scholars[57] argue that "Expertise is important at all levels and stages of the Council" and that the Advisory Committee should be allowed to fully perform its activities including those relating to the complaint procedure.

With regard to the "other relevant stakeholders[58]", the Council has the duty to ensure "the most effective contribution" by the UN specialized agencies, other inter-governmental organizations and NHRIs, as well as NGOs". However a more participatory process is still needed. As recalled in Chapter V, NGOs have a speaking right under the form of "General Comments" prior to the adoption of the Outcome by the Plenary of the Council. However no improvement has been considered so far in order to enhance their participation.

As for the working methods of the Council and its Agenda and Programme of work, a number of issues have been put on the negotiation table. Over the last years, it has been questioned how small delegations and NGOs, being not based in Geneva, may participate in the work of the Council if this maintains a so flexible Program. The Agenda has been also questioned as long as it maintains a stand-alone item on Israel (Item 7), while the other geographic Items (4 and 10) are so little used. These procedural issues will become the test/the battlefield of the two differing positions reflecting the divide between the Western Group and the rest of the world. The former wants to streamline the Agenda while the latter aims at devoting extra time to the UPR (Item 6) to the detriment of Item 4-10. For instance, the EU has put forward the proposal to streamline the Agenda by merging and jointly dealing with the OPT and "urgent situations" under the same Agenda's Item.[59] If the EU proposal is accepted, it will mark a significant improvement in terms of objectivity.

Another specific issue refers to the Council's relations with the Security Council and the Third Committee of the General Assembly, respectively. Provided that UN Member States agree that the Council should interact more with other parts of the UN family, to mainstream human rights throughout the Organization, it is not yet clear the linkage between the Human Rights Council and Security Council.

[57] Clapham (File with the Author).
[58] See Chapter V.
[59] Ibidem (File with the Author).

This is an operational issue with long-term effects. In fact it has been noted that there are approximately sixteen international peacekeeping missions in which the Security Council has mandated a human rights component. Such framework should involve de jure – and not only de facto – the key components of the relevant UN system, namely the Special Procedures that could advise and assist in this process[60], the Council itself and OHCHR. The latter in particular could follow-up on these human rights components.

Along these lines, there is a need to define the institutional relationship between the Human Rights Council and the Third Committee of the GA, which has already led to practical difficulties in the implementation of the Council's work, particularly when the decisions of the latter trigger budgetary implications. In this regard, as per procedure, the GA has to endorse the mandates adopted by its subsidiary organs, including the Council. The GA has the authority to allocate financial resources, annually, on the basis of a report of the Council's work (as prepared in June). It has been noted that any Council's action after June has to wait the GA endorsement, which can occur even 12 month later.[61] On a more general note, it has been argued [62] that many perceive the Council as a principal body, although it remains a subsidiary organ of the GA, institutionally. The discrepancy emerges when considering the different timeframe. The Council is a *de facto* standing body[63] that meets throughout the year while the Third Committee gathers once, a year. Such difficulty was long-debated in 2007, on the occasion of UNGA62. Many Western Group countries challenged the opportunity of the Third Committee to adopt the annual report of the Human Rights Council. The problem has not been properly addressed and solved yet. As noted at the 64th session of the Third Committee by the Egyptian Ambassador, Amb. M. A. Abdelaziz, there is a lack of clarity if one considers that the above report is still submitted to both the GA General Committee and the Third Committee. The ambiguity of this dynamics is not helped by the current parallel though coordinated negotiations in Geneva and New York, which make it difficult to focus on the relationship between the Council and the GA/Third Committee[64].

[60] SPs can also take part in discussions in the Security Council, under the Arria formula.
[61] Op.cit supra in note 50.
[62] Mr. B. Ndyae, available at: http://www2.ohchr.org/english/bodies/hrcouncil/Informal_Initiatives.htm
[63] Op.cit.supra in note (Tistounet).
[64] During UNGA64, it was also argued that, due to its universal membership, the General Assembly should play a guiding role at the standard-setting and programming levels, while the Council should result in its operational arm. The latter should ensure the implementation of the political commitments in light of the international obligations of the States (See Malaysia and Bangladesh). If such a proposal is pursued, it would deny the past role of the Commission and affect the scope of the Council (see UN Press Releases, in supra note 42).

Considering the above questions, from a negotiation standpoint, the simultaneity between New York and Geneva makes more difficult a balanced and result-oriented review. It is most likely that the blocs' policy prevailing in Geneva might produce the narrowing of the mandate of the Human Rights Council, while the New York negotiations might aim at ensuring a primary role for the General Assembly[65]. The risk is a misleading process of a potentially wide *de facto* reform with eventually minimum formal impact. It means that the mandate of the Council (IB Package) will not be reopened but practically reduced through additional filters and requirements, for instance with regard to the Special Procedures. It is thus likely that beside from surgery operations referring to the Advisory Committee and the complaint procedure, the working methods and the mandate of the Council will not vary. Accordingly the GA membership might be oriented to keep the Council under its umbrella. This last arguments are also substantiated by the aggravated amendment procedure, under Art. 108 of the Charter of the United Nations which makes difficult to figure out such a change in this juncture.

2.2. The UN Human Rights Council review process: the current negotiations phase

In accordance with operative paragraph 16 of GA Resolution 60/251 and the so-called IB Package (Council's Resolutions 5/1-5/2), the Human Rights Council decided, at the 12th session (September 2009): to create an open-ended inter-governmental working group (OEWG) on the review of the work and functioning of the Council; and requested its President to undertake transparent and all-inclusive consultations on the modalities of the review.[66]

In line with the above provisions, the Working Group met formally at the end of October 2010. An additional session/consultations round has been scheduled for February 2011, prior to the next main session of the Council (March 2011) so that the Group will report to the Council at the June 2011 session. The relevant inter-governmental exercise will be concluded by 2011 with the general review of the Council: status (Op.1 of GA Resolution 60/251), work and functioning (Op.16 of the GA resolution 60/251), including the UPR (See Council's Resolution 5/1).

[65] It is feasible that the Council will remain a subsidiary organ of the General Assembly with more limited tasks.
[66] See UN Doc. A/HRC/RES/12/L.28, then renumbered A/HRC/RES/12/1.

So far, all main relevant stakeholders (most UN Member States, SPs, Treaty-monitoring Bodies, NGOs and the Office of the High Commissioner for Human Rights) have expressed their views, by addressing written contributions and oral statements on general and specific issues, which have been considered within the intergovernmental Working Group and by the Council at large.

As for the views of Member States, it might be argued that their approach reflects the same dynamics preceding the adoption of GA Resolution 60/251. In March 2005, the African Union members reached the so-called Enzulwini Consensus, in Addis Ababa, which still provides indications about the African Group's position vis-à-vis the Council. They particularly support the idea to maintain a small-sized Council in lieu of a universal membership body (which has favoured so far mainly the African Group to the detriment of the Western Group[67]). During 2005-early 2006 negotiations, the African Group's position was grounded on the nature of the then Commission vis-à-vis its parent body, the Economic and Social Council. Since the ECOSOC is a small-sized collegial body, it has been argued, this composition should be reflected in the Commission and thus in its successor body, the Council. At that time it was invoked a coherent system. Thus the same coherence should be applied to the current review.

Considering the universal composition of the parent body of the newly established Council, it should be expected that the African Union supports a new universal composition of the Council. Unfortunately this is not the case. At present, there is a clear move by G-77 and NAM to preserve their positions.

The Report[68] of the OEIGWG gathered in Geneva, in October 2010, confirms it. By reiterating the principle of State sovereignty, China has stressed its narrow view[69] on: the UPR mechanism (to be diluted), the role of the special procedures (to be overseen by a legal Committee), and the OHCHR (not to remain within the UN Secretariat).

In particular, the Beijing Authorities propose: i. that the UPR remains an intergovernmental/State-driven mechanism (along these lines, the Islamic Republic of Iran, Algeria, Bangladesh, Cuba, Libya, Nigeria on behalf of the African Group, Pakistan on behalf of the OIC, and India); ii. "to develop guidelines for the preparation by the OHCHR of the UPR documents in order to ensure transparency, objectivity, fairness and that the relevant work by the OHCHR strictly abides by the purposes and

[67] Scanlon, H., A Dialogue of the Deaf: Essays on Africa and the United Nations, Ed. A.Adebajo and H. Scanlon, Centre for Conflict Resolution, 2009, p. 131-146.
[68] See UN Doc. A/HRC/WG.8/1/CRP.1/Rev.1.
[69] File with the author.

principles of the UN Charter and fully respect the sovereignty of States under Review (there is the fear that civil society entities with their information for the UPR might alter the general assessment of the SuR); iii. the periodicity of the UPR process should be extended to a five-year cycle (so do Paraguay, the Russian Federation, the Islamic Republic of Iran, Venezuela, Nepal, Thailand, Bangladesh, Saudi Arabia, Malaysia, Morocco, Philippines, Indonesia, Algeria, Egypt on behalf of NAM, Nigeria on behalf of the African Group, Pakistan on behalf of the OIC, Peru, and Colombia); iv. the second UPR cycle should mainly focus on the latest development of human rights situations in the SuR (Along the same lines, the Russian Federation (and Algeria) request that in the 2nd cycle of the UPR it will be given priority to the implementation of recommendations that enjoy the Government's support).[70]iv. a specific monitoring of the monitors.[71] To this end, it should be established "a monitoring mechanism for the review of the compliance with the mandates and the Code of Conduct by the Special Procedure Mandate-Holders, to ensure their impartiality, objectivity, and professionalism" and to initiate a procedure of dismissal of a mandate-holder in case of persistent non-compliance (also Egypt on behalf of the NAM, Nigeria on behalf of the African Group, Pakistan on behalf of the OIC, Sri Lanka, and South Africa that has requested an ethic Committee); v. Nigeria, on behalf of the African Group, Egypt on behalf of the NAM, Sri Lanka, Costa Rica, Iran, and Pakistan on behalf of the OIC have specifically proposed: to establish country specific mandates only with the cooperation of the country concerned (in particular Nigeria on behalf of the African Group, Egypt on behalf of the NAM, and Sri Lanka), or with a two-third majority; alternatively, they have proposed to create regional special procedures (in particular Sri Lanka, Costa Rica) and/or convert some mandates into Working Groups in view of their sensitive nature, to ensure a "representative opinion" on sensitive issues (in particular Nigeria on behalf of the African Group, the Islamic Republic of Iran, and Pakistan on behalf of the OIC)[72].

Besides affecting the existing modalities to deal with gross and/or serious human rights violations, these proposals aim at reducing the scope of the protection mandate of the Special Procedures, in particular of the geographic Special Procedures and, more generally, of the Council itself.

[70] As reported under Chapter III, by the IB Package it emerges that the UPR is an evolving process. The second cycle of the UPR thus becomes crucial to evaluate if the first cycle has been able to activate an effective action-oriented framework (The EU)
[71] See the October 2010 OHCHR Non-paper, available on the extranet of the OHCHR, at www.ohchr.org.
[72] The conversion of individual Special Procedures into Working Groups, indicates the attempt to dilute the independent deliberative process which characterise individuals whereas working groups, based on the principle of geographical distribution of posts, risk to be affected by the polarization of the Council. This, it has been argued, may lead to a reduced level of human rights protection (so Belgium on behalf of the EU.

Along these lines, the negotiations might be conducive to some unexpected results with regard to the Advisory Committee and the complaint procedure.

The US and the EU argue that: "The Committee works in isolation"; and "the scarce resources should be used more efficiently". They have thus proposed the replacement of the Committee with a roster of independent experts[73]. This proposal aims at remedying and overcoming the limits of the mandate and rules of procedures of the Advisory Committee. In its current format, the Committee only deals with three main issues. On the contrary, NAM, OIC, China, and African Group are oriented to retain the newly established Advisory Committee as it stands. The Russian Federation, Cuba, the Islamic Republic of Iran, Algeria, and the Asian Group have reiterated their willingness to keep the Advisory Committee within the framework of the IB Package. Therefore the Advisory Committee shall continue to provide its advice only at the request of the Human Rights Council (Pakistan, the Islamic Republic of Iran, China and Sri Lanka); the Advisory Committee shall not adopt resolutions and decisions (Pakistan). The proposal on the table do not pay tribute to the work of the past Sub-Commission, whose inner coherence could be recuperated, and prove the negotiation limits of the Western Group, whose decisions will not affect the final institutional reform outcome (There is also the risk that the drastic EU proposal may further reduce the tools for victims of human rights violations, as long as the possible elimination of the Advisory Committee would affect the complaint procedure, leaving it in the hand of the Council's WGS). The third vision has been expressed by Canada that proposes: to "better capitalize on diversity of expertise". To this end, the Committee's role should be expanded.

With specific regard to the complaint procedures, the G-77 members[74] have proposed the abolition of the complaint procedure. On the contrary, the Western Group has proposed to retain it, since this is the only victim-oriented mechanism of the Council (though requiring urgent modifications and improvement: "in particular admissibility criteria should be clarified, as well as the current arrangements of the two working groups should be changed (Poland)"). It has been argued that the OHCHR Secretariat received, between January and June 2008, only 30 communications, of which the WG on communications transmitted only six cases to the WG on situations. The latter referred to the Council about only one case., about which the Council decided not to act upon. Like Canada, Switzerland has proposed: that the complaint procedure

[73] File with the Author.
[74] See the proposal by Mexico available at http://www2.ohchr.org/english/bodies/hrcouncil/Informal_Initiatives.htm.

be rendered accessible and genuinely operational (also Sweden and Ireland); and its scope should include "emerging patterns of violations"(see also Belgium on behalf of the EU). The EU thus added the following proposals: the Committee should present to the Council an exhaustive report on all the cases considered under the complaint procedure, including the ones rejected as inadmissible, discontinued or kept under review by the Working Group on Communications (Belgium on behalf of the EU); and there should be the strengthening of the Working Group on Communications and the abolition the Working Group on Situations.

The proposals concerning the Agenda and Programme of Work of the Council reflect the above opposite stances. China, G-77, including Egypt on behalf of the NAM, Pakistan on behalf of the OIC, Nigeria on behalf of the African Group, the Islamic Republic of Iran, Bangladesh, Algeria, Morocco, Malaysia, Libya, Syria, Viet Nam, Bahrain, Lebanon, Venezuela, Saudi Arabia, Thailand, Yemen, the Russian Federation and South Africa are of the view to maintain the Agenda as it stands. It means that the Agenda's Items cannot be streamlined and grouped in geographic and thematic ones. They want to keep the Agenda's Items separated. Standing-alone Items, such as on Racism (current Item 9) and OPT (current Item 7) allow to keep a specific focus on these issues, it has been argued, despite their affinity with other Items, such as Item 3 concerning all thematic issues relating to human rights and Item 4 and 10 relating to geographic-related issues, respectively.

In a minority position, the UK, Australia, the US, Belgium on behalf of the EU, Canada, Japan and Israel have expressed their willingness to simplify the Council's Agenda, in order to make it predictable and more efficient, besides rationalizing the treatment of countries situations: the aim is to eliminate the stand-alone Item on OPT, as one of the few effective inheritances from the past Commission.

As for the programme of work of the Council, many G-77 countries (including Egypt on behalf of the NAM and the Islamic Republic of Iran) have proposed to narrow and reduce the formal regular sessions of the Council, by entirely devoting one of them to the UPR; on the other hand, Norway, Thailand and Venezuela have clearly expressed their willingness to keep the current pattern: "no fewer than three (regular) sessions per year, including a main session, for a total duration of no less than 10 weeks[75]".

[75] See operative paragraph 10 of UN Doc. A/RES/60/251.

At the time of the writing there is however expectation that in the future negotiations rounds Member States will stick to the Charter's provisions, in particular Article 1, para.3 and Articles 55-56.

3. The main issues at stake[76]

From a substantial standpoint, it is important to mention the features of the Council (by which this differs from the Commission on Human Rights, both procedurally and substantially) to better understand the main issues of this review. The Council is characterized by:

i. New and specific admission criteria for membership, in addition to a secret ballot voting by the majority of the GA members;
ii. In order to avoid permanent seats, there are temporal limits to the duration of the seat (no more than two consecutive terms);
iii. Voluntary pledges and commitments and possibility of suspension by a two-third voting in the event of States committing gross and systematic violations;
iv. The regularity of its meetings and a more flexible *modus operandi* (regular and special sessions where the former take place for not less than ten weeks a year, while the latter deal with urgent human rights situations, both thematic and geographic ones, upon request by one of its members with the support of a one-third of the membership);
v. The examination by peers of the compliance of human rights obligations by all United Nations Member States, through the UPR mechanism;
vi. New tools, such as panel discussions, exchanges of views with the High Commissioner for Human Rights, and ad hoc fact-finding missions.

[76] Procedurally, in accordance with Council's Resolution 12/1, the second five-day meeting will take place in February 2011, and a final report will be submitted to the Council at the next June session. In October 2010, it was agreed to hold informal consultations between November and December 2010, under the chairmanship of five facilitators appointed by the Council's President. During the last regional informal meeting in Bangkok, no concrete result was achieved.

From the above, the issues currently at stake refer to: the size and status of the Council, including the criteria for membership and elections; the role of the President of the Council and the establishment of an Office to assist him/her in fulfilling this task; the regular promotion and protection role of the Council; the Special Procedures (SPs)' independence and effectiveness; the follow-up to the Universal Periodic Review (UPR) with a view to an assessment process of its first cycle; ways to enhance the role of civil society, including National Human Rights Institutions established in conformity with the Paris Principles[77]; the position of the OHCHR vis-à-vis the Council; and overall the interaction between the Council and the General Assembly (particularly with regard to the relation between the Third Committee and the Council).

Conclusion

"Reform does not necessarily amount to progress", statement by the then Sub-Commission expert, M. Bossuyt, during the last session of the Sub-Commission on Promotion and Protection of human rights, 2005 (See E/CN.4/Sub.2/2005/SR.5, paras47 et ff).

The UN trend in the field of the institutional reform shows[78] strong foreclosures. Much of the reform-oriented action to date has achieved little results, mainly referring to the rules of procedures of the Security Council, to the size of the main organs (Security Council and ECOSOC) and to subsidiary organs, such as the past Commission on Human Rights and its relating mechanisms, including the then Sub-Commission for the promotion and protection of human rights. When a major decision has been taken, it has been inspired and determined by the political will of States rather than being guided by the UN purposes (Article 1 of the Charter)[79].

Against this background, this Organization has demonstrated the ability to improve the UN programmes and activities, particularly during the last fifteen years. Despite the emerging threats and the new challenges, such as the so-called "war on terror," the difficulties in achieving the MDGs and the international financial crisis,

[77] See Principles relating to the Status of National Institutions (The Paris Principles) adopted by General Assembly Resolution 48/134 of 20 December 1993.
[78] See op.cit. in supra note 30 (p.363).
[79] Thus it seems unlikely that by 2011 the Human Rights Council will achieve the highest status, namely the position of main organ of the UN, as envisaged in 2006. Op.cit.in supra note 24.

adjustment efforts have been made, in particular by the System of Special Procedures and the OHCHR, whose role is pivotal within the UN HR machinery.

Within this framework, it has been noted that the current Council's "review" will not result in a major institutional reform[80]. It is not unrealistic that the review will merely confirm the abilities of the Council, particularly as to the UPR, without adding or better defining procedures, tools and thus role and effects of the Council's work within the UN system of promotion and protection of human rights.

On the contrary, the 2011 review should be felt as a unique opportunity to overcome the limits of the 2005 World Summit and eventually result in an opportunity to strengthen the Council's work.

No one can predict the final outcome of the current "review". However if this would not meet the expectations of the human rights cause, it has been argued that "change happens even if reform does not".[81]

[80] Marquez Carrasco, C., and Nifosi-Sutton, I., The UN Human Rights Council: Reviewing its First Year, in Yearbook on Humanitarian Action and Human Rights, University of Deusto and Pedro Arrupe Institute of Human Rights, 2008, p.102, 107.

[81] Once solved the problem of the role of the Council, in the future, it would be necessary to set "permanent institutional working relationships between conventional and extra-conventional bodies and with other relevant stakeholders, such as UNDP. Op.cit.supra in note 30, (p.390); see also Clapham, A., United Nations Charter-Based Protection of Human Rights (Draft chapter for R. Hanski, M. Sheinin & M. Suski (eds) An introduction to the International Protection of Human Rights, A textbook. Third Edition, Institute for Human Rights, Abo Akademi University, 2009 (forthcoming), p. 1-23.

CONCLUSION

"The promotion and protection of human rights is a bedrock requirement for the realization of the Charter's vision of a just and peaceful world", UN 2002 Action Two Programme, UN Secretary-General Report, entitled, The strengthening of the United Nations: An Agenda for Further Change

The main subject of the present Thesis refers to the origin and functioning of the Human Rights Council and its relating mechanisms, within the UN system of promotion and protection of human rights.

As argued, the "Threats and Challenges" of the early XXI century have irreversibly contributed to "Change" the international scenario (UN Doc. A/59/565 of December 2004). In the past few years, the political dimension of international relations has affected the UN Human Rights machinery more than any other sector of the Organization of the United Nations.

The creation of the Human Rights Council (the Council) and the ongoing definition of its functioning give rise to questions in various fields, in particular with regard to its ability to promote and protect human rights, in accordance with the Charter of the United Nations (1945), the Universal Declaration of Human Rights (1948), and the international human rights treaties entered into force and ratified since then.

Summary

The past Commission on Human Rights increasingly resembled a sort of "General Assembly". It was the only international forum on human rights which developed (with the endorsement of ECOSOC) specific pivotal mechanisms, such as the Special Procedures. It was also the only intergovernmental forum, in which NGOs and NHRIs could actively "participate", though in different ways, in order to address human rights situations and human rights issues.

Notwithstanding its achievements, the Commission was swiftly replaced, after 60 years of intense work, by a new Council on Human Rights. The transition was so

rapid that the general framework of the Council within the UN has not been fully defined yet.

The UN General Assembly established the Council, with an elevated status, as one of its subsidiary organs (Article 22 of the Charter of the United Nations), though postponing any decision (See Op.1 of GA Resolution 60/251) on the Council's upgrade to one of the "main organs" of the UN (Articles 7 – 108 of the Charter of the United Nations), within the year 2011.

The current review process refers to the status (OP.1 of GA Resolution 60/251), the work and functioning of the Council (OP.16 of GA Resolution 60/251 and OP.14, footnote "a" of the Annex to Council's Resolution 5/1). However, since the first regular session of the Council (June 2006), specifically during its first year (the institution-building period), UN Member States negotiated each and every procedure, tool and body relating to the Council as they would continue to operate, in the format which was set out in June 2007 (See the so-called de Alba Package)

As discussed in the preceding Chapters, the Council meets more frequently throughout the year than the then Commission (which convened one main six-week long regular session, per year); members can be suspended (see 15th special session on Libya, on February 25, 2010[1]), though by a two-thirds majority of members of the UN, present and voting in the GA; the UPR has been introduced with the objective of scrutinizing the human rights records of all UN Member States, on equal footing, so as to reduce or possibly eliminate the politicization, which had rampantly affected the last years of Commission.

From a substantive legal standpoint, the Council deals with "all human rights, including the right to development", thus overcoming – *prima facie* – the traditional hierarchy between first, second and third human rights' generations. In this regard Item 3 of its Agenda is entitled: "Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development."

[1] At the time of the finalisation of this Thesis, due to the dramatic escalation of violence in Libya, the EU (Letter by Hungary in UN Doc. A/HRC/S-15/1) – not the African Group – called for a Special Session on the "Situation of Human Rights in Libya" which took place, on February 25, 2011. The relating Resolution (un Doc. A/HRC/S-15/2) indicates "the deep concern with the situation in Libya" and the strong condemnation for "the recent gross and systematic human rights violations committed in Libya, including indiscriminate armed attacks against civilians, extrajudicial killings, arbitrary arrests, detention and torture of peaceful demonstrators, some of which may also amount to crimes against humanity (Op.1)."The Council also "[Op.]9.Reminds the Government of Libya to respect its commitment as a Member of the Human Rights Council to uphold the highest standards in the promotion and protection of human rights and to cooperate fully with the Council and its Special Procedures [--] *Decides* to urgently dispatch an independent, international commission of inquiry, to be appointed by the President of the Council, to investigate all alleged violations of international human rights law in Libya [Op.11]". For the first time, the Council "R*ecommends* to the United Nations General Assembly, in view of the gross and systematic violations of human rights by the Libyan authorities, the consideration of the application of the measures foreseen in OP8 of General Assembly resolution 60/251", namely to suspend Libya from the Council. The Council has thus made full use of the tools at its disposal, consistently with its mandate, though it casts doubts on the effective application of the Council's admission criteria.

Since its inception the Council has begun using specific tools, such as special sessions and special sittings (as for the latter, this tool has been denominated, "urgent debate"), Presidential Statements, ad hoc Panel Debates, fact-finding missions, and commissions of enquiry. At the core of this "Change (See the 2004 HLP Report, A/59/565)", it has been constantly stressed the need to ensure "an objective focus on all human rights". In this regard, UN Member States are used to recall that their actions are guided by the main human rights principles, emanating from the UDHR (1948), the 1993 Vienna Conference (See GA Resolution 60/251) and the international human rights binding treaties, which they have ratified or acceded to.

Despite the above encouraging elements, like its predecessor, the Council is an inter-governmental body, whose resolutions and recommendations (which are not legally binding) are driven by political considerations. In this regard, the new size of the Council, 47 members (while the Commission consisted of 53 members), has significantly impacted on the decision-making process. As discussed, developing countries *de facto* are the ones that effectively set the agenda and agree on the main issues to be dealt with. There are thus areas in which the Council has failed to perform its main mandate. As argued by most scholars and human rights practitioners, the Council excessively focuses on Israeli human rights violations as proved by the high number of Special Sessions devoted to the Israeli-Palestinian Conflict, on racism-related issues, including the elaboration of vague new complementary standards to ICERD (See UN Doc. A/HRC/13/18) and on economic, social and cultural rights, while it does not manage to adequately address - or worse it disregards - other human rights violations, such as the situation of human rights in Zimbabwe, Chechnya or Iran[2] and summary executions committed due to the sexual orientation of the person concerned, or discrimination against LGBT. Along these lines, it is also quite worrisome the new member States' tendency to challenge and narrow the mandates of thematic Special Procedures, such as the mandate on freedom of expression, on freedom of religion and the joint thematic work on sensitive issues, such as the recent study on secret detention and counter-terrorism, by stressing the alleged contravention to the newly introduced Code of Conduct for Special Procedures Mandate-Holders (See Council's Resolution 5/2), which - does not supersede but - should be jointly applied with the UN Charter and the 1946 UN Convention on The Privileges and The Immunities of the United Nations.

[2] The EU continues to submit a relevant initiative at the UN GA Third Committee level, as long as the universal membership of the Committee ensures an objective negotiation of the resolution on the situation of human rights in Iran.

The above approach reflects a dangerous dynamic, being developed within the Council: country-situations have to be negotiated under the supervision of the regional group of the country concerned, which hinders any effective action even by neighbouring countries. There is a sort of "psychological pressure", as illustrated by the African Group position vis-à-vis the situation of human rights in the DRC, Sudan and Somalia, respectively. Along these lines, it seems that the Council, unlike its predecessor, does not apply a gradual approach to country situations. In the past, those countries that were considered under the confidential procedure could be moved to the public debate under Item 9 of the Commission's Agenda, if the situation on the ground did not improve. Should the human rights situation in the country be less a matter of concern for Member States, the Commission usually converted the mandate of the country Special Rapporteur into a country Independent Expert. Theoretically, if the conditions on the ground allowed it, the Independent Expert could be associated with or replaced by a stand-alone OHCHR's Field Presence - thus providing a variety of tools for action in connection with country specific situations. On the contrary, the current practice shows that the Council tends not to apply either the confidential procedure or the public debate under Item 4. Rather, it alternatively resorts either to country independent experts (under Item 10) or to the joint work by thematic procedures or to OHCHR.

The Council's practice shows the distance between the principles of "universality, impartiality, objectivity and non-selectivity [..]", as contained in Op.4 of GA Res. 60/251, and their concrete implementation.

Between June 2006 and June 2010, the Council adopted, without a vote, 293 out of 368 Texts. The consensual decision-making, denounced by Tolley already in 1986, still persists, with the aggravating circumstance that the past Commission was used to adopt an average of 110 Resolutions per year, while, despite its annual intense programme of work, the Council does not go further than 90 Texts, per year.

The practice shows in particular that, by recalling the principles of "dialogue and cooperation", cross-regional blocs do not allow the adoption, in particular, of country resolutions. Some scholars argue that UN Council's Members have not lived up to their responsibilities. Other scholars emphasize that an intergovernmental organ is composed of States' delegates "with the political responsibility to promote the national interests" first and foremost.

Theoretically the above arguments would be correct. However the huge *corpus iuris* that mainly the past Commission created, in accordance with the Charter of the United Nations and the Universal Declaration of Human Rights, remains a driving force. The former UN Secretary-General was used to state that we have just entered the "era of implementation". Therefore, in spite of the reluctance of some Member States this evolving process can no longer be stopped. It is sufficient to recall the "proliferation" of Optional Protocols to relevant international human rights treaties by which to enable individuals, groups of individuals and NGOs to file, under specific legal requirements, a complaint before the relevant Treaty-monitoring Body in the event of presumed violations of human rights committed by the State-Party.

The "complementarity" between the newly introduced Universal Periodic Review mechanism and the Treaty-monitoring Bodies might offer a concrete opportunity for UN Member States to execute their respective relevant obligations as long as the peer review shows their respective "implementation, capacity and knowledge gaps (See the 2005 OHCHR Plan of Action)" to be closed with the assistance of "the other relevant stakeholders", namely NGOs, and NHRIs, and the OHCHR, in accordance with the "UPR follow-up (as envisaged by the Annex to Council's Resolution 5/1 of June 2007, paras.33-38)".

The introduction of the UPR has been welcomed by all stakeholders. Through the de Alba Package (Annex to Council's Resolution 5/1), UN Member States have introduced a mechanism, which exclusively preserves the sovereign equality of UN Member States when reviewing the human rights record of each country, from the most virtuous States to top offenders, such DPRK, Iran and Libya. In this context, two positive elements should be stressed: the frequent "recommendation", to extend "standing invitations" to Special Procedures Mandate-Holders and the objective rise in the number of ratifications of international human rights binding treaties, as recommended in particular by EU countries during the Interactive Dialogues before the UPR WG.

There is expectation that the forthcoming review of the UPR (after October 2011) might introduce some corrections so as to make it more effective, in particular, by allowing greater participation by the "other relevant stakeholders" and generally better use of "external expertise", and by ensuring an automatic standardised follow-up with the assistance of OHCHR. As scholars argue, the UPR can become an effective tool to enhance cooperation towards the realization of national human rights capacities and

infrastructures, in line with the Charter of the United Nations (Articles 1, para.3, 55-56). In particular, the "UPR follow-up" activities have the potential to create synergies among international human rights mechanisms and the wider human rights community, in light of the "recommendations" put forward by UN Member States during the UPR, which are mainly based upon information, recommendation and conclusions, as put forward by the Special Procedures, Treaty Bodies, NHRIs, NGOs and OHCHR.

Against this background, UN Member States should deal also with the issue of the coordination between the Council and the Third Committee of the General Assembly whose universal membership might overcome the limits relating to the new size of the Council (47 member while the Commission counted 53 members). In this regard, the practice shows that despite the references to various guiding principles, the *politicization* conditions the Council's work. The Western Group tends to submit outstanding issues and present Resolutions on situations of violations of human rights, at the Third Committee level, as shown by the EU Resolutions on "the moratorium on the use of the death penalty" and "the situation of human right in Iran," respectively.

There is indeed an expectation that Council's Members will effectively apply the principles of "dialogue and cooperation (GA res. 60/251)". This choice, which remains a political decision, is in the hands of Member States. As such, it will determine the nature (*universitas* rather than *societas*) and the ability of the Council to protect (effectiveness rather than representativeness) human rights, especially when States neglect or fail to do so. To this end, the Council's mechanisms, such as the Advisory Committee, should be strengthened or at least enabled to perform its advisory work (A/HRC/2/2-A/HRC/Sub.1/58/36, p.80). The Council should also more effectively involve NGOs and NHRIs as "stakeholders". The membership should observe the independence of the OHCHR and recognize to it effective *marges de manouvres* by for instance standardising the dialogue of the High Commissioner with the Security Council on a formal and regular basis, as the latest events in Libya would have required. If a leading role cannot be recognized, at least the OHCHR should enhance its *trait d'union* role among all stakeholders to which to provide its independent expertise.

All the above stakeholders participate, though to a different degree, in the UN system for the promotion and protection of human rights, which ultimately relies on the Charter of the United Nations. In this regard, various scholars stress the value, the "constitutional" rank of the Charter. Indeed Articles 1, para.3, Article 13, Articles 55-56, Article 62-68, and Article 71 have set a strong normative line of continuity to

support the third pillar of the UN, namely the promotion and protection of human rights, next to economic and social development, peace and security.

Conclusions

In conclusion, I would like to offer some general reflections on the origin and functioning of the Human Rights Council as the UN Forum on Human Rights within the international system.

The Statute of the International Court of Justice, as annexed to the Charter of the United Nations, enlists in Article 38 the sources of international law - to be applied, by the ICJ when deciding on international disputes. In particular the Court "shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law [*opinion juris sive necessitatis et diuturnitas*]; c. the general principles of law recognized by civilized nations [..]".

As argued in the preceding Chapters, the Charter of the United Nations defined the international relations system in the immediate aftermath of WWII, in addition to laying the foundations of the international legal order aimed at maintaining peace and security. To this end, although placed among the UN purposes (Article 1, para.3), the promotion and protection of human rights was initially designed as being instrumental to peace and security (See the Preamble to the Charter). On the other hand, in line with the Covenant of the League of Nations, the principles of State sovereignty and the consent among States were confirmed as the basic "requirements" for the future Organization with a universal character. Article 2 of the Charter of the United Nations enlists the core principles of this new international relations system, *in primis*, the principles of State sovereignty and "non interference in internal affairs". At the same time, the "erosion (I would rather indicate a tension)" of those same principles was introduced by the development of a "common standard of achievement for all peoples and all nations", namely the Universal Declaration of Human Rights (1948), the subsequent international human rights treaties, the two world conferences on human rights (1968-1993) and the human rights jurisprudence developed by the TBs.

As a matter of fact, especially the above two documents, UN Charter and UDHR, though different in nature, laid the foundations of what is defined, "the international human rights law" or "international law relating to human rights". Within

the UN framework, by the promotion of the universal respect for human rights and fundamental freedoms" it was acknowledged, though generically, that human rights is "a matter of international concern."

Over the years, the past Commission on Human Rights (Article 62-68 of the Charter of the United Nations) was entrusted with drafting most international human rights treaties which, following the ratification by UN Member States and the subsequent entry into force, contributed to create the current *corpus iuris* of international human rights law. As a result, scholars began arguing that human rights might derogate or totally partly erode the basic traditional principles of classical international law.

After "the inaction period" of the past Commission on Human Rights (1947-1967) and, more overtly, after the fall of the Berlin Wall (1989), the principle of State sovereignty and its corollary, namely the principle of "non interference in domestic affairs (Article 2, paras.4-7 of the Charter of the United Nations)" have confronted - *prima facie* – an enhanced process of "erosion".

Considering the preceding Chapters, it would be more correct to argue that given the development of international human rights law, originating from the Charter of the United Nations and the Universal Declaration of Human Rights, the practice of the last decades indicates a current "tension" between purposes and principles of the Charter of the United Nations. As discussed, the above instruments have paved the way to set a normative, procedural and operational framework within which States are obligated to fulfil their human rights obligations, in good faith (Art.26 of the Vienna Convention on the Law of Treaties). In particular, by ratifying or acceding to relevant binding treaties, States have "conventionally" accepted some "interferences" by Treaty-monitoring Bodies so that it might be inferred the quasi-judicial nature of their work. It is therefore evident that some forms of "erosion" of the principle of State sovereignty have been developed, in this specific framework.

On a positive note, the traditional international human rights binding treaties are being incrementally supplemented by Optional Protocols (such as ICCPR, CEDAW, CAT), which allow individuals, groups of individuals and NGOs to file complaint or submit communications to TB[3].

[3] The most recent Protocols are the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, as adopted by the General Assembly in December 2008 (See UN Doc.A/RES/63/117), and the "draft Optional Protocol to the UN Convention on the Rights of the Child, to provide an ad hoc communication procedure (See UN Doc.A/HRC/RES/13/3). One adopted, it will become the third Optional Protocol to the UN Convention on the Rights of the Child.

Aside from these specific obligations, the above "tension" remains without undermining the sovereign equality of UN Member States. At the 2005 World Summit, UN Member States reiterated that the Charter of the United Nations and international law remain at the core of the multilateral system (paras, 2-5-6 of UN Doc. A/RES/60/1): [2] "We reaffirm our faith in the United Nations and our commitment to the purposes and principles of the Charter of the United Nations and international law, which are indispensable foundations of a more peaceful, prosperous and just world, and reiterate our determination to foster strict respect for them; [5] We are determined to establish a just and lasting peace all over the world in accordance with the purposes and principles of the Charter. We rededicate ourselves to support all efforts to uphold the sovereign equality of all States, respect their territorial integrity and political independence, to refrain in our international relations from the threat or use of force in any manner inconsistent with the purposes and principles of the United Nations, to uphold resolution of disputes by peaceful means and in conformity with the principles of justice and international law, the right to self-determination of peoples which remain under colonial domination and foreign occupation, non-interference in the internal affairs of States, respect for human rights and fundamental freedoms, respect for the equal rights of all without distinction as to race, sex, language or religion, international cooperation in solving international problems of an economic, social, cultural or humanitarian character and the fulfilment in good faith of the obligations assumed in accordance with the Charter; [6] We reaffirm the vital importance of an effective multilateral system, in accordance with international law, in order to better address the multifaceted and interconnected challenges and threats confronting our world and to achieve progress in the areas of peace and security, development and human rights, underlining the central role of the United Nations, and commit ourselves to promoting and strengthening the effectiveness of the Organization through the implementation of its decisions and resolutions".

Notwithstanding its nature, the above Resolution synthesizes the road-map determined by UN Member States and their primacy in the international system.

As discussed, they have undertaken a thorough reform of the UN HR machinery by replacing the past Commission with a Human Rights Council. In the preceding Chapters, I therefore attempted to illustrate the most recent developments within the UN HR machinery, in order to assess to what extent the Purpose enshrined in Article 1, para.3, of the UN Charter can be achieved by the Council as the new UN

human rights inter-governmental body, made of "States' delegates". This reform process has opened up a window which is allowing all of us to better understand the workings of the Council and the different approaches within the Council.

The polarization having affected the past Commission still impacts on the new Council since the divide between Member States from different regional groups or simply geo-political regions (especially, the Western Group and the Rest of the World often referred to as the group of the like-minded states) continues to determine the Council's Agenda. The preceding Chapters have also outlined worrisome aspects, such as the narrow mandate of the Advisory Committee. The think-tank of the past Commission, whose studies were at the basis of many new international Declarations or binding Treaties, has been relegated into mere "drafting groups", at the direction of the Council. The lack of independent expertise or the attempt to reduce the *marges de manoeuvre* emerges from the practice and the arrangements relating to NGOs, though remaining the primary source, in particular, of the Special Procedures' protection work[4]. In addition to their specific protection role, NGOs continue to be the prime movers of most Council's promotion-related activities, such as the Brazilian Guidelines on alternative parental care measures (UN Doc. A/HRC/11/L.11 of June 2009) or the draft UN Declaration on Human Rights Education and Training (UN Doc. A/HRC/AC/4/4).

Indeed the practice of the last years of the Council shows that States dominate the international scenario and continue to bear primary responsibility to protect human rights. They decide if, when and how to close "knowledge, capacity and implementation gaps in the field of human rights (OHCHR Action Plan 2005)". They have decided the modalities of the Universal Periodic Review which reiterates their primary role in this sector.

The international human rights protection system thus maintains a subsidiary role. It is activated whenever States are not willing or capable, i.e. fail or neglect to translate or adequately implement their human rights obligations. Even in these cases, despite the protection role of the Council, States are not legally bound to act accordingly. As discussed, the Council's Resolutions (or alternatively decisions and recommendations) are the result of political negotiations and do not produce legal effects but moral persuasion and political pressure. The lack of enforcement or coercive

[4] The same considerations may be applied, to a different extent, to the Treaty-monitoring Bodies if one considers the NGOs' practice to submit, inter alia, the so-called "shadow reports."

power indicates the strong limitations surrounding this system, by which the principle of State sovereignty remains *de jure* and *de facto* at the core of international law.

Against this background, this system, though characterized by both effectiveness (*universitas*) and representativeness (*societas*) forces, is evolving. In this juncture, the very novelty is the Council's focus on the implementation stage and on the follow-up activities, as expressly envisaged within the UPR mechanism (See the Annex to Council's Resolution 5/1 of June 18, 2007). In this regard, the present Thesis has also reported positive results, such as the rise of the number of ratifications of human rights binding instruments and of "extending invitations" to the Special Procedures, as recommended during the reviews before the UPR Working Group and moreover the focus on implementation of recommendations which appears one of the element of consensus emerging from the on-going HRC review. The lack of coercion power is compensated by the development of the follow-up framework, within which OHCHR plays a pivotal role. Through its Field Presences and cooperation programs/activities, it can develop partnerships with other UN components and synergies with NHRIs and NGOs, in order to strengthen national protection systems in the field of human rights. In particular, since its creation (UN Doc. A/RES/48/141) this Office has developed its ability to assist UN Member States in closing the relevant human rights "knowledge, capacity and implementation gaps".

More generally, considering the new framework envisioned within the UPR mechanism (paras.33-38 of the Annex to Council's Resolution 5/1 of June 18, 2007), the OHCHR can assist Member States in pursuing the purposes and the cooperation envisioned in Articles 55-56 of the Charter of the United Nations. In the event of "persistent non-cooperation", para.38 of the Annex to Council's Resolution 5/1 sets forth that: "the Council will address as appropriate" the case (See para.38 of Council's Resolution 5/1). The second cycle of the UPR, which is expected to start in mid 2012, will be the litmus test of the willingness of Member States, to effectively implement recommendations resulting from the human rights system and thus undertake action at the national level that may result in real change in human rights.

The relevant practice of continuous implementation between UPR cycles will also allow Member States to identify those areas in need of adequate new international standards; and the Council, by its standard-setting ability, may continue to enrich international human rights law, accordingly. This double-track approach, implementation and continuous standard-setting is poised to advance human rights, in

such a way as to effectively develop it as the third pillar of the United Nations, being - no longer merely instrumental to but – closely interconnected with (economic and social) development, peace and security.

ANNEX I: THE CHARTER OF THE UNITED NATIONS (1945)

EXCERPT from the CHARTER OF THE UNITED NATIONS[1]

Preamble: We the Peoples of the United Nations determined
To save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom;

Article 1, para.3: To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion;

Article 2: The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles. i. The Organization is based on the principle of the sovereign equality of all its Members. ii. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter [..] iv. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations. v. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action. vi. The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security. vii. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter Vll.

Article 7: There are established as principal organs of the United Nations: a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice and a Secretariat. Such subsidiary organs as may be found necessary may be established in accordance with the present Charter.

[1] *For sake of completeness, mention has to be made of the following Articles also referring to human rights: Article 76: The basic objectives of the trusteeship system, in accordance with the Purposes of the United Nations laid down in Article 1 of the present Charter, shall be: to further international peace and security; to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement; to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world; and to ensure equal treatment in social, economic, and commercial matters for all Members of the United Nations and their nationals, and also equal treatment for the latter in the administration of justice, without prejudice to the attainment of the foregoing objectives and subject to the provisions of Article 80. Article 87: The General Assembly and, under its authority, the Trusteeship Council, in carrying out their functions, may: consider reports submitted by the administering authority; accept petitions and examine them in consultation with the administering authority; provide for periodic visits to the respective trust territories at times agreed upon with the administering authority; and take these and other actions in conformity with the terms of the trusteeship agreements.)*

Article 10:
The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters

Article 13, para.1: The General Assembly shall initiate studies and make recommendations for the purpose of: a. promoting international co-operation in the political field and encouraging the progressive development of international law and its codification; b. promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 22: The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions.

Article 55: With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: higher standards of living, full employment, and conditions of economic and social progress and development; solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 56: All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.

Article 62: The Economic and Social Council may make or initiate studies and reports with respect to international economic, social, cultural, educational, health, and related matters and may make recommendations with respect to any such matters to the General Assembly to the Members of the United Nations, and to the specialized agencies concerned. It may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all. It may prepare draft conventions for submission to the General Assembly, with respect to matters falling within its competence. It may call, in accordance with the rules prescribed by the United Nations, international conferences on matters falling within its competence.

Article 68: The Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions.

Article 71: The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned[2].

[2] *With specific regard to the OHCHR, please see below Articles 97-98-100*

Article 97:The Secretariat shall comprise a Secretary-General and such staff as the Organization may require. The Secretary-General shall be appointed by the General Assembly upon the recommendation of the Security Council. He shall be the chief administrative officer of the Organization.

Article 98: The Secretary-General shall act in that capacity in all meetings of the General Assembly, of the Security Council, of the Economic and Social Council, and of the Trusteeship Council, and shall perform such other functions as are entrusted to him by these organs. The Secretary-General shall make an annual report to the General Assembly on the work of the Organization.

Article 100: In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization. Each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities.

Article 103: In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Article 108: Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council.

ANNEX II: United Nations General Assembly Resolution 60/251, of March 15, 2006[1]

2006 GENERAL ASSEMBLY RESOLUTION CREATING THE HUMAN RIGHTS COUNCIL

The General Assembly,

Reaffirming the purposes and principles contained in the Charter of the United Nations, including developing friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and achieving international cooperation in solving international problems of an economic, social, cultural or humanitarian character and in promoting and encouraging respect for human rights and fundamental freedoms for all,

Reaffirming also the Universal Declaration of Human Rights[i] and the Vienna Declaration and Programme of Action[ii], and recalling the International Covenant on Civil and Political Rights[iii], the International Covenant on Economic, Social and Cultural Rights[3] and other human rights instruments,

Reaffirming further that all human rights are universal, indivisible, interrelated, interdependent and mutually reinforcing, and that all human rights must be treated in a fair and equal manner, on the same footing and with the same emphasis,

Reaffirming that, while the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, all States, regardless of their political, economic and cultural systems, have the duty to promote and protect all human rights and fundamental freedoms,

Emphasizing the responsibilities of all States, in conformity with the Charter, to respect human rights and fundamental freedoms for all, without distinction of any kind as to race, colour, sex,

[1] ***As retrieved on January 10, 2011, from http://cil.nus.edu.sg/2006/2006-general-assembly-resolution-creating-the-human-rights-council-gar-60251.)***

language or religion, political or other opinion, national or social origin, property, birth or other status,

Acknowledging that peace and security, development and human rights are the pillars of the United Nations system and the foundations for collective security and well-being, and recognizing that development, peace and security and human rights are interlinked and mutually reinforcing,

Affirming the need for all States to continue international efforts to enhance dialogue and broaden understanding among civilizations, cultures and religions, and emphasizing that States, regional organizations, non-governmental organizations, religious bodies and the media have an important role to play in promoting tolerance, respect for and freedom of religion and belief,

Recognizing the work undertaken by the Commission on Human Rights and the need to preserve and build on its achievements and to redress its shortcomings,

Recognizing also the importance of ensuring universality, objectivity and non-selectivity in the consideration of human rights issues, and the elimination of double standards and politicization,

Recognizing further that the promotion and protection of human rights should be based on the principles of cooperation and genuine dialogue and aimed at strengthening the capacity of Member States to comply with their human rights obligations for the benefit of all human beings,

Acknowledging that non-governmental organizations play an important role at the national, regional and international levels, in the promotion and protection of human rights,

Reaffirming the commitment to strengthen the United Nations human rights machinery, with the aim of ensuring effective enjoyment by all of all human rights, civil, political, economic, social and cultural rights, including the right to development, and to that end, the resolve to create a Human Rights Council,

Decides to establish the Human Rights Council, based in Geneva, in replacement of the Commission on Human Rights, as a subsidiary organ of the General Assembly; the Assembly shall review the status of the Council within five years;

1. Decides that the Council shall be responsible for promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner;

2. Decides also that the Council should address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon. It should also promote the effective coordination and the mainstreaming of human rights within the United Nations system;

3. Decides further that the work of the Council shall be guided by the principles of universality, impartiality, objectivity and non-selectivity, constructive international dialogue and cooperation, with a view to enhancing the promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development;

4. Decides that the Council shall, inter alia:

    a. Promote human rights education and learning as well as advisory services, technical assistance and capacity-building, to be provided in consultation with and with the consent of Member States concerned;

    b. Serve as a forum for dialogue on thematic issues on all human rights;

    c. Make recommendations to the General Assembly for the further development of international law in the field of human rights;

    d. Promote the full implementation of human rights obligations undertaken by States and follow-up to the goals and commitments related to the promotion and protection of human rights emanating from United Nations conferences and summits;

    e. Undertake a universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States; the review shall be a cooperative mechanism, based on an interactive dialogue, with the full involvement of the country concerned and with consideration given to its capacity-building needs; such a mechanism shall complement and not duplicate the work of treaty bodies; the Council shall develop the modalities and

necessary time allocation for the universal periodic review mechanism within one year after the holding of its first session;

f. Contribute, through dialogue and cooperation, towards the prevention of human rights violations and respond promptly to human rights emergencies;

g. Assume the role and responsibilities of the Commission on Human Rights relating to the work of the Office of the United Nations High Commissioner for Human Rights, as decided by the General Assembly in its resolution 48/141 of 20 December 1993;

h. Work in close cooperation in the field of human rights with Governments, regional organizations, national human rights institutions and civil society;

i. Make recommendations with regard to the promotion and protection of human rights;

j. Submit an annual report to the General Assembly;

5. Decides also that the Council shall assume, review and, where necessary, improve and rationalize all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights in order to maintain a system of special procedures, expert advice and a complaint procedure; the Council shall complete this review within one year after the holding of its first session;

6. Decides further that the Council shall consist of forty-seven Member States, which shall be elected directly and individually by secret ballot by the majority of the members of the General Assembly; the membership shall be based on equitable geographical distribution, and seats shall be distributed as follows among regional groups: Group of African States, thirteen; Group of Asian States, thirteen; Group of Eastern European States, six; Group of Latin American and Caribbean States, eight; and Group of Western European and other States, seven; the members of the Council shall serve for a period of three years and shall not be eligible for immediate re-election after two consecutive terms;

7. Decides that the membership in the Council shall be open to all States Members of the United Nations; when electing members of the Council, Member States shall take into account the contribution of candidates to the promotion and protection of human rights and their voluntary pledges and commitments made thereto; the General Assembly, by a two-thirds majority of the members present and voting, may suspend the rights of membership in the Council of a member of the Council that commits gross and systematic violations of human rights;

8. Decides also that members elected to the Council shall uphold the highest standards in the promotion and protection of human rights, shall fully cooperate with the Council and be reviewed under the universal periodic review mechanism during their term of membership;

9. Decides further that the Council shall meet regularly throughout the year and schedule no fewer than three sessions per year, including a main session, for a total duration of no less than ten weeks, and shall be able to hold special sessions, when needed, at the request of a member of the Council with the support of one third of the membership of the Council;

10. Decides that the Council shall apply the rules of procedure established for committees of the General Assembly, as applicable, unless subsequently otherwise decided by the Assembly or the Council, and also decides that the participation of and consultation with observers, including States that are not members of the Council, the specialized agencies, other intergovernmental organizations and national human rights institutions, as well as non-governmental organizations, shall be based on arrangements, including Economic and Social Council resolution 1996/31 of 25 July 1996 and practices observed by the Commission on Human Rights, while ensuring the most effective contribution of these entities;

11. Decides also that the methods of work of the Council shall be transparent, fair and impartial and shall enable genuine dialogue, be results- oriented, allow for subsequent follow-up discussions to recommendations and their implementation and also allow for substantive interaction with special procedures and mechanisms;

12. Recommends that the Economic and Social Council request the Commission on Human Rights to conclude its work at its sixty-second session, and that it abolish the Commission on 16 June 2006;

13. Decides to elect the new members of the Council; the terms of membership shall be staggered, and such decision shall be taken for the first election by the drawing of lots, taking into consideration equitable geographical distribution;

14. Decides also that elections of the first members of the Council shall take place on 9 May 2006, and that the first meeting of the Council shall be convened on 19 June 2006;

15. Decides further that the Council shall review its work and functioning five years after its establishment and report to the General Assembly.

72nd plenary meeting
15 March 2006

ANNEX III: THE DE ALBA PACKAGE[1]

Human Rights Council

5/1. Institution-building of the United Nations Human Rights Council

The Human Rights Council,

Acting in compliance with the mandate entrusted to it by the United Nations General Assembly in resolution 60/251 of 15 March 2006,

Having considered the draft text on institution-building submitted by the President of the Council,

1. *Adopts* the draft text entitled "United Nations Human Rights Council: Institution-Building", as contained in the annex to the present resolution, including its appendix(ces);

2. *Decides* to submit the following draft resolution to the General Assembly for its adoption as a matter of priority in order to facilitate the timely implementation of the text contained thereafter:

"*The General Assembly*,

"*Taking note* of Human Rights Council resolution 5/1 of 18 June 2007,

"1. *Welcomes* the text entitled 'United Nations Human Rights Council: Institution-Building', as contained in the annex to the present resolution, including its appendix(ces)."

9th meeting
18 June 2007

[Resolution adopted without a vote.][2]

[1] **Consisting of Council's Resolution 5/1 and Council's Resolution 5/2**
[2] See A/HRC/5/21, chap. III, paras. 60-62.

Annex

UNITED NATIONS HUMAN RIGHTS COUNCIL: INSTITUTION-BUILDING

I. UNIVERSAL PERIODIC REVIEW MECHANISM

A. Basis of the review

1. The basis of the review is:

(*a*) The Charter of the United Nations;

(*b*) The Universal Declaration of Human Rights;

(*c*) Human rights instruments to which a State is party;

(*d*) Voluntary pledges and commitments made by States, including those undertaken when presenting their candidatures for election to the Human Rights Council (hereinafter "the Council").

2. In addition to the above and given the complementary and mutually interrelated nature of international human rights law and international humanitarian law, the review shall take into account applicable international humanitarian law.

B. Principles and objectives

1. Principles

3. The universal periodic review should:

(*a*) Promote the universality, interdependence, indivisibility and interrelatedness of all human rights;

(*b*) Be a cooperative mechanism based on objective and reliable information and on interactive dialogue;

(*c*) Ensure universal coverage and equal treatment of all States;

(*d*) Be an intergovernmental process, United Nations Member-driven and action-oriented;

(*e*) Fully involve the country under review;

(*f*) Complement and not duplicate other human rights mechanisms, thus representing an added value;

(*g*) Be conducted in an objective, transparent, non-selective, constructive, non-confrontational and non-politicized manner;

(*h*) Not be overly burdensome to the concerned State or to the agenda of the Council;

(*i*) Not be overly long; it should be realistic and not absorb a disproportionate amount of time, human and financial resources;

(*j*) Not diminish the Council's capacity to respond to urgent human rights situations;

(*k*) Fully integrate a gender perspective;

(*l*) Without prejudice to the obligations contained in the elements provided for in the basis of review, take into account the level of development and specificities of countries;

(*m*) Ensure the participation of all relevant stakeholders, including non-governmental organizations and national human rights institutions, in accordance with General Assembly resolution 60/251 of 15 March 2006 and Economic and Social Council resolution 1996/31 of 25 July 1996, as well as any decisions that the Council may take in this regard.

2. Objectives

4. The objectives of the review are:

(*a*) The improvement of the human rights situation on the ground;

(*b*) The fulfilment of the State's human rights obligations and commitments and assessment of positive developments and challenges faced by the State;

(*c*) The enhancement of the State's capacity and of technical assistance, in consultation with, and with the consent of, the State concerned;

(*d*) The sharing of best practice among States and other stakeholders;

(*e*) Support for cooperation in the promotion and protection of human rights;

(*f*) The encouragement of full cooperation and engagement with the Council, other human rights bodies and the Office of the United Nations High Commissioner for Human Rights.

C. Periodicity and order of the review

5. The review begins after the adoption of the universal periodic review mechanism by the Council.

6. The order of review should reflect the principles of universality and equal treatment.

7. The order of the review should be established as soon as possible in order to allow States to prepare adequately.

8. All member States of the Council shall be reviewed during their term of membership.

9. The initial members of the Council, especially those elected for one or two-year terms, should be reviewed first.

10. A mix of member and observer States of the Council should be reviewed.

11. Equitable geographic distribution should be respected in the selection of countries for review.

12. The first member and observer States to be reviewed will be chosen by the drawing of lots from each Regional Group in such a way as to ensure full respect for equitable geographic distribution. Alphabetical order will then be applied beginning with those countries thus selected, unless other countries volunteer to be reviewed.

13. The period between review cycles should be reasonable so as to take into account the capacity of States to prepare for, and the capacity of other stakeholders to respond to, the requests arising from the review.

14. The periodicity of the review for the first cycle will be of four years. This will imply the consideration of 48 States per year during three sessions of the working group of two weeks each.[a]

D. Process and modalities of the review

1. Documentation

15. The documents on which the review would be based are:

(*a*) Information prepared by the State concerned, which can take the form of a national report, on the basis of general guidelines to be adopted by the Council at its sixth session (first session of the second cycle), and any other information considered relevant by the State concerned, which could be presented either orally or in writing, provided that the written presentation summarizing the information will not exceed 20 pages, to guarantee equal treatment to all States and not to overburden the mechanism. States are encouraged to prepare the information through a broad consultation process at the national level with all relevant stakeholders;

(*b*) Additionally a compilation prepared by the Office of the High Commissioner for Human Rights of the information contained in the reports of treaty bodies, special procedures, including observations and comments by the State concerned, and other relevant official United Nations documents, which shall not exceed 10 pages;

(*c*) Additional, credible and reliable information provided by other relevant stakeholders to the universal periodic review which should also be taken into consideration by the Council in the

[a] The universal periodic review is an evolving process; the Council, after the conclusion of the first review cycle, may review the modalities and the periodicity of this mechanism, based on best practices and lessons learned.

review. The Office of the High Commissioner for Human Rights will prepare a summary of such information which shall not exceed 10 pages.

16. The documents prepared by the Office of the High Commissioner for Human Rights should be elaborated following the structure of the general guidelines adopted by the Council regarding the information prepared by the State concerned.

17. Both the State's written presentation and the summaries prepared by the Office of the High Commissioner for Human Rights shall be ready six weeks prior to the review by the working group to ensure the distribution of documents simultaneously in the six official languages of the United Nations, in accordance with General Assembly resolution 53/208 of 14 January 1999.

2. Modalities

18. The modalities of the review shall be as follows:

(*a*) The review will be conducted in one working group, chaired by the President of the Council and composed of the 47 member States of the Council. Each member State will decide on the composition of its delegation;[b]

(*b*) Observer States may participate in the review, including in the interactive dialogue;

(*c*) Other relevant stakeholders may attend the review in the Working Group;

(*d*) A group of three rapporteurs, selected by the drawing of lots among the members of the Council and from different Regional Groups (*troika*) will be formed to facilitate each review, including the preparation of the report of the working group. The Office of the High Commissioner for Human Rights will provide the necessary assistance and expertise to the rapporteurs.

19. The country concerned may request that one of the rapporteurs be from its own Regional Group and may also request the substitution of a rapporteur on only one occasion.

20. A rapporteur may request to be excused from participation in a specific review process.

21. Interactive dialogue between the country under review and the Council will take place in the working group. The rapporteurs may collate issues or questions to be transmitted to the State under review to facilitate its preparation and focus the interactive dialogue, while guaranteeing fairness and transparency.

22. The duration of the review will be three hours for each country in the working group. Additional time of up to one hour will be allocated for the consideration of the outcome by the plenary of the Council.

[b] A Universal Periodic Review Voluntary Trust Fund should be established to facilitate the participation of developing countries, particularly the Least Developed Countries, in the universal periodic review mechanism.

23. Half an hour will be allocated for the adoption of the report of each country under review in the working group.

24. A reasonable time frame should be allocated between the review and the adoption of the report of each State in the working group.

25. The final outcome will be adopted by the plenary of the Council.

E. Outcome of the review

1. Format of the outcome

26. The format of the outcome of the review will be a report consisting of a summary of the proceedings of the review process; conclusions and/or recommendations, and the voluntary commitments of the State concerned.

2. Content of the outcome

27. The universal periodic review is a cooperative mechanism. Its outcome may include, inter alia:

(*a*) An assessment undertaken in an objective and transparent manner of the human rights situation in the country under review, including positive developments and the challenges faced by the country;

(*b*) Sharing of best practices;

(*c*) An emphasis on enhancing cooperation for the promotion and protection of human rights;

(*d*) The provision of technical assistance and capacity-building in consultation with, and with the consent of, the country concerned;[c]

(*e*) Voluntary commitments and pledges made by the country under review.

3. Adoption of the outcome

28. The country under review should be fully involved in the outcome.

29. Before the adoption of the outcome by the plenary of the Council, the State concerned should be offered the opportunity to present replies to questions or issues that were not sufficiently addressed during the interactive dialogue.

[c] A decision should be taken by the Council on whether to resort to existing financing mechanisms or to create a new mechanism.

30. The State concerned and the member States of the Council, as well as observer States, will be given the opportunity to express their views on the outcome of the review before the plenary takes action on it.

31. Other relevant stakeholders will have the opportunity to make general comments before the adoption of the outcome by the plenary.

32. Recommendations that enjoy the support of the State concerned will be identified as such. Other recommendations, together with the comments of the State concerned thereon, will be noted. Both will be included in the outcome report to be adopted by the Council.

F. Follow-up to the review

33. The outcome of the universal periodic review, as a cooperative mechanism, should be implemented primarily by the State concerned and, as appropriate, by other relevant stakeholders.

34. The subsequent review should focus, inter alia, on the implementation of the preceding outcome.

35. The Council should have a standing item on its agenda devoted to the universal periodic review.

36. The international community will assist in implementing the recommendations and conclusions regarding capacity-building and technical assistance, in consultation with, and with the consent of, the country concerned.

37. In considering the outcome of the universal periodic review, the Council will decide if and when any specific follow-up is necessary.

38. After exhausting all efforts to encourage a State to cooperate with the universal periodic review mechanism, the Council will address, as appropriate, cases of persistent non-cooperation with the mechanism.

II. SPECIAL PROCEDURES

A. Selection and appointment of mandate-holders

39. The following general criteria will be of paramount importance while nominating, selecting and appointing mandate-holders: (a) expertise; (b) experience in the field of the mandate; (c) independence; (d) impartiality; (e) personal integrity; and (f) objectivity.

40. Due consideration should be given to gender balance and equitable geographic representation, as well as to an appropriate representation of different legal systems.

41. Technical and objective requirements for eligible candidates for mandate-holders will be approved by the Council at its sixth session (first session of the second cycle), in order to ensure that eligible candidates are highly qualified individuals who possess established competence, relevant expertise and extensive professional experience in the field of human rights.

42. The following entities may nominate candidates as special procedures mandate-holders: (a) Governments; (b) Regional Groups operating within the United Nations human rights system; (c) international organizations or their offices (e.g. the Office of the High Commissioner for Human Rights); (d) non-governmental organizations; (e) other human rights bodies; (f) individual nominations.

43. The Office of the High Commissioner for Human Rights shall immediately prepare, maintain and periodically update a public list of eligible candidates in a standardized format, which shall include personal data, areas of expertise and professional experience. Upcoming vacancies of mandates shall be publicized.

44. The principle of non-accumulation of human rights functions at a time shall be respected.

45. A mandate-holder's tenure in a given function, whether a thematic or country mandate, will be no longer than six years (two terms of three years for thematic mandate-holders).

46. Individuals holding decision-making positions in Government or in any other organization or entity which may give rise to a conflict of interest with the responsibilities inherent to the mandate shall be excluded. Mandate-holders will act in their personal capacity.

47. A consultative group would be established to propose to the President, at least one month before the beginning of the session in which the Council would consider the selection of mandate-holders, a list of candidates who possess the highest qualifications for the mandates in question and meet the general criteria and particular requirements.

48. The consultative group shall also give due consideration to the exclusion of nominated candidates from the public list of eligible candidates brought to its attention.

49. At the beginning of the annual cycle of the Council, Regional Groups would be invited to appoint a member of the consultative group, who would serve in his/her personal capacity. The Group will be assisted by the Office of the High Commissioner for Human Rights.

50. The consultative group will consider candidates included in the public list; however, under exceptional circumstances and if a particular post justifies it, the Group may consider additional nominations with equal or more suitable qualifications for the post. Recommendations to the President shall be public and substantiated.

51. The consultative group should take into account, as appropriate, the views of stakeholders, including the current or outgoing mandate-holders, in determining the necessary expertise, experience, skills, and other relevant requirements for each mandate.

52. On the basis of the recommendations of the consultative group and following broad consultations, in particular through the regional coordinators, the President of the Council will identify an appropriate candidate for each vacancy. The President will present to member States and observers a list of candidates to be proposed at least two weeks prior to the beginning of the session in which the Council will consider the appointments.

53. If necessary, the President will conduct further consultations to ensure the endorsement of the proposed candidates. The appointment of the special procedures mandate-holders will be completed upon the subsequent approval of the Council. Mandate-holders shall be appointed before the end of the session.

B. Review, rationalization and improvement of mandates

54. The review, rationalization and improvement of mandates, as well as the creation of new ones, must be guided by the principles of universality, impartiality, objectivity and non-selectivity, constructive international dialogue and cooperation, with a view to enhancing the promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development.

55. The review, rationalization and improvement of each mandate would take place in the context of the negotiations of the relevant resolutions. An assessment of the mandate may take place in a separate segment of the interactive dialogue between the Council and special procedures mandate-holders.

56. The review, rationalization and improvement of mandates would focus on the relevance, scope and contents of the mandates, having as a framework the internationally recognized human rights standards, the system of special procedures and General Assembly resolution 60/251.

57. Any decision to streamline, merge or possibly discontinue mandates should always be guided by the need for improvement of the enjoyment and protection of human rights.

58. The Council should always strive for improvements:

(*a*) Mandates should always offer a clear prospect of an increased level of human rights protection and promotion as well as being coherent within the system of human rights;

(*b*) Equal attention should be paid to all human rights. The balance of thematic mandates should broadly reflect the accepted equal importance of civil, political, economic, social and cultural rights, including the right to development;

(*c*) Every effort should be made to avoid unnecessary duplication;

(*d*) Areas which constitute thematic gaps will be identified and addressed, including by means other than the creation of special procedures mandates, such as by expanding an existing mandate, bringing a cross-cutting issue to the attention of mandate-holders or by requesting a joint action to the relevant mandate-holders;

(*e*) Any consideration of merging mandates should have regard to the content and predominant functions of each mandate, as well as to the workload of individual mandate-holders;

(*f*) In creating or reviewing mandates, efforts should be made to identify whether the structure of the mechanism (expert, rapporteur or working group) is the most effective in terms of increasing human rights protection;

(*g*) New mandates should be as clear and specific as possible, so as to avoid ambiguity.

59. It should be considered desirable to have a uniform nomenclature of mandate-holders, titles of mandates as well as a selection and appointment process, to make the whole system more understandable.

60. Thematic mandate periods will be of three years. Country mandate periods will be of one year.

61. Mandates included in Appendix I, where applicable, will be renewed until the date on which they are considered by the Council according to the programme of work.[d]

62. Current mandate-holders may continue serving, provided they have not exceeded the six-year term limit (Appendix II). On an exceptional basis, the term of those mandate-holders who have served more than six years may be extended until the relevant mandate is considered by the Council and the selection and appointment process has concluded.

63. Decisions to create, review or discontinue country mandates should also take into account the principles of cooperation and genuine dialogue aimed at strengthening the capacity of Member States to comply with their human rights obligations.

[d] Country mandates meet the following criteria:

- There is a pending mandate of the Council to be accomplished; or
- There is a pending mandate of the General Assembly to be accomplished; or
- The nature of the mandate is for advisory services and technical assistance.

64. In case of situations of violations of human rights or a lack of cooperation that require the Council's attention, the principles of objectivity, non-selectivity, and the elimination of double standards and politicization should apply.

III. HUMAN RIGHTS COUNCIL ADVISORY COMMITTEE

65. The Human Rights Council Advisory Committee (hereinafter "the Advisory Committee"), composed of 18 experts serving in their personal capacity, will function as a think-tank for the Council and work at its direction. The establishment of this subsidiary body and its functioning will be executed according to the guidelines stipulated below.

A. Nomination

66. All Member States of the United Nations may propose or endorse candidates from their own region. When selecting their candidates, States should consult their national human rights institutions and civil society organizations and, in this regard, include the names of those supporting their candidates.

67. The aim is to ensure that the best possible expertise is made available to the Council. For this purpose, technical and objective requirements for the submission of candidatures will be established and approved by the Council at its sixth session (first session of the second cycle). These should include:

(*a*) Recognized competence and experience in the field of human rights;

(*b*) High moral standing;

(*c*) Independence and impartiality.

68. Individuals holding decision-making positions in Government or in any other organization or entity which might give rise to a conflict of interest with the responsibilities inherent in the mandate shall be excluded. Elected members of the Committee will act in their personal capacity.

69. The principle of non-accumulation of human rights functions at the same time shall be respected.

B. Election

70. The Council shall elect the members of the Advisory Committee, in secret ballot, from the list of candidates whose names have been presented in accordance with the agreed requirements.

71. The list of candidates shall be closed two months prior to the election date. The Secretariat will make available the list of candidates and relevant information to member States and to the public at least one month prior to their election.

72. Due consideration should be given to gender balance and appropriate representation of different civilizations and legal systems.

73. The geographic distribution will be as follows:

African States: 5

Asian States: 5

Eastern European States: 2

Latin American and Caribbean States: 3

Western European and other States: 3

74. The members of the Advisory Committee shall serve for a period of three years. They shall be eligible for re-election once. In the first term, one third of the experts will serve for one year and another third for two years. The staggering of terms of membership will be defined by the drawing of lots.

C. Functions

75. The function of the Advisory Committee is to provide expertise to the Council in the manner and form requested by the Council, focusing mainly on studies and research-based advice. Further, such expertise shall be rendered only upon the latter's request, in compliance with its resolutions and under its guidance.

76. The Advisory Committee should be implementation-oriented and the scope of its advice should be limited to thematic issues pertaining to the mandate of the Council; namely promotion and protection of all human rights.

77. The Advisory Committee shall not adopt resolutions or decisions. The Advisory Committee may propose within the scope of the work set out by the Council, for the latter's consideration and approval, suggestions for further enhancing its procedural efficiency, as well as further research proposals within the scope of the work set out by the Council.

78. The Council shall issue specific guidelines for the Advisory Committee when it requests a substantive contribution from the latter and shall review all or any portion of those guidelines if it deems necessary in the future.

D. Methods of work

79. The Advisory Committee shall convene up to two sessions for a maximum of 10 working days per year. Additional sessions may be scheduled on an ad hoc basis with prior approval of the Council.

80. The Council may request the Advisory Committee to undertake certain tasks that could be performed collectively, through a smaller team or individually. The Advisory Committee will report on such efforts to the Council.

81. Members of the Advisory Committee are encouraged to communicate between sessions, individually or in teams. However, the Advisory Committee shall not establish subsidiary bodies unless the Council authorizes it to do so.

82. In the performance of its mandate, the Advisory Committee is urged to establish interaction with States, national human rights institutions, non-governmental organizations and other civil society entities in accordance with the modalities of the Council.

83. Member States and observers, including States that are not members of the Council, the specialized agencies, other intergovernmental organizations and national human rights institutions, as well as non-governmental organizations shall be entitled to participate in the work of the Advisory Committee based on arrangements, including Economic and Social Council resolution 1996/31 and practices observed by the Commission on Human Rights and the Council, while ensuring the most effective contribution of these entities.

84. The Council will decide at its sixth session (first session of its second cycle) on the most appropriate mechanisms to continue the work of the Working Groups on Indigenous Populations; Contemporary Forms of Slavery; Minorities; and the Social Forum.

IV. COMPLAINT PROCEDURE

A. Objective and scope

85. A complaint procedure is being established 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.

86. Economic and Social Council resolution 1503 (XLVIII) of 27 May 1970 as revised by resolution 2000/3 of 19 June 2000 served as a working basis and was improved where necessary, so as to ensure that the complaint procedure is impartial, objective, efficient, victims-oriented and conducted in a timely manner. The procedure will retain its confidential nature, with a view to enhancing cooperation with the State concerned.

B. Admissibility criteria for communications

87. A communication related to a violation of human rights and fundamental freedoms, for the purpose of this procedure, shall be admissible, provided that:

(*a*) It is not manifestly politically motivated and its object is consistent with the Charter of the United Nations, the Universal Declaration of Human Rights and other applicable instruments in the field of human rights law;

(*b*) It gives a factual description of the alleged violations, including the rights which are alleged to be violated;

(*c*) Its language is not abusive. However, such a communication may be considered if it meets the other criteria for admissibility after deletion of the abusive language;

(*d*) It is submitted by a person or a group of persons claiming to be the victims of violations of human rights and fundamental freedoms, or by any person or group of persons, including non-governmental organizations, acting in good faith in accordance with the principles of human rights, not resorting to politically motivated stands contrary to the provisions of the Charter of the United Nations and claiming to have direct and reliable knowledge of the violations concerned. Nonetheless, reliably attested communications shall not be inadmissible solely because the knowledge of the individual authors is second-hand, provided that they are accompanied by clear evidence;

(*e*) It is not exclusively based on reports disseminated by mass media;

(*f*) It does not refer to a case that appears to reveal a consistent pattern of gross and reliably attested violations of human rights already being dealt with by a special procedure, a treaty body or other United Nations or similar regional complaints procedure in the field of human rights;

(*g*) Domestic remedies have been exhausted, unless it appears that such remedies would be ineffective or unreasonably prolonged.

88. National human rights institutions, established and operating under the Principles Relating to the Status of National Institutions (the Paris Principles), in particular in regard to quasi-judicial competence, may serve as effective means of addressing individual human rights violations.

C. Working groups

89. Two distinct working groups shall be established with the mandate to examine the communications and to bring to the attention of the Council consistent patterns of gross and reliably attested violations of human rights and fundamental freedoms.

90. Both working groups shall, to the greatest possible extent, work on the basis of consensus. In the absence of consensus, decisions shall be taken by simple majority of the votes. They may establish their own rules of procedure.

1. Working Group on Communications: composition, mandate and powers

91. The Human Rights Council Advisory Committee shall appoint five of its members, one from each Regional Group, with due consideration to gender balance, to constitute the Working Group on Communications.

92. In case of a vacancy, the Advisory Committee shall appoint an independent and highly qualified expert of the same Regional Group from the Advisory Committee.

93. Since there is a need for independent expertise and continuity with regard to the examination and assessment of communications received, the independent and highly qualified experts of the Working Group on Communications shall be appointed for three years. Their mandate is renewable only once.

94. The Chairperson of the Working Group on Communications is requested, together with the secretariat, to undertake an initial screening of communications received, based on the admissibility criteria, before transmitting them to the States concerned. Manifestly ill-founded or anonymous communications shall be screened out by the Chairperson and shall therefore not be transmitted to the State concerned. In a perspective of accountability and transparency, the Chairperson of the Working Group on Communications shall provide all its members with a list of all communications rejected after initial screening. This list should indicate the grounds of all decisions resulting in the rejection of a communication. All other communications, which have not been screened out, shall be transmitted to the State concerned, so as to obtain the views of the latter on the allegations of violations.

95. The members of the Working Group on Communications shall decide on the admissibility of a communication and assess the merits of the allegations of violations, including whether the communication alone or in combination with other communications appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms. The Working Group on Communications shall provide the Working Group on Situations with a file containing all admissible communications as well as recommendations thereon. When the Working Group on Communications requires further consideration or additional information, it may keep a case under review until its next session and request such information from the State concerned. The Working Group on Communications may decide to dismiss a case. All decisions of the Working Group on Communications shall be based on a rigorous application of the admissibility criteria and duly justified.

2. Working Group on Situations: composition, mandate and powers

96. Each Regional Group shall appoint a representative of a member State of the Council, with due consideration to gender balance, to serve on the Working Group on Situations. Members shall be appointed for one year. Their mandate may be renewed once, if the State concerned is a member of the Council.

97. Members of the Working Group on Situations shall serve in their personal capacity. In order to fill a vacancy, the respective Regional Group to which the vacancy belongs, shall appoint a representative from member States of the same Regional Group.

98. The Working Group on Situations is requested, on the basis of the information and recommendations provided by the Working Group on Communications, to present the Council with a report on consistent patterns of gross and reliably attested violations of human rights and fundamental freedoms and to make recommendations to the Council on the course of action to take, normally in the form of a draft resolution or decision with respect to the situations referred to it. When the Working Group on Situations requires further consideration or additional information, its members may keep a case under review until its next session. The Working Group on Situations may also decide to dismiss a case.

99. All decisions of the Working Group on Situations shall be duly justified and indicate why the consideration of a situation has been discontinued or action recommended thereon. Decisions to discontinue should be taken by consensus; if that is not possible, by simple majority of the votes.

D. Working modalities and confidentiality

100. Since the complaint procedure is to be, inter alia, victims-oriented and conducted in a confidential and timely manner, both Working Groups shall meet at least twice a year for five working days each session, in order to promptly examine the communications received, including replies of States thereon, and the situations of which the Council is already seized under the complaint procedure.

101. The State concerned shall cooperate with the complaint procedure and make every effort to provide substantive replies in one of the United Nations official languages to any of the requests of the Working Groups or the Council. The State concerned shall also make every effort to provide a reply not later than three months after the request has been made. If necessary, this deadline may however be extended at the request of the State concerned.

102. The Secretariat is requested to make the confidential files available to all members of the Council, at least two weeks in advance, so as to allow sufficient time for the consideration of the files.

103. The Council shall consider consistent patterns of gross and reliably attested violations of human rights and fundamental freedoms brought to its attention by the Working Group on Situations as frequently as needed, but at least once a year.

104. The reports of the Working Group on Situations referred to the Council shall be examined in a confidential manner, unless the Council decides otherwise. When the Working Group on Situations recommends to the Council that it consider a situation in a public meeting, in particular in the case of manifest and unequivocal lack of cooperation, the Council shall consider such recommendation on a priority basis at its next session.

105. So as to ensure that the complaint procedure is victims-oriented, efficient and conducted in a timely manner, the period of time between the transmission of the complaint to the State concerned and consideration by the Council shall not, in principle, exceed 24 months.

E. Involvement of the complainant and of the State concerned

106. The complaint procedure shall ensure that both the author of a communication and the State concerned are informed of the proceedings at the following key stages:

(*a*) When a communication is deemed inadmissible by the Working Group on Communications or when it is taken up for consideration by the Working Group on Situations; or when a communication is kept pending by one of the Working Groups or by the Council;

(*b*) At the final outcome.

107. In addition, the complainant shall be informed when his/her communication is registered by the complaint procedure.

108. Should the complainant request that his/her identity be kept confidential, it will not be transmitted to the State concerned.

F. Measures

109. In accordance with established practice the action taken in respect of a particular situation should be one of the following options:

(*a*) To discontinue considering the situation when further consideration or action is not warranted;

(*b*) To keep the situation under review and request the State concerned to provide further information within a reasonable period of time;

(*c*) To keep the situation under review and appoint an independent and highly qualified expert to monitor the situation and report back to the Council;

(*d*) To discontinue reviewing the matter under the confidential complaint procedure in order to take up public consideration of the same;

(*e*) To recommend to OHCHR to provide technical cooperation, capacity-building assistance or advisory services to the State concerned.

V. AGENDA AND FRAMEWORK FOR THE PROGRAMME OF WORK

A. Principles

Universality

Impartiality

Objectivity

Non-selectiveness

Constructive dialogue and cooperation

Predictability

Flexibility

Transparency

Accountability

Balance

Inclusive/comprehensive

Gender perspective

Implementation and follow-up of decisions

B. Agenda

Item 1. Organizational and procedural matters

Item 2. Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General

Item 3. Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Item 4. Human rights situations that require the Council's attention

Item 5. Human rights bodies and mechanisms

Item 6. Universal Periodic Review

Item 7. Human rights situation in Palestine and other occupied Arab territories

Item 8. Follow-up and implementation of the Vienna Declaration and Programme of Action

Item 9. Racism, racial discrimination, xenophobia and related forms of intolerance, follow-up and implementation of the Durban Declaration and Programme of Action

Item 10. Technical assistance and capacity-building

C. Framework for the programme of work

Item 1. Organizational and procedural matters

Election of the Bureau

Adoption of the annual programme of work

Adoption of the programme of work of the session, including other business

Selection and appointment of mandate-holders

Election of members of the Human Rights Council Advisory Committee

Adoption of the report of the session

Adoption of the annual report

Item 2. Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General

Presentation of the annual report and updates

Item 3. Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Economic, social and cultural rights

Civil and political rights

Rights of peoples, and specific groups and individuals

Right to development

Interrelation of human rights and human rights thematic issues

Item 4. Human rights situations that require the Council's attention

Item 5. Human rights bodies and mechanisms

Report of the Human Rights Council Advisory Committee

Report of the complaint procedure

Item 6. Universal Periodic Review

Item 7. Human rights situation in Palestine and other occupied Arab territories

Human rights violations and implications of the Israeli occupation of Palestine and other occupied Arab territories

Right to self-determination of the Palestinian people

Item 8. Follow-up and implementation of the Vienna Declaration and Programme of Action

Item 9. Racism, racial discrimination, xenophobia and related forms of intolerance, follow-up and implementation of the Durban Declaration and Programme of Action

Item 10. Technical assistance and capacity-building

VI. METHODS OF WORK

110. The methods of work, pursuant to General Assembly resolution 60/251 should be transparent, impartial, equitable, fair, pragmatic; lead to clarity, predictability, and inclusiveness. They may also be updated and adjusted over time.

A. Institutional arrangements

1. Briefings on prospective resolutions or decisions

111. The briefings on prospective resolutions or decisions would be informative only, whereby delegations would be apprised of resolutions and/or decisions tabled or intended to be tabled. These briefings will be organized by interested delegations.

2. President's open-ended information meetings on resolutions, decisions and other related business

112. The President's open-ended information meetings on resolutions, decisions and other related business shall provide information on the status of negotiations on draft resolutions and/or decisions so that delegations may gain a bird's eye view of the status of such drafts. The consultations shall have a purely informational function, combined with information on the extranet, and be held in a transparent and inclusive manner. They shall not serve as a negotiating forum.

3. Informal consultations on proposals convened by main sponsors

113. Informal consultations shall be the primary means for the negotiation of draft resolutions and/or decisions, and their convening shall be the responsibility of the sponsor(s). At least one informal open-ended consultation should be held on each draft resolution and/or decision before it is considered for action by the Council. Consultations should, as much as possible, be scheduled in a timely, transparent and inclusive manner that takes into account the constraints faced by delegations, particularly smaller ones.

4. Role of the Bureau

114. The Bureau shall deal with procedural and organizational matters. The Bureau shall regularly communicate the contents of its meetings through a timely summary report.

5. Other work formats may include panel debates, seminars and round tables

115. Utilization of these other work formats, including topics and modalities, would be decided by the Council on a case-by-case basis. They may serve as tools of the Council for enhancing dialogue and mutual understanding on certain issues. They should be utilized in the context of the Council's agenda and annual programme of work, and reinforce and/or complement its intergovernmental nature. They shall not be used to substitute or replace existing human rights mechanisms and established methods of work.

6. High-Level Segment

116. The High-Level Segment shall be held once a year during the main session of the Council. It shall be followed by a general segment wherein delegations that did not participate in the High-Level Segment may deliver general statements.

B. Working culture

117. There is a need for:

(*a*) Early notification of proposals;

(*b*) Early submission of draft resolutions and decisions, preferably by the end of the penultimate week of a session;

(*c*) Early distribution of all reports, particularly those of special procedures, to be transmitted to delegations in a timely fashion, at least 15 days in advance of their consideration by the Council, and in all official United Nations languages;

(*d*) Proposers of a country resolution to have the responsibility to secure the broadest possible support for their initiatives (preferably 15 members), before action is taken;

(*e*) Restraint in resorting to resolutions, in order to avoid proliferation of resolutions without prejudice to the right of States to decide on the periodicity of presenting their draft proposals by:

(i) Minimizing unnecessary duplication of initiatives with the General Assembly/Third Committee;

(ii) Clustering of agenda items;

(iii) Staggering the tabling of decisions and/or resolutions and consideration of action on agenda items/issues.

C. Outcomes other than resolutions and decisions

118. These may include recommendations, conclusions, summaries of discussions and President's Statement. As such outcomes would have different legal implications, they should supplement and not replace resolutions and decisions.

D. Special sessions of the Council

119. The following provisions shall complement the general framework provided by General Assembly resolution 60/251 and the rules of procedure of the Human Rights Council.

120. The rules of procedure of special sessions shall be in accordance with the rules of procedure applicable for regular sessions of the Council.

121. The request for the holding of a special session, in accordance with the requirement established in paragraph 10 of General Assembly resolution 60/251, shall be submitted to the President and to the secretariat of the Council. The request shall specify the item proposed for consideration and include any other relevant information the sponsors may wish to provide.

122. The special session shall be convened as soon as possible after the formal request is communicated, but, in principle, not earlier than two working days, and not later than five working

days after the formal receipt of the request. The duration of the special session shall not exceed three days (six working sessions), unless the Council decides otherwise.

123. The secretariat of the Council shall immediately communicate the request for the holding of a special session and any additional information provided by the sponsors in the request, as well as the date for the convening of the special session, to all United Nations Member States and make the information available to the specialized agencies, other intergovernmental organizations and national human rights institutions, as well as to non-governmental organizations in consultative status by the most expedient and expeditious means of communication. Special session documentation, in particular draft resolutions and decisions, should be made available in all official United Nations languages to all States in an equitable, timely and transparent manner.

124. The President of the Council should hold open-ended informative consultations before the special session on its conduct and organization. In this regard, the secretariat may also be requested to provide additional information, including, on the methods of work of previous special sessions.

125. Members of the Council, concerned States, observer States, specialized agencies, other intergovernmental organizations and national human rights institutions, as well as non-governmental organizations in consultative status may contribute to the special session in accordance with the rules of procedure of the Council.

126. If the requesting or other States intend to present draft resolutions or decisions at the special session, texts should be made available in accordance with the Council's relevant rules of procedure. Nevertheless, sponsors are urged to present such texts as early as possible.

127. The sponsors of a draft resolution or decision should hold open-ended consultations on the text of their draft resolution(s) or decision(s) with a view to achieving the widest participation in their consideration and, if possible, achieving consensus on them.

128. A special session should allow participatory debate, be results-oriented and geared to achieving practical outcomes, the implementation of which can be monitored and reported on at the following regular session of the Council for possible follow-up decision.

VII. RULES OF PROCEDURE[e]

SESSIONS

Rules of procedure

Rule 1

The Human Rights Council shall apply the rules of procedure established for the Main Committees of the General Assembly, as applicable, unless subsequently otherwise decided by the Assembly or the Council.

REGULAR SESSIONS

Number of sessions

Rule 2

The Human Rights Council shall meet regularly throughout the year and schedule no fewer than three sessions per Council year, including a main session, for a total duration of no less than 10 weeks.

Assumption of membership

Rule 3

Newly-elected member States of the Human Rights Council shall assume their membership on the first day of the Council year, replacing member States that have concluded their respective membership terms.

Place of meeting

Rule 4

The Human Rights Council shall be based in Geneva.

SPECIAL SESSIONS

Convening of special sessions

Rule 5

The rules of procedure of special sessions of the Human Rights Council will be the same as the rules of procedure applicable for regular sessions of the Human Rights Council.

[e] Figures indicated in square brackets refer to identical or corresponding rules of the General Assembly or its Main Committees (A/520/Rev.16).

Rule 6

The Human Rights Council shall hold special sessions, when needed, at the request of a member of the Council with the support of one third of the membership of the Council.

PARTICIPATION OF AND CONSULTATION WITH OBSERVERS OF THE COUNCIL

Rule 7

(a) The Council shall apply the rules of procedure established for committees of the General Assembly, as applicable, unless subsequently otherwise decided by the Assembly or the Council, and the participation of and consultation with observers, including States that are not members of the Council, the specialized agencies, other intergovernmental organizations and national human rights institutions, as well as non-governmental organizations, shall be based on arrangements, including Economic and Social Council resolution 1996/31 of 25 July 1996, and practices observed by the Commission on Human Rights, while ensuring the most effective contribution of these entities.

(b) Participation of national human rights institutions shall be based on arrangements and practices agreed upon by the Commission on Human Rights, including resolution 2005/74 of 20 April 2005, while ensuring the most effective contribution of these entities.

ORGANIZATION OF WORK AND AGENDA FOR REGULAR SESSIONS

Organizational meetings

Rule 8

(a) At the beginning of each Council year, the Council shall hold an organizational meeting to elect its Bureau and to consider and adopt the agenda, programme of work, and calendar of regular sessions for the Council year indicating, if possible, a target date for the conclusion of its work, the approximate dates of consideration of items and the number of meetings to be allocated to each item.

(b) The President of the Council shall also convene organizational meetings two weeks before the beginning of each session and, if necessary, during the Council sessions to discuss organizational and procedural issues pertinent to that session.

PRESIDENT AND VICE-PRESIDENTS

Elections

Rule 9

(a) At the beginning of each Council year, at its organizational meeting, the Council shall elect, from among the representatives of its members, a President and four Vice-Presidents. The President and the Vice-Presidents shall constitute the Bureau. One of the Vice-Presidents shall serve as Rapporteur.

(b) In the election of the President of the Council, regard shall be had for the equitable geographical rotation of this office among the following Regional Groups: African States, Asian States, Eastern European States, Latin American and Caribbean States, and Western European and other States. The four Vice-Presidents of the Council shall be elected on the basis of equitable geographical distribution from the Regional Groups other than the one to which the President belongs. The selection of the Rapporteur shall be based on geographic rotation.

Bureau

Rule 10

The Bureau shall deal with procedural and organizational matters.

Term of office

Rule 11

The President and the Vice-Presidents shall, subject to rule 13, hold office for a period of one year. They shall not be eligible for immediate re-election to the same post.

Absence of officers

Rule 12 [105]

If the President finds it necessary to be absent during a meeting or any part thereof, he/she shall designate one of the Vice-Presidents to take his/her place. A Vice-President acting as President shall have the same powers and duties as the President. If the President ceases to hold office pursuant to rule 13, the remaining members of the Bureau shall designate one of the Vice-Presidents to take his/her place until the election of a new President.

Replacement of the President or a Vice-President

Rule 13

If the President or any Vice-President ceases to be able to carry out his/her functions or ceases to be a representative of a member of the Council, or if the Member of the United Nations of which he/she is a representative ceases to be a member of the Council, he/she shall cease to hold such office and a new President or Vice-President shall be elected for the unexpired term.

SECRETARIAT

Duties of the secretariat

Rule 14 [47]

The Office of the United Nations High Commissioner for Human Rights shall act as secretariat for the Council. In this regard, it shall receive, translate, print and circulate in all official United Nations languages, documents, reports and resolutions of the Council, its committees and its organs; interpret speeches made at the meetings; prepare, print and circulate the records of the session; have the custody and proper preservation of the documents in the archives of the Council; distribute all documents of the Council to the members of the Council and observers and, generally, perform all other support functions which the Council may require.

RECORDS AND REPORT

Report to the General Assembly

Rule 15

The Council shall submit an annual report to the General Assembly.

PUBLIC AND PRIVATE MEETINGS OF THE HUMAN RIGHTS COUNCIL

General principles

Rule 16 [60]

The meetings of the Council shall be held in public unless the Council decides that exceptional circumstances require the meeting be held in private.

Private meetings

Rule 17 [61]

All decisions of the Council taken at a private meeting shall be announced at an early public meeting of the Council.

CONDUCT OF BUSINESS

Working groups and other arrangements

Rule 18

The Council may set up working groups and other arrangements. Participation in these bodies shall be decided upon by the members, based on rule 7. The rules of procedure of these bodies shall follow those of the Council, as applicable, unless decided otherwise by the Council.

Quorum

Rule 19 [67]

The President may declare a meeting open and permit the debate to proceed when at least one third of the members of the Council are present. The presence of a majority of the members shall be required for any decision to be taken.

Majority required

Rule 20 [125]

Decisions of the Council shall be made by a simple majority of the members present and voting, subject to rule 19.

Appendix I

RENEWED MANDATES UNTIL THEY COULD BE CONSIDERED BY THE HUMAN RIGHTS COUNCIL ACCORDING TO ITS ANNUAL PROGRAMME OF WORK

Independent expert appointed by the Secretary-General on the situation of human rights in Haiti

Independent expert appointed by the Secretary-General on the situation of human rights in Somalia

Independent expert on the situation of human rights in Burundi

Independent expert on technical cooperation and advisory services in Liberia

Independent expert on the situation of human rights in the Democratic Republic of the Congo

Independent expert on human rights and international solidarity

Independent expert on minority issues

Independent expert on the effects of economic reform policies and foreign debt on the full enjoyment of all human rights, particularly economic, social and cultural rights

Independent expert on the question of human rights and extreme poverty
Special Rapporteur on the situation of human rights in the Sudan
Special Rapporteur on the situation of human rights in Myanmar
Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea
Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 (The duration of this mandate has been established until the end of the occupation.)
Special Rapporteur on adequate housing as a component of the right to an adequate standard of living
Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance
Special Rapporteur on extrajudicial, summary or arbitrary executions
Special Rapporteur on freedom of religion or belief
Special Rapporteur on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights
Special Rapporteur on the human rights aspects of the victims of trafficking in persons, especially women and children
Special Rapporteur on the human rights of migrants
Special Rapporteur on the independence of judges and lawyers
Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism
Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression
Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health
Special Rapporteur on the right to education
Special Rapporteur on the right to food
Special Rapporteur on the sale of children, child prostitution and child pornography
Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people
Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment
Special Rapporteur on violence against women, its causes and consequences
Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises
Special Representative of the Secretary-General for human rights in Cambodia

Special Representative of the Secretary-General on the situation of human rights defenders
Representative of the Secretary-General on human rights of internally displaced persons
Working Group of Experts on People of African Descent
Working Group on Arbitrary Detention
Working Group on Enforced or Involuntary Disappearances
Working Group on the question of the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination

Appendix II

TERMS IN OFFICE OF MANDATE-HOLDERS

Mandate-holder	Mandate	Terms in office
Charlotte Abaka	Independent Expert on the situation of human rights in Liberia	July 2006 (first term)
Yakin Ertürk	Special Rapporteur on violence against women, its causes and consequences	July 2006 (first term)
Manuela Carmena Castrillo	Working Group on Arbitrary Detention	July 2006 (first term)
Joel Adebayo Adekanye	Working Group on Enforced or Involuntary Disappearances	July 2006 (second term)
Saeed Rajaee Khorasani	Working Group on Enforced or Involuntary Disappearances	July 2006 (first term)
Joe Frans	Working Group on people of African descent	July 2006 (first term)
Leandro Despouy	Special Rapporteur on the independence of judges and lawyers	August 2006 (first term)
Hina Jilani	Special Representative of the Secretary-General on the situation of human rights defenders	August 2006 (second term)
Soledad Villagra de Biedermann	Working Group on Arbitrary Detention	August 2006 (second term)

Mandate-holder	Mandate	Terms in office
Miloon Kothari	Special Rapporteur on adequate housing as a component of the right to an adequate standard of living	September 2006 (second term)
Jean Ziegler	Special Rapporteur on the right to food	September 2006 (second term)
Paulo Sérgio Pinheiro	Special Rapporteur on the situation of human rights in Myanmar	December 2006 (second term)
Darko Göttlicher	Working Group on Enforced or Involuntary Disappearances	January 2007 (first term)
Tamás Bán	Working Group on Arbitrary Detention	April 2007 (second term)
Ghanim Alnajjar	Independent Expert appointed by the Secretary-General on the situation of human rights in Somalia	May 2007 (second term)
John Dugard	Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967	June 2007 (second term)
Rodolfo Stavenhagen	Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people	June 2007 (second term)
Arjun Sengupta	Independent Expert on the question of human rights and extreme poverty	July 2007 (first term)
Akich Okola	Independent Expert on the situation of human rights in Burundi	July 2007 (first term)
Titinga Frédéric Pacéré	Independent Expert on the situation of human rights in the Democratic Republic of the Congo	July 2007 (first term)
Philip Alston	Special Rapporteur on extrajudicial, summary or arbitrary executions	July 2007 (first term)
Asma Jahangir	Special Rapporteur on freedom of religion or belief	July 2007 (first term)

Mandate-holder	Mandate	Terms in office
Okechukwu Ibeanu	Special Rapporteur on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights	July 2007 (first term)
Vernor Muñoz Villalobos	Special Rapporteur on the right to education	July 2007 (first term)
Juan Miguel Petit	Special Rapporteur on the sale of children, child prostitution and child pornography	July 2007 (second term)
Vitit Muntarbhorn	Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea	July 2007 (first term)
Leila Zerrougui	Working Group on Arbitrary Detention	August 2007 (second term)
Santiago Corcuera Cabezut	Working Group on Enforced or Involuntary Disappearances	August 2007 (first term)
Walter Kälin	Representative of the Secretary-General on the human rights of internally displaced persons	September 2007 (first term)
Sigma Huda	Special Rapporteur on trafficking in persons, especially in women and children	October 2007 (first term)
Bernards Andrew Nyamwaya Mudho	Independent Expert on the effects of economic reform policies and foreign debt on the full enjoyment of human rights, particularly economic, social and cultural rights	November 2007 (second term)
Manfred Nowak	Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment	November 2007 (first term)

Mandate-holder	Mandate	Terms in office
Louis Joinet	Independent Expert appointed by the Secretary-General on the situation of human rights in Haiti	February 2008 (second term)
Rudi Muhammad Rizki	Independent Expert on human rights and international solidarity	July 2008 (first term)
Gay McDougall	Independent Expert on minority issues	July 2008 (first term)
Doudou Diène	Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance	July 2008 (second term)
Jorge A. Bustamante	Special Rapporteur on the human rights of migrants	July 2008 (first term)
Martin Scheinin	Special Rapporteur on the promotion and protection of human rights while countering terrorism	July 2008 (first term)
Sima Samar	Special Rapporteur on the situation of human rights in the Sudan	July 2008 (first term)
John Ruggie	Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises	July 2008 (first term)
Seyyed Mohammad Hashemi	Working Group on Arbitrary Detention	July 2008 (second term)
Najat Al-Hajjaji	Working Group on the use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination	July 2008 (first term)
Amada Benavides de Pérez	Working Group on the use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination	July 2008 (first term)

Mandate-holder	Mandate	Terms in office
Alexander Ivanovich Nikitin	Working Group on the use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination	July 2008 (first term)
Shaista Shameem	Working Group on the use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination	July 2007 (first term)
Ambeyi Ligabo	Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression	August 2008 (second term)
Paul Hunt	Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health	August 2008 (second term)
Peter Lesa Kasanda	Working Group on people of African descent	August 2008 (second term)
Stephen J. Toope	Working Group on Enforced or Involuntary Disappearances	September 2008 (second term)
George N. Jabbour	Working Group on people of African descent	September 2008 (second term)
Irina Zlatescu	Working Group on people of African descent	October 2008 (second term)
José Gómez del Prado	Working Group on the use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination	October 2008 (first term)
Yash Ghai	Special Representative of the Secretary-General for human rights in Cambodia	November 2008 (first term)

Human Rights Council

5/2. Code of Conduct for Special Procedures Mandate-holders of the Human Rights Council

The Human Rights Council,

Guided by the aims and principles of the Charter of the United Nations and the Universal Declaration of Human Rights and recognizing the ensuing obligations inter alia of States to cooperate in promoting universal respect for human rights as enshrined therein,

Recalling the Vienna Declaration and Programme of Action adopted on 25 June 1993 by the World Conference on Human Rights,

Recalling also that in resolution 60/251 of 15 March 2006, entitled "Human Rights Council", the General Assembly:

(*a*) Reaffirmed that all human rights are universal, indivisible, interrelated, interdependent and mutually reinforcing and that all human rights must be treated in a fair and equal manner on the same footing and with the same emphasis;

(*b*) Acknowledged that peace and security, development and human rights are the pillars of the United Nations system and that they are interlinked and mutually reinforcing;

(*c*) Decided that members elected to the Council shall uphold the highest standards in the promotion and protection of human rights and shall fully cooperate with the Council;

(*d*) Stressed the importance of "ensuring universality, objectivity and non-selectivity in the consideration of human rights issues, and the elimination of double standards and politicization";

(*e*) Further recognized that the promotion and protection of human rights "should be based on the principles of cooperation and genuine dialogue and aimed at strengthening the capacity of Member States to comply with their human rights obligations for the benefit of all human beings";

(*f*) Decided that "the work of the Council shall be guided by the principles of universality, impartiality, objectivity, and non-selectivity, constructive international dialogue and cooperation, with a view to enhancing the promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development";

(*g*) Also decided that "the methods of work of the Council shall be transparent, fair and impartial and shall enable genuine dialogue, be results-oriented, allow for subsequent follow-up discussions to recommendations and their implementation and also allow for substantive interaction with special procedures and mechanisms";

Underlining the centrality of the notions of impartiality and objectivity, as well as the expertise of mandate-holders, within the context of special procedures, along with the need to give the required degree of attention to all human rights violations, wherever they may be taking place,

Bearing in mind that the efficiency of the system of special procedures should be reinforced through the consolidation of the status of mandate-holders and the adoption of principles and regulations taking the specificities of their mandate into consideration,

Considering that it is necessary to assist all stakeholders, including States, national human rights institutions, non-governmental organizations and individuals, to better understand and support the activities of mandate-holders,

Recalling articles 100, 104, 105 of the Charter of the United Nations, section 22 of article VI of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946 and paragraph 6 of General Assembly resolution 60/251,

Noting decision 1/102 of 30 June 2006, in which the Council decided to extend exceptionally for one year the mandates and mandate-holders of the special procedures of the Commission on Human Rights, of the Sub-Commission for the Promotion and Protection of Human Rights as well as the procedure established pursuant to Economic and Social Council resolution 1503 (XLVIII) of 27 May 1970,

Noting also decision 1/104 of 30 June 2006, in which the Council established the Open-ended Intergovernmental Working Group entrusted with the task of formulating recommendations on the issue of the review and possibly the enhancement and rationalization of all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights, in order to maintain a regime of special procedures in accordance with paragraph 6 of General Assembly resolution 60/251,

Noting further resolution 2/1 of 27 November 2006, in which the Council requested the Open-ended Intergovernmental Working Group to "draft a code of conduct regulating the work of the special procedures",

Considering that this code of conduct is an integral part of the review, improvement and rationalization called for in General Assembly resolution 60/251 that, inter alia, seeks to enhance the cooperation between Governments and mandate-holders which is essential for the effective functioning of the system,

Considering also that such a code of conduct will strengthen the capacity of mandate-holders to exercise their functions whilst enhancing their moral authority and credibility and will require supportive action by other stakeholders, and in particular by States,

Considering further that one should distinguish between, on the one hand, the independence of mandate-holders, which is absolute in nature, and, on the other hand, their prerogatives, as circumscribed by their mandate, the mandate of the Human Rights Council, and the provisions of the Charter of the United Nations,

Mindful of the fact that it is desirable to spell out, complete and increase the visibility of the rules and principles governing the behaviour of mandate-holders,

Noting the Regulations Governing the Status, Basic Rights and Duties of Officials other than Secretariat Officials, and Experts on Mission that was adopted by the General Assembly in resolution 56/280 of 27 March 2002,

Noting also the draft Manual of the United Nations Human Rights Special Procedures adopted in 1999 by the sixth annual meeting of mandate-holders, as revised,

Taking note of the deliberations and proposals of the Open-ended Intergovernmental Working Group on Review of Mandates,

1. *Urges* all States to cooperate with, and assist, the special procedures in the performance of their tasks and to provide all information in a timely manner, as well as respond to communications transmitted to them by the special procedures without undue delay;

2. *Adopts* the Code of Conduct for Special Procedures Mandate-Holders of the Human Rights Council, the text of which is annexed to the present resolution and whose provisions should be disseminated by the Office of the United Nations High Commissioner for Human Rights, to the mandate-holders, to the Member States of the United Nations and to other concerned parties.

9th meeting

18 June 2007

[Resolution adopted without a vote.][3]

[3] See A/HRC/5/21, chap. III, para. 62.

Annex

DRAFT CODE OF CONDUCT FOR SPECIAL PROCEDURES MANDATE-HOLDERS OF THE HUMAN RIGHTS COUNCIL

Article 1 - Purpose of the Code of Conduct

The purpose of the present Code of Conduct is to enhance the effectiveness of the system of special procedures by defining the standards of ethical behaviour and professional conduct that special procedures mandate-holders of the Human Rights Council (hereinafter referred to as "mandate-holders") shall observe whilst discharging their mandates.

Article 2 - Status of the Code of Conduct

1. The provisions of the present Code complement those of the Regulations Governing the Status, Basic Rights and Duties of Officials other than Secretariat Officials, and Experts on Mission (ST/SGB/2002/9) (hereinafter referred to as "the Regulations");
2. The provisions of the draft manual of United Nations Human Rights Special Procedures should be in consonance with those of the present Code;
3. Mandate-holders shall be provided by the United Nations High Commissioner for Human Rights, along with the documentation pertaining to their mission, with a copy of the present Code of which they must acknowledge receipt.

Article 3 - General principles of conduct

Mandate-holders are independent United Nations experts. While discharging their mandate, they shall:

(*a*) Act in an independent capacity, and exercise their functions in accordance with their mandate, through a professional, impartial assessment of facts based on internationally recognized human rights standards, and free from any kind of extraneous influence, incitement, pressure, threat or interference, either direct or indirect, on the part of any party, whether stakeholder or not, for any reason whatsoever, the notion of independence being linked to the status of mandate-holders, and to their freedom to assess the human rights questions that they are called upon to examine under their mandate;

(*b*) Keep in mind the mandate of the Council which is responsible for promoting universal respect for the protection of all human rights and fundamental freedoms for all, through dialogue and cooperation as specified in General Assembly resolution 60/251 of 15 March 2006;

(*c*) Exercise their functions in accordance with their mandate and in compliance with the Regulations, as well as with the present Code;

(*d*) Focus exclusively on the implementation of their mandate, constantly keeping in mind the fundamental obligations of truthfulness, loyalty and independence pertaining to their mandate;

(*e*) Uphold the highest standards of efficiency, competence and integrity, meaning, in particular, though not exclusively, probity, impartiality, equity, honesty and good faith;

(*f*) Neither seek nor accept instructions from any Government, individual, governmental or non-governmental organization or pressure group whatsoever;

(*g*) Adopt a conduct that is consistent with their status at all times;

(*h*) Be aware of the importance of their duties and responsibilities, taking the particular nature of their mandate into consideration and behaving in such a way as to maintain and reinforce the trust they enjoy of all stakeholders;

(*i*) Refrain from using their office or knowledge gained from their functions for private gain, financial or otherwise, or for the gain and/or detriment of any family member, close associate, or third party;

(*j*) Not accept any honour, decoration, favour, gift or remuneration from any governmental or non-governmental source for activities carried out in pursuit of his/her mandate.

Article 4 - Status of mandate-holders

1. Mandate-holders exercise their functions on a personal basis, their responsibilities not being national but exclusively international.

2. When exercising their functions, the mandate-holders are entitled to privileges and immunities as provided for under relevant international instruments, including section 22 of article VI of the Convention on the Privileges and Immunities of the United Nations.

3. Without prejudice to these privileges and immunities, the mandate-holders shall carry out their mandate while fully respecting the national legislation and regulations of the country wherein they are exercising their mission. Where an issue arises in this regard, mandate-holders shall adhere strictly to the provisions of Regulation 1 (e) of the Regulations.

Article 5 - Solemn declaration

Prior to assuming their functions, mandate-holders shall make the following solemn declaration in writing:

"I solemnly declare that I shall perform my duties and exercise my functions from a completely impartial, loyal and conscientious standpoint, and truthfully, and that I shall discharge these functions and regulate my conduct in a manner totally in keeping with the terms of my mandate, the Charter of the United Nations, the interests of the United Nations, and with the objective of promoting and protecting human rights, without seeking or accepting any instruction from any other party whatsoever."

Article 6 - Prerogatives

Without prejudice to prerogatives for which provision is made as part of their mandate, the mandate-holders shall:

(*a*) Always seek to establish the facts, based on objective, reliable information emanating from relevant credible sources, that they have duly cross-checked to the best extent possible;

(*b*) Take into account in a comprehensive and timely manner, in particular information provided by the State concerned on situations relevant to their mandate;

(*c*) Evaluate all information in the light of internationally recognized human rights standards relevant to their mandate, and of international conventions to which the State concerned is a party;

(*d*) Be entitled to bring to the attention of the Council any suggestion likely to enhance the capacity of special procedures to fulfil their mandate.

Article 7 - Observance of the terms of the mandate

It is incumbent on the mandate-holders to exercise their functions in strict observance of their mandate and in particular to ensure that their recommendations do not exceed their mandate or the mandate of the Council itself.

Article 8 - Sources of information

In their information-gathering activities the mandate-holders shall:

(*a*) Be guided by the principles of discretion, transparency, impartiality, and even-handedness;

(*b*) Preserve the confidentiality of sources of testimonies if their divulgation could cause harm to individuals involved;

(*c*) Rely on objective and dependable facts based on evidentiary standards that are appropriate to the non-judicial character of the reports and conclusions they are called upon to draw up;

(*d*) Give representatives of the concerned State the opportunity of commenting on mandate-holders' assessment and of responding to the allegations made against this State, and annex the State's written summary responses to their reports.

Article 9 - Letters of allegation

With a view to achieving effectiveness and harmonization in the handling of letters of allegation by special procedures, mandate-holders shall assess their conformity with reference to the following criteria:

(*a*) The communication should not be manifestly unfounded or politically motivated;

(*b*) The communication should contain a factual description of the alleged violations of human rights;

(*c*) The language in the communication should not be abusive;

(*d*) The communication should be submitted by a person or a group of persons claiming to be victim of violations or by any person or group of persons, including non-governmental organizations, acting in good faith in accordance with principles of human rights, and free from politically motivated stands or contrary to, the provisions of the Charter of the United Nations, and claiming to have direct or reliable knowledge of those violations substantiated by clear information;

(*e*) The communication should not be exclusively based on reports disseminated by mass media.

Article 10 - Urgent appeals

Mandate-holders may resort to urgent appeals in cases where the alleged violations are time-sensitive in terms of involving loss of life, life-threatening situations or either imminent or ongoing damage of a very grave nature to victims that cannot be addressed in a timely manner by the procedure under article 9 of the present Code.

Article 11 - Field visits

Mandate-holders shall:

(*a*) Ensure that their visit is conducted in compliance with the terms of reference of their mandate;

(*b*) Ensure that their visit is conducted with the consent, or at the invitation, of the State concerned;

(*c*) Prepare their visit in close collaboration with the Permanent Mission of the concerned State accredited to the United Nations Office at Geneva except if another authority is designated for this purpose by the concerned State;

(*d*) Finalize the official programme of their visits directly with the host country officials with administrative and logistical back-up from the local United Nations Agency and/or Representative of the High Commissioner for Human Rights who may also assist in arranging private meetings;

(*e*) Seek to establish a dialogue with the relevant government authorities and with all other stakeholders, the promotion of dialogue and cooperation to ensure the full effectiveness of special procedures being a shared obligation of the mandate-holders, the concerned State and the said stakeholders;

(*f*) Have access upon their own request, in consultation with the Office of the High Commissioner for Human Rights and after a common understanding between the host Government and the mandate-holder, to official security protection during their visit, without prejudice to the privacy and confidentiality that mandate-holders require to fulfil their mandate.

Article 12 - Private opinions and the public nature of the mandate

Mandate-holders shall:

(*a*) Bear in mind the need to ensure that their personal political opinions are without prejudice to the execution of their mission, and base their conclusions and recommendations on objective assessments of human rights situations;

(*b*) In implementing their mandate, therefore, show restraint, moderation and discretion so as not to undermine the recognition of the independent nature of their mandate or the environment necessary to properly discharge the said mandate.

Article 13 - Recommendations and conclusions

Mandate-holders shall:

(*a*) While expressing their considered views, particularly in their public statements concerning allegations of human rights violations, also indicate fairly what responses were given by the concerned State;

(*b*) While reporting on a concerned State, ensure that their declarations on the human rights situation in the country are at all times compatible with their mandate and the integrity, independence and impartiality which their status requires, and which is likely to promote a constructive dialogue among stakeholders, as well as cooperation for the promotion and protection of human rights;

(*c*) Ensure that the concerned government authorities are the first recipients of their conclusions and recommendations concerning this State and are given adequate time to respond, and that likewise the Council is the first recipient of conclusions and recommendations addressed to this body.

Article 14 - Communication with Governments

Mandate-holders shall address all their communications to concerned Governments through diplomatic channels unless agreed otherwise between individual Governments and the Office of the High Commissioner for Human Rights.

Article 15 - Accountability to the Council

In the fulfilment of their mandate, mandate-holders are accountable to the Council

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[i] Resolution 217 A (III).

[ii] A/CONF.157/24 (Part I), chap. III.

[iii] See resolution 2200 A (XXI), annex.