

Preventive Action and Accountability:
Human Rights and the United Nations Security Council

Fernando Fernández-Arias, Fellow at the Weatherhead Center for International Affairs
Harvard University

Summary: The United Nations Security Council does not have a mandate to protect and promote human rights. It does, however, have tools for positive action both to prevent serious human rights violations and to promote accountability for mass atrocities. This paper examines the ways in which the Security Council has contributed to protecting human rights, the various activities it is currently carrying out in this field and the possibilities for further action by the Council, especially in the fields of preventive diplomacy and in the delicate issue of ensuring accountability in cases of genocide, crimes against humanity, and major core human rights violations within a conflict. Furthermore, this paper will study the ways in which inculcating a human rights culture throughout the Security Council's work would ensure that a human dimension is considered by Council members when taking decisions on the maintenance of international peace and security.

Introduction

On 31 January 1992, the United Nations Security Council (UNSC) held its first ever meeting at head of state (or government) level. It was chaired by British Prime Minister John Major under the agenda item “the responsibility of the Security Council in the maintenance of peace and security.” Presidents George H.W. Bush of the United States, Boris Yeltsin of Russia, and François Mitterrand of France were in attendance, as were the King of Morocco, the Presidents of Ecuador and Venezuela, and the Prime Ministers of China, Cape Verde, Hungary, India, and Japan, among others. The meeting was held in the aftermath of the collapse of the Soviet Union and the end of the Cold War and after the success of the Gulf War, where a UN-sanctioned international coalition ousted the Iraqi army from invaded Kuwait. It was a time when establishing the system of collective security overseen by the UNSC that the UN Charter had envisaged seemed possible. In his statement that day at the Council meeting, President Yeltsin affirmed “the Security Council is called upon to underscore the civilized world's collective

responsibility for the protection of human rights and freedoms,” having also affirmed that “I believe these questions are not an internal matter of states but they’re obligations under the UN Charter.”¹

More than 25 years later, on 18 April 2017, the Security Council held a meeting, under the agenda item “Maintenance of Peace and Security” on “Human Rights and prevention of armed conflict.” The debate was held at the initiative of the United States, the Council’s rotating President, whose original intention was to create a new agenda item, “Human rights and international peace and security,” but this would have required the support of at least nine member states in a procedural vote, which eventually it was not possible to achieve. The main briefer of the meeting was UN Secretary General Antonio Guterres. In his remarks, he affirmed that “human rights concerns are intrinsic to maintaining peace and security and essential to informing Security Council deliberations and decision-making. The unity of this Council in effectively addressing the most blatant violations of human rights—and in particular averting mass atrocities—is crucial.”² At the end of his statement, UNSG Guterres suggested a theoretical test to Council members: “if the most acute human rights and development concerns were immediately resolved, how many situations would still be threats to peace and security and remain on the Council’s agenda?”³

The UN Security Council is entrusted by the United Nations Charter with the maintenance of International Peace and Security⁴ and, to this end, has a mandate and is provided with the tools described in Chapters VI (“Pacific settlement of disputes”) and VII (“Action with respect to threat of the peace, breaches of the peace and acts of aggression”) of the Charter. While human rights are mentioned throughout the Charter,⁵ including the Preamble and Article I, neither Chapter VI nor Chapter VII makes any reference to it. In accordance with the distribution of functions of competences within the institutional framework of the United Nations, the intergovernmental body entrusted with the protection and promotion of human rights is the Human Rights Council (HRC), a subsidiary body of the

¹ A full recording of the UNSC meeting is available at <https://www.c-span.org/video/?24101-1/security-council-summit-meeting>. Accessed on 11 June 2017.

² The official text of the UNSC statement is available at <https://www.un.org/sg/en/content/sg/speeches/2017-04-18/secretary-generals-prevention-armed-conflict-remarks>. Accessed on 11 June 2017.

³ Ibid.

⁴ United Nations Charter, Article 24.1: “In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.”

⁵ Samuel Moyn writes: “In the Dumbarton Oak agreements, human rights were practically omitted, while in the UN Charter they were reduced to embellishment.” *The Last Utopia: Human rights in history* (Cambridge, MA: The Belknap Press of Harvard University Press, 2010), p. 181.

General Assembly that was established on 15 March 2006 by UNGA resolution 60/251 (A/RES/60/251)⁶ as a successor to the Commission on Human Rights, which had long been perceived as ineffective. The HRC was created following the mandate of the United Nations Summit held on 14–16 September 2005,⁷ whose Outcome Document was based on a set of proposals outlined in March 2005 in the report by then UN Secretary General Kofi Annan entitled “In Larger Freedom,”⁸ a report whose goal was to consolidate the main principles of the United Nations for the twenty-first century.

The notion of “larger freedom” set forth in the UNSG report “encapsulates the idea that development, security and human rights go hand in hand.”⁹ Throughout the entire document all three concepts are presented as common goals which are necessarily intertwined if the principles and purposes of the UN Charter are to be fulfilled, with the overarching aim of facing with success the realities of the new millennium. The report clearly affirms that “we will not enjoy development without security, we will not enjoy security without development, and we will not enjoy either without respect for human rights.”¹⁰ Despite the clear definition and distribution of functions and competences amongst the various intergovernmental bodies of the UN system, the report made it clear that all UN bodies, whatever their mandate, must keep all three dimensions in consideration when carrying out their duties.

But, if an institutional structure for the promotion and protection of human rights is already in place within the UN system, why should the Security Council encroach on those functions when it does not have the mandate?¹¹ At the center of this issue is the real effectiveness, or lack of it, of international mechanisms for human rights protection. The UNSC “is potentially the most powerful international

⁶ All United Nations official documents can be accessed online and consulted in all UN official languages, using their reference symbol, at <http://www.un.org/en/documents/index.html>.

⁷ UNGA resolution A/RES/60/1 adopts the 2005 Summit Outcome Document. Paragraphs 157-160 set out the parameters of the new HRC.

⁸ “In Larger Freedom: Towards Security, Development and Human Rights for All,” Doc A/59/2005, was a five-year implementation report on the goals of the Millennium Declaration requested to the UNSC by UNGA which became the basis for the 2005 Summit Outcome Document and the subsequent reform of the United Nations institutional framework.

⁹ “In Larger Freedom”, para. 14, p. 5.

¹⁰ Ibid, para 17, p. 6.

¹¹ The academic literature on human rights and the UN Security Council is limited. The most relevant publication on the issue is Jared Genser and Bruno Stagno Ugarte (eds.), *The United Nations Security Council in the Age of Human Rights* (Cambridge, UK: Cambridge University Press, 2014). In January 2016, the New York-based think tank Security Council Report (<http://www.securitycouncilreport.org/index.php>) published a very complete research report “Human Rights and the Security Council –An evolving role,” available online at http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/research_report_human_rights_january_2016.pdf. Accessed on 11 June 2017.

organization ever known to the world of states”¹² and is endowed with strong competences and effective instruments, including the determination of the existence of any threat to peace or an act of aggression (Article 39 of the Charter) and the authorization of sanctions (Article 41) or the use of force (Article 42). Any UN-sanctioned intervention is immediately perceived as legitimized by the international community, and although “the UN is not the only source of legitimacy in world politics, [...] its universality, legal framework and relative attractiveness do give its votes and pronouncements a considerable degree of legitimacy.”¹³ Furthermore, Article 25 of the Charter certifies that Security Council decisions are applicable *erga omnes*.¹⁴

On the other hand, the interconnection of conflict and human rights violations seems undeniable. As Mary Robinson, at the time UN High Commissioner for Human Rights, said: “today’s human rights violations are the causes of tomorrow’s conflicts.”¹⁵ Article 55 of the UN Charter seems to recognize this dimension when it states that “with a view to the creation of conditions of stability and well-being that are necessary for peaceful and friendly relations among nations,” the United Nations shall promote “universal respect for, and observance of, human rights and fundamental freedoms.” Many studies have focused on the links between human rights and conflict and on human rights violations as causes, symptoms and consequences of violent conflict,¹⁶ and amongst them, an over-arching study financed by the European Commission concluded that “in the twenty-first century, violence and conflict continue to be at the heart of some of the worst human rights violations across the globe.”¹⁷ Security Council Resolution 2171 (S/RES/2171) on prevention of conflict, adopted unanimously in August 2014 acknowledged that serious abuses and violations of human rights “can be an early indication of a descent into conflict or escalation of a conflict.”

¹² Ian Hurd, *After Anarchy: Legitimacy and Power in the United Nations Security Council* (Princeton: Princeton University Press 2007), p. 12.

¹³ Joseph S. Nye Jr., *Soft Power: The Means to Success in World Politics* (New York: Public Affairs, 2004).

¹⁴ UN Charter, Article 25: “The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”

¹⁵ Mary Robinson, “Realizing Human Rights: ‘Take hold of it duly and boldly,’” Romanes lecture 1997 (Oxford: Clarendon Press, 1998)

¹⁶ Among others: Julie A. Mertus and Jeffrey W. Helsing (eds.), *Human Rights and Conflict: Exploring the links between law, rights and peacebuilding* (Washington, DC: Institute of Peace Press, 2006); Georg E. Frersk, “Human Rights Violations and Contemporary Violent Conflict: and inquiry into causes and remedies,” in Ineke Boerefijn (ed), *Human Rights and Conflict: Essays in honour of Bas de Gaay Fortman* (Cambridge, UK: Intersentia, 2012); Chandra Lekha Sriram, Olga Martín-Ortega, and Joanna Herman (eds.), *War, Conflict and Human Rights: Theory and practice* (2nd ed, Abingdon, UK: Routledge 2014); and Kjersti Skarstad, “Human Rights Violations and Conflict Risk: A theoretical and empirical assessment,” in Cecilia Marcela Bailliet and Kjetil Mujezinovic Larsen (eds.), *Promoting Peace through International Law* (Oxford: Oxford University Press, 2015).

¹⁷ Carmen Márquez Carrasco, Laura Íñigo Álvarez, Nora Loozen, and Elizabeth Salmón Gárate, “Human Rights violations in conflict settings,” FRAME document (Brussels: European Commission, 2014), p. 12.

The nature of conflict has changed since the UN Charter was written and adopted. Since the 1990s, the agenda of the Security Council has focused on internal, rather than international, conflicts. It is mostly in that internal context that human rights violations can occur, and they can affect all categories of recognized rights. Thoms and Ron state: “violations of civil and political rights are more obviously linked to conflict than abuses of economic and social rights. Discrimination and violations of social and economic rights function as underlying causes, creating grievances and group identities that may lead to violence. In contrast, violations of civil and political rights are clearly more identifiable as direct conflict triggers. When populations are unsettled by long-standing inequalities in access to basic needs and political participation, government repression may trigger violent conflict.”¹⁸ It has been widely reported that one of the sparks that triggered the ongoing civil war in Syria was the arrest and torture of a group of children and teenagers who scribbled anti-government graffiti on their school wall.¹⁹

The protection of populations from atrocity crimes has become more central to the work of the Security Council and has informed more than forty of its resolutions since 2005, being incorporated directly into the mandates of most peacekeeping operations.²⁰ In the reality of the daily work at the UN Security Council, however, there does not seem to exist a profound human rights culture or a real interest in dealing with the human rights dimension of the various phases of conflict. Very often, when faced with human-rights-related issues, some members of the Council, permanent and non-permanent alike, insist that the issue at stake be addressed by the corresponding competent intergovernmental bodies and that the UNSC must avoid encroachment on their mandates. But despite this evident lack of interest and despite what has been labeled a “linguistic phobia” toward the term “human rights,”²¹ the Council has, throughout its more than seventy years of history and performance, increasingly taken into consideration human rights issues in its work, although in most cases without referring to them by name. The first two parts of this paper will be devoted, respectively, to a historic account of the UNSC work in the field of human rights and to an exploration of the many issues on its current agenda that are directly related to human rights issues.

¹⁸ Oskar N. Thoms and Jon Ron, “Do Human Rights violations cause internal conflict,” *Human Rights Quarterly*, vol. 29 (3) p. 701.

¹⁹ Among others, Joe Sterling, CNN, “Daraa: The spark that lit the flame,” 1 March 2012, <http://www.cnn.com/2012/03/01/world/meast/syria-crisis-beginnings/>. Accessed on 11 June 2017.

²⁰ “Mobilizing collective action: The next decade of the responsibility to protect,” Report of the United Nations Secretary General, 22 July 2016, Doc A/70/999-S/2016/620, p. 3.

²¹ Security Council Report, “Human Rights and the Security Council,” p. 9.

The focus of the central part of this paper will be twofold: On the one hand, it will show that the UN Security Council is in possession of tools, non-existent in other UN or international bodies, that can be used to prevent atrocities and mass-scale human rights violations, whilst also having the ability to promote a much more effective level of accountability and to eliminate the impunity of those responsible of the crime of genocide, war crimes, or crimes against humanity, mostly in conjunction with the International Criminal Court (ICC). On the other hand, it will be proposed that it is essential that a culture of human rights is inculcated into the daily work of the Security Council, namely that human rights become an intrinsic part of what the UNSC takes into consideration when deliberating and adopting decisions on the maintenance of international peace and security, always in cooperation with the vast UN human rights edifice. On both fronts, the political will of the Council members, especially the permanent five with the right of veto, is clearly essential.

I. The United Nations Security Council and Human Rights: a brief history

The early decades of the United Nations Security Council's activity were dominated by the Cold War. Within that context, human rights seemed to be well outside the scope of the Security Council yet there are relatively few, but significant, references to human rights situations in a number of country-specific resolutions. It must, however, be pointed out that it took the UNSC years even to acknowledge the basic human rights international instruments: the Universal Declaration of Human Rights, adopted in 1948, was first mentioned in a Council resolution in 1963, and the Geneva Conventions of 1949 were first referenced in 1967.²² What the forthcoming list will not show are the cases in which the permanent members exercised their veto (whether publicly or, more often, in the negotiation process, of which there is no public record) when faced with draft resolutions with elements of human rights, humanitarian international law, or protection of civilians. Whether for colonial, political, or geostrategic reasons, draft texts on the Middle East (including the Occupied Arab Territories and, more recently, Syria), Algeria, South Africa, Namibia, the Western Sahara, Southern Rhodesia (Zimbabwe), Hungary, Czechoslovakia, Vietnam, Afghanistan, Myanmar, Kampuchea (Cambodia), Georgia, and Sri Lanka, as well as the well-documented cases of the former Yugoslavia and Rwanda, were vetoed, either publicly or, more often, behind the closed doors of the consultations room. A more detailed account of the use of

²² Bruno Stagno Ugarte and Jared Gesner, "Evolution of the Security Council's Engagement on Human Rights," in Genser and Stagno Ugarte (eds.), *The United Nations Security Council in the Age of Human Rights*, p. 27.

the veto by the permanent members in human-rights-related texts will be included in the third section of this paper. The resolutions with human rights elements are the following:

- Trieste: The first-ever acknowledgment of human rights in a UNSC text is the annex to resolution 16 (S/RES/16) of January 1947, in which the Council accepts its responsibility to protect the basic human rights of the inhabitants of the Free Territory of Trieste.
- Jammu and Kashmir: Resolution 47 (S/RES/47) of 21 April 1948 ordered India and Pakistan to ensure that “all subjects of the State of Jammu and Kashmir, regardless of the creed, caste or party, will be safe and free in expressing their views and voting [...] and there will be freedom of the press, speech and assembly and freedom of travel in the State, including freedom of lawful entry and exit.”
- Indonesia: Resolution 67 (S/RES/67) of January 1949 was adopted in preparation for the first elections in Indonesia, following the withdrawal of the colonial power, the Netherlands, and called for “freedom of assembly, speech and publication at all times” in preparation for the “free and democratic” elections. As Stagno Ugarte and Genser have commented: “Similar pronouncements from the Council on the democratic entitlement and the associated human rights and fundamental freedoms would become rare as the Cold War pressed on.”²³
- Hungary: In 1956, faced with the Soviet intervention in Hungary to repress the anti-Communist insurgency in the country, and after the threat of a Soviet veto to a first draft resolution, the UNSC adopted resolution 120 (S/RES/120), of a procedural nature (where the right of veto is not applicable), which states that the Council, “*Considering* that a grave situation has been created by the use of Soviet military forces to suppress the efforts of the Hungarian people to reassert their rights [...] *Decides* to call an emergency session of the General Assembly, as provided in General Assembly resolution 377 A (V) of 3 November 1950,²⁴ in order to make appropriate recommendations concerning the situation in Hungary.” Resolution 120 was adopted on 4 November 1956 by nine votes in favor and one against (the Soviet Union).

²³ Ibid, p.8.

²⁴ Known as “Uniting for Peace,” UNGA resolution 377 (A/RES/5/1377) states that in cases where the UNSC fails to act to maintain peace and security due to lack of consensus of its permanent members, the General Assembly may act on the matter during its main session or by holding a special emergency session, which can be called, as was the case in the present example, by a procedural vote of the UNSC.

- Republic of Congo: A few years later, in 1961, in the context of the conflict in the Republic of Congo (today the Democratic Republic of Congo), which was the site of ONUC, the first UN peace-keeping operation in Africa, the UNSC passed a number of resolutions in an effort to stop the civil war in the country. Resolution 161 B (S/RES/161) of 21 February contains a preliminary paragraph with human rights language: “*Noting with deep regret and concern the systematic violations of human rights and fundamental freedoms and the general absence of the rule of law in the Congo.*” A few months later, when on his way to the Republic of Congo to negotiate a cease-fire between the warring factions, Secretary General Dag Hammarskjöld and the accompanying team died in a plane crash under conditions that have not yet been fully clarified.²⁵

- Dominican Republic: The UNSC took action in 1965 in reaction to the coup and subsequent civil war in the Dominican Republic. In May of that year, the Council adopted two resolutions, 203 (S/RES/203) and 205 (S/RES/205), calling in both cases for a cease-fire and requesting a report from the Secretary General. A later UNSC presidential statement following a debate on the issue held on 26 July, affirmed that: “There have been brought to the attention of the Council acts of aggression against the civilian population and other violations of human rights [...] the statements by the members of the Council have condemned gross violations of human rights in the Dominican Republic, have expressed the desire that such violations should cease, and have indicated again the need for a strict observance of the cease-fire....”

- South Africa: The clearest case of early UNSC involvement in human rights is the situation of apartheid-era South Africa.²⁶ A number of UNSC resolutions adopted between 1960 and the end of the apartheid regime in 1991 mention human rights related issues. Resolution 134 (S/RES/134) of 1 April 1960 was the first to request an end to the policies of apartheid and racial discrimination, and resolution 181 (S/RES/181) of 7 August 1963 “*Calls upon the government of South Africa to abandon the policies of apartheid and discrimination [...] and to liberate all persons imprisoned, interned or subjected to other restrictions for having opposed the policy of apartheid.*” It was the first occasion in which the UNSC called for the liberation of political prisoners. A few months later, on 4 December 1963, the Council went further and in resolution

²⁵ The inquest on the causes and circumstances of UNSG Hammarskjöld’s death are still on going, as requested by various UNGA resolutions including most recently resolution A/RES/71/260 adopted on 23 December 2016.

²⁶ Apartheid was the object of a 1973 International Convention adopted by UNGA and was listed as a crime against humanity by Article 7 (j) of the Rome Statute of the International Criminal Court of 1998.

182 (S/RES/182) affirmed that the situation in South Africa “is seriously disturbing international peace and security,” declared that the policies of racial discrimination are “inconsistent with the principles contained with the Charter of the United Nations,” and recognized “the need to eliminate discrimination in regard to basic human rights and fundamental freedoms for all individuals.” In fact, resolution 182 is the first UNSC-issued text that references the Universal Declaration of Human Rights, fifteen years after its adoption by the General Assembly. Subsequent resolutions on South Africa adopted by the Council included similar language: resolutions 190 (S/RES/190) and 191 (S/RES/191) of 1964 and, significantly, resolution 418 (S/RES/418) of 4 November 1977, which established an arms embargo against the country. It is worth remembering that South Africa, a founding member of the United Nations, was suspended from membership by the General Assembly in 1974 and re-admitted in 1994, once the apartheid regime was finished.

- Southern Rhodesia: The first UNSC sanctions committee was established in 1968 by resolution 253 (S/RES/253) regarding Southern Rhodesia (modern-day Zimbabwe, at the time officially under British administration, despite its unilateral declaration of independence in 1965). This resolution, in addition to establishing a detailed sanctions regime, “*condemns* all measures of political repression, including arrests, detentions, trials and executions which violate fundamental freedoms and rights of the people of Southern Rhodesia” and calls upon the government of the United Kingdom “to enable the people to secure the enjoyment of their rights as set forth in the Charter of the United Nations.”
- Guinea-Bissau: An interesting example is UNSC resolution 294 (S/RES/294) of 15 July 1971 on the armed attacks by Portugal along Senegal’s border with Guinea Bissau (at the time, under Portuguese colonial rule), because it takes note of the report of an *ad hoc* working group of experts that had been established by the Commission on Human Rights (CHR) on the Portuguese acts of violence in Senegalese territory. It is one of the few instances in which a UNSC resolution mentions a CHR (or its successor, the Human Rights Council) document.
- Iraq: After the end of the cold war a window of opportunity seemed to open for the UNSC to make a clearer and explicit connection between human rights violations and conflict. The Iraq conflict was a first example of the post-Cold War dynamic, with cooperation amongst all five UNSC permanent members, and resolution 688 (S/RES/688), adopted on 5 April 1991, for the first time makes a connection between repression and threats to international peace and

security in the face of massive human rights violations perpetrated by the Baghdad regime against its Kurdish population: “*Gravely concerned* by the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish-populated areas [...] which threaten international peace and security in the region.” In the operative section, the resolution “*Demands* that Iraq, as a contribution to remove the threat to international peace and security in the region, immediately end this repression and [...] ensure that the human and political rights of all Iraqi citizens are respected.”

- Recent briefings on human rights situations outside the Council’s agenda: Discussing the human rights dimension in briefings or debates on country-specific situations on the Council’s agenda is now relatively common, but adding a specific “situation to the agenda largely or exclusively because of a human rights crisis has always been controversial and in three cases led to a rare procedural vote.”²⁷ Examples are Zimbabwe in 2005 and Myanmar in 2006, both with a procedural vote (China and Russia voted against, but procedural votes, as stated earlier, are not subject to a veto; Myanmar is still on the agenda) and, all the more relevant, the Democratic People’s Republic of Korea (DPRK). This issue was placed on the agenda in December 2014 following a request by ten members of the Council, “marking the first time the Security Council had placed a situation on its agenda solely because of human rights violations committed in a country.”²⁸ China and Russia voted against it, as they did when the issue was raised again in December 2015 and December 2016. On both occasions there were nine votes in favor, the bare minimum to adopt a decision. Finally, it is worth mentioning, because of the rarity of United Nations texts that deal with discrimination on grounds of sexual orientation, the Council’s press statement of 13 June 2016, after the terrorist attack in Orlando, Florida. The statement condemned the attack for “targeting persons as a result of their sexual orientation” and reminded the need to combat terrorism “in accordance [...] with human rights law.”²⁹

This account of both early and more recent UNSC activity on country-specific human rights issues leads us back to the first-ever meeting of the Council held at Head of State (or government) level, held in January 1992, which was described at the very beginning of this paper. During the debate, most members of the Council, as well as UNSG Boutros Boutros-Ghali expressed support for the Council’s

²⁷ Security Council Report, “Human Rights and the Security Council,” p. 8.

²⁸ Ibid.

²⁹ Security Council Press Statement available at <https://www.un.org/press/en/2016/sc12399.doc.htm>. Accessed on 11 June 2017.

interest and concern with human rights matters. India and Zimbabwe however cautioned that UNSC action in this field could impinge on states' sovereignty. Premier Li Peng of China likewise stated that human rights must be universally respected but fall within the sovereignty of each country, and should not be used as an excuse to interfere in the internal affairs of other countries. The negotiated outcome of the summit meeting was a detailed Presidential Statement that included a reference to the "encouragement of respect for human rights and fundamental freedoms," and acknowledged and welcomed the fact that "human rights verification" has been one of the "integral parts of the Security Council's efforts to maintain international peace and security."³⁰

II. The United Nations Security Council and Human Rights: the current use of the toolbox

The end of the Cold War was certainly a turning point in United Nations history. In June 1992, UNSG Boutros Boutros-Ghali issued his report "An Agenda for Peace,"³¹ a forward-looking plan of action that stated that "an opportunity has been regained to achieve the great objectives of the Charter—a United Nations capable of maintaining international peace and security, of securing justice and human rights and of promoting, in the words of the Charter, 'social progress and better standards of life in larger freedom'." An era of optimism ensued, highlighted by a series of big thematic international conferences at summit level (Environment and Development, Rio de Janeiro 1992; Human Rights, Vienna 1993; Population and Development, Cairo 1994; Social Development, Copenhagen 1995; Women, Beijing 1995), while at the same time some UNSC-mandated missions were signal failures, unable to prevent mass atrocities that resulted in a high cost in human life: UNPROFOR (Former Yugoslavia, 1992-1995), ONUSOM (Somalia, 1992-1995) and, most poignantly, UNAMIR (Rwanda 1993-1996).

In the face of the realities of yet more complex internal conflicts, the UNSC and its members started to add further dimensions to its work. When it comes to human rights, or the human dimension of conflict, there are three areas of particular interest within the Council's agenda: peace operations mandates, the emergence of thematic issues, and the establishment of *ad hoc* international tribunals.

³⁰ The complete proceeds of the 3046th meeting of the UNSC are available at http://www.un.org/en/sc/repertoire/89-92/Chapter%208/GENERAL%20ISSUES/Item%2028_SC%20respons%20in%20maint%20IPS.pdf. Accessed on 11 June 2017.

³¹ UN Document A/47/277, available at <http://www.un-documents.net/a47-277.htm>. Accessed on 11 June 2017.

A. Peace operations

From the deployment of the first peacekeeping operation, in 1948,³² until today, the shape and mandates of peace operations have evolved enormously. In June 2015, at the request of the UNSG, a High-Level Independent Panel on Peace Operations submitted its report, “Uniting our strengths for peace: politics, partnerships for people,” which presents an overarching vision of all peace operations and formulates proposals on how to strengthen them. Current operations are multidimensional, have a robust protection mandate and multifaceted components, yet not all of them are the same in size or mandate.³³ With a few exceptions, all new operations authorized since the end of the Cold War have a human rights component.

The UN Observer Mission in El Salvador (ONUSAL), adopted by resolution 693 (S/RES/693) in May 1991, was the first peace operation with an explicit and comprehensive human rights mandate. The main mandate of the mission was to monitor all agreements concluded between the parties and particularly to “verify the compliance by the parties with the Agreement on Human Rights signed at San José on 26 July 1990.” It must be noted that the human rights accord was signed by the parties before a comprehensive peace treaty was concluded, after which ONUSAL’s mandate was extended to verify and monitor the peace agreement -by resolution 729 (S/RES/729) in 1992. Half of the staff of the original mission was made up of human rights observers, supported by police advisors and military observers. They monitored the human rights situations and investigated cases of human rights violations, reporting regularly to the UNSC. It was an early, and very successful, example of integrating human rights in a peace mandate.

As stated earlier, most peace operations authorized after ONUSAL have had a human rights component and human rights tasks in their mandates, centered on the protection of civilians in conflict situations. In

³² United Nations Truce Supervision Operation (UNTSO) in the Golan Heights, still ongoing, adopted by UNSC resolution 50 (S/RES/50).

³³ The High-Level panel report lists the various forms peace operations can adopt: “Those instruments range from special envoys and mediators; political missions, including peacebuilding missions; regional preventive diplomacy offices; observation missions, including both ceasefire and electoral missions; to small, technical-specialist missions such as electoral support missions; multidisciplinary operations both large and small drawing on civilian, military and police personnel to support peace process implementation, and that have included even transitional authorities with governance functions; as well as advance missions for planning,” UN document A/70/95-S/2015/446, p. 20.

some operations, such as the UN operation in the Democratic Republic of Congo,³⁴ the biggest peace operation ever undertaken by the UN, the human rights element is at the very core of the mission's mandate. Gradually, gender advisors have also been included in the mandates authorized by the UNSC. However, neither UNPROFOR (United Nations Protection Force in the Former Yugoslavia, established in 1991) nor UNAMIR (United Nations Assistance Mission for Rwanda, 1993) had a human rights component in its mandate. It is difficult to assess whether stronger mandates, including the monitoring and investigation of human rights abuses, and the presence of human rights observers would have made a difference. It is generally accepted that the presence of outsiders wearing United Nations insignia can have a significant deterrent effect, but that did not stop the genocide in Rwanda in 1994 or the massacre of Bosnian men and boys in Srebrenica in July 1995. A multinational review effort conducted in 1996 reached the conclusion that the Rwandan genocide "occurred in a period when the United Nations was acting in an expansive yet highly selective fashion, reflecting a structural mismatch between the responsibilities of international institutions and interests of states."³⁵

Another exception to the now common rule of peace operations having a human rights element in the mandate is MINURSO, the United Nations Mission for the referendum in Western Sahara. Established by the UNSC in 1991 by resolution S/RES/690, its current mandate is to monitor the ceasefire between Morocco and the Frente POLISARIO, reduce the threat of mines, and support confidence-building measures. Many attempts have been made by UNSC members to include a human rights component to the mandate, something Morocco is frontally opposed to, with no success.

The report of the High-Level Independent Panel on Peace Operations is, in its own words, a "comprehensive assessment of the state of United Nations peace operations, in the light of the emerging needs and evolving challenges they face";³⁶ it mainstreams human rights concerns throughout the text and also throughout the various phases of the definition and design of the operation mandate and mission, training of its members, inclusion of a specific human rights (and gender) component,

³⁴ In 1999, the Security Council established the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) by resolution 1279 (S/RES/1279), for the observation of the ceasefire and disengagement of forces, and later extended its mandate to supervise the implementation of the Ceasefire Agreement. In 2010 the UNSC, by resolution 1925 (S/RES/1925), renamed MONUC the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) which was given a mandate, among other things, aimed at the protection of civilians, humanitarian personnel and human rights defenders under imminent threat.

³⁵ John R. Eriksson, Tor Sellström, Howard Adelman, Astri Suhrke, Bruce Jones, John Borton, Krishna Kumar, and the Joint Evaluation of Emergency Assistance to Rwanda, "The International Response to Conflict and Genocide: Lessons from the Rwanda Experience" (Copenhagen: Steering Committee of the Joint Evaluation of Emergency Assistance to Rwanda, 1996) p. 22.

³⁶ "Report of the High-level Independent Panel on Peace Operations on uniting our strengths for peace: politics, partnership and people" included in UN document A/70/95-S/2015/446.

implementation of all the tasks, and accountability at mission leadership level. In addition, the report devotes an entire section to recommendations on human rights³⁷ and identifies the areas in which improvement should be achieved. It underlines the need for sufficient resources for the deployment of human rights officers, and also for better implementation of public and regular reporting on human rights, especially by the mission's senior leadership, to the Security Council. It also makes a call for better monitoring and reporting on human rights issues on the ground, underlining the need to ensure coherence and avoid duplication of efforts.

B. Thematic issues on the Council's agenda

Beginning in the 1990s, but even more clearly in the new century, the UNSC started dealing with thematic issues and eventually incorporating them into the Council's agenda. Many of those issues, as we will now see, are human rights related although they are hardly ever referred to as such or employ human rights language. The importance of including thematic issues on the agenda is of a double nature: on the one hand, it allows the UNSC to address country-specific situations that may be of concern but are not on the Council's agenda; on the other, the sequence of open debates on those issues and especially the normative body generated by resolutions and other statements by the Council have created new, and growing, codified international standards, applicable *erga omnes*, with undeniable impact on human rights protection. It should be noted that the impulse toward these thematic issues has often come from elected members of the Council.

- Children and armed conflict: Since the World Summit on Children, held in 1990, the issue of children affected by armed conflict has been under the scrutiny of the international community. In 1996, after a report by Graça Machel entitled "Impact of armed conflict on children,"³⁸ the UN General Assembly established the mandate of the Special Representative of the Secretary General for Children and Armed Conflict (A/RES/51/77). The resolution mandated the special representative to report to UNGA and the Commission on Human Rights but not the Security Council. However, at the initiative of elected member Portugal, the Council held its first open debate on the issue, with a briefing by then Special Representative Olara Otunnu, in June 1998. Ever since, the Council has held regular open debates and

³⁷ Ibid. Paragraphs 263-267, p. 78.

³⁸ Graça Machel was appointed Independent Expert by UNSG Boutros Boutros-Ghali. Her report was adopted by UNGA as document A/51/306.

adopted several resolutions on the issue. Resolution 1261 (S/RES/1261), of 30 August 1999, effectively includes the item on the Council's agenda and gives an indication to mainstream the issue when addressing country-specific situations and decides to undertake "when taking action aimed at promoting peace and security, to give special attention to the protection, welfare and rights of children." In resolution 1612 (S/RES/1612) of July 2005, the Council decided to establish a monitoring and reporting mechanism on children and armed conflict as well as a working group on the issue, which became operational in November of that year. This subsidiary body of the Council meets prior to the renewal of country-specific mandates, receives direct information from the UN High Commissioner for Human Rights (UNHCHR) and the Office of the Coordinator of Humanitarian Assistance (OCHA), issues concrete recommendations on children's rights abuses, and informs the draft texts being negotiated by Council members. A notable feature of the Working Group on Children and Armed Conflict is that, following the mainstreaming mandate of resolution 1261 noted above, it reviews situations of children in conflicts that are not on the Council's agenda.

- Protection of Civilians: In September of 1999, at the initiative of elected member Canada, the UNSC adopted resolution 1265 (S/RES/1265) on the protection of civilians in conflict, bringing in elements of international humanitarian law, human rights, and refugee law. A number of resolutions and annual open debates have ensued, but "the protection of civilians in situations being dealt with by the Council is still subject to case by case consideration, and thereby a political perspective, not a moral or legal imperative,"³⁹ as the inability of Council members to agree on Syria proves. However, since resolution 1265 the protection of civilians has become the core mandate of all new peace operations, and currently there are "no less than sixteen peacekeeping operations"⁴⁰ with that main mandate. A remarkable aspect is that, in spite of

³⁹ Bruno Stagno Ugarte, "Security Council Diplomacy on the Protection of Civilians: a convoluted history," in Haidi Wilmott, Ralph Mamiya, Scott Sheeran, and Marc Weller (eds.), *Protection of Civilians* (Oxford Scholarship Online, 2016), p. 292.

⁴⁰ As listed in Stagno Ugarte, "Security Council Diplomacy on the Protection of Civilians," p. 299: the UN Mission in Sierra Leone (UNSC res 1270 (1999) UN Doc S/RES/1270), the UN Mission in the Democratic Republic of Congo (UNSC Res (2000) UN Doc S/RES/1291), later the UN Stabilization Mission in the Democratic Republic of Congo (UNSC Res 1565 (2004) UN Doc S/RES/1565), the UN Mission in Liberia (UNSC Res 1509 (2003) UN Doc S/RES/1509), the UN Operation in Côte d'Ivoire (UNSC Res 1528 (2004) UN Doc S/RES/1528), the UN Stabilization Mission in Haiti (UNSC Res 1542 (2004) UN Doc S/RES/1542), the UN Operation in Burundi (UNSC Res 1545 (2004) UN Doc S/RES/1545), the UN Mission in Sudan (UNSC Res 1590 (2005) UN Doc S/RES/1590), the UN Interim Force in Lebanon (UNSC Res 1701 (2006) UN Doc S/RES/1701), the African Union–UN Hybrid Operation in Darfur (UNSC Res 1769 (2007) UN Doc S/RES/1769), the UN Mission in the Central African Republic and Chad (UNSC Res 1778 (2007) UN Doc S/RES/1778), and the UN Multidimensional Integrated Stabilization Mission in the Central African Republic (UNSC Res 2127 (2013) UN Doc S/RES/2127), the UN Mission in South Sudan (UNSC Res 1996 (2011) UN Doc S/RES/1996), the UN Interim Security Force for Abyei (UNSC Res 1990 (2011) UN Doc S/RES/1990), the UN Multidimensional Integrated

having become standard-usage terminology, there is no formal or generally accepted definition of protection of civilians, although this “very ambiguity has allowed Council members and others to remain comfortable”⁴¹ with it. Resolution 1674 (S/RES/1674) of 2006 goes a few steps further and links protection of civilians with the “responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity” (as provided for in the 2005 Summit Outcome Document), while noting that the targeting of civilians and commission of systematic “violations of international humanitarian and human rights law in situation of armed conflict may constitute a threat to international peace and security.” A further, more recent example is resolution 2286 S/RES/2286 of 3 May 2016 on attacks on medical personnel and facilities in situations of conflict. Although the text fails to mention the jurisdiction of the International Criminal Court for the accountability of war crimes, it does quote the Rome Statute and condemns impunity for violations and abuses against medical and humanitarian personnel. It also requests that country-specific reports include information on the protection of the wounded, as well as medical and humanitarian personnel and requests yearly briefings on the issue. Finally, a truly remarkable aspect of this resolution is that it was led by five elected members from four different regional groups: Egypt, Japan, New Zealand, Spain, and Uruguay.⁴²

In 2009, at the initiative of the United Kingdom, the Council established an informal expert group on the protection of civilians. It meets before the renewal of peace operation mandates and informs the deliberations among members on the issue. China, however, never participates in these meetings. Despite all the effort by members to adopt the resolutions mentioned in this paragraph, the Council has been unable, due to the unwillingness of some of its permanent members, to declare the civil war in Syria a threat to international peace and security. When, in May 2014, a draft resolution decided to refer both sides to the International Criminal Court for prosecution of crimes against civilians, Russia and China used their power of veto, thus placing political and geostrategic considerations before moral or

Stabilization Mission in Mali (UNSC Res 2100 (2013) UN Doc S/RES/2100), and the UN Assistance Mission in Afghanistan (UNAMA, UNSC Res 2145 (2014) UN Doc S/RES/2145).

⁴¹ Stagno Ugarte, “Security Council Diplomacy on the Protection of Civilians,” p. 298.

⁴² A relatively unknown, yet essential, feature of the working methods of the Security Council is the system of “pen holders.” Each UNSC agenda item is assigned to one member, which is in charge of drafting all documents related to the issue and leading all relevant negotiations. The P-3 (France, the UK and the US) hold the pen of most agenda items, Russia just a few, China does not lead any agenda item. Elected members are assigned various tasks by the P-5, generally the chairs of subsidiary bodies and sanctions committees. Elected members, however, can negotiate their way and become pen holders for issues not assigned to any permanent member (Australia was pen holder for Afghanistan in 2013-14, succeeded by Spain 2015-16), and they can also create cross-regional clusters to deal with new issues, as was the case on this occasion.

legal obligations.

- Women, Peace and Security: Following one of the main recommendations of resolution 1265 on protection of civilians, namely the need to offer special protection to women and girls and involve them as much as possible in peacebuilding efforts, elected Council member Bangladesh promoted a debate on women, peace, and security, the outcome of which was resolution 1325 (S/RES/1325) of 31 October 2000, the first text and still the centerpiece of a doctrine that has taken deep roots in the work of the Security Council. Resolution 1325 basically “reaffirmed the importance of equal participation and full involvement of women in all efforts for maintaining peace and security”⁴³ and recognized that peace is “inextricably linked with gender equality and women’s leadership.”⁴⁴ The text of the resolution reaffirms “the need to implement fully [...] human rights law that protects the rights of women and girls during and after conflict” and calls upon parties in conflict to respect women’s and girls’ rights. A Global Study on the implementation of UNSC resolution 1325 was prepared at the request of the UNSG on the occasion of the fifteenth anniversary of the resolution, and it states the text “is a human rights mandate [...] it was conceived of and lobbied for as a human rights resolution that would promote the rights of women in conflict situation”⁴⁵ but has evolved into an issue of security that puts women at the center, as agents of peace.

The entire UNSC doctrine on women peace and security, developed in further resolutions, builds on the intersection between security and human rights with an inclusive conception of justice that highlights the need for human rights in a post-conflict situation. Resolutions 2106 (S/RES/2106) and 2122 (S/RES/2122), both adopted in 2013, go further in the use of human rights language when reiterating the Council’s intention to fight impunity for the most serious crimes committed against women and girls (with a mention of the role of the ICC) and also to recall the right to reparations for violations of individual rights. In 2015 the Council adopted resolution 2242 (S/RES/2242), which takes up some of the recommendations made by both the aforementioned report of the high-level panel on peace operations and the Global Study on 1325, and it addresses women’s roles in countering violent extremism and terrorism and includes a reference to the adoption of sanctions against non-state actors that perpetrate

⁴³ Ban Ki-moon, foreword to *Preventing Conflict, Transforming Justice, Securing the Peace: A Global Study on the implementation of United Nations Security Council resolution 1325* (UN Women 2015), p. 4. The Global Study is available at <http://wps.unwomen.org>, accessed on 12 June 2017.

⁴⁴ Phumzile Mlabo-Ngcuka, foreword to *Preventing Conflict, Transforming Justice, Securing the Peace*, p. 5.

⁴⁵ *Preventing Conflict, Transforming Justice, Securing the Peace*, p. 15.

human rights violations against women and girls. Finally, it seeks to improve the Council's own working methods in relation to women, peace, and security, especially with respect to mainstreaming the issue throughout country-specific situations on the Council's agenda and inviting women's organizations to brief the Council in country-specific considerations, the first-ever time that civil society organizations have received an invitation to address the Council in a systematic manner. It also creates an Informal Experts Group "to facilitate a more Systematic approach to women, peace and security" and "enable greater oversight and coordination of implementation efforts". The whole Women, Peace and Security theme has been supported since the beginning by a strong body of evidence and research provided by civil society, academia, and think tanks, which show that sustainable peace, with the active and equal participation of women, means an inclusive political process and an attempt to deal with issues of justice and reconciliation in a post-conflict process "that privileges human rights as a central element in the post-war architecture."⁴⁶

- Sexual violence in conflict: This thematic issue was born at the initiative of the United States as a corollary or "spin-off" of Women, Peace and Security but has developed into its own theme with time. Resolution 1820 (S/RES/1820), adopted in June 2008, affirms that "sexual violence, when used or commissioned as a tactic of war in order to deliberately target civilians or as a part of a widespread and systematic attack against civilian populations [...] may impede the restoration of peace and security" and also stresses that "effective steps to prevent and respond to such acts of sexual violence can significantly contribute to the maintenance of international peace and security." One year later, resolution 1888 (S/RES/1888) of 20 September 2009, requests the UNSG to "appoint a Special Representative to provide coherent and strategic leadership [...] to address, at both headquarters and country level, sexual violence in armed conflict." The UNSC holds an annual briefing session with the Special Representative, who is also invited to participate in country-specific debates on the Council's agenda. Sexual violence is included on the list of crimes against humanity as defined by the Rome Statute of the International Criminal Court.⁴⁷

- Human trafficking: At the initiative of elected member Spain in December 2016, the Security Council addressed, in a high-level open debate, the issue of human trafficking as a threat to

⁴⁶ Ibid., p. 24.

⁴⁷ Article 7 (g) of the Rome Statute: "Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity."

international peace and security, after which it adopted resolution 2331 (S/RES/2331), thereby including it in the Council's agenda. Previously, in December 2015, a UNSC Presidential Statement condemned human trafficking (which is a significant issue in many country-specific situations of the Council's agenda) and requested the UNSG to issue a report on the issue. Perhaps the most interesting and innovative aspect of resolution 2331 is the connection it establishes between terrorism and trafficking of persons and the fact that it attributes human rights abuses to non-state actors. It also links sexual violence in conflict to terrorist tactics and therefore enhances the mandate of the Special Representative for sexual violence in conflict, as well of the Special Representative for children and armed conflict. Previous counter-terrorism resolutions, such as 2249 (S/RES/2249) and 2253 (S/RES/2253) of 2015, had condemned "widespread abuse of human rights" by ISIL/Daesh, but resolution 2331 widens the list to include Boko Haram, Al Shabaab, the Lord's Resistance Army, "and other terrorist or armed groups," and is focused on the fight against human trafficking, which is defined as a "violation or abuse of human rights" that "in the context of armed conflict may constitute war crimes." Furthermore, it opens the way to briefings to the UNSC by civil society representatives, in the same way that resolution 2242 did regarding Women, Peace and Security.

- The Responsibility to Protect: The Responsibility to Protect (R2P) is not a thematic issue on the UNSC agenda. Yet, it is a concept mentioned in many of its resolutions and it permeates, in various degrees, much of its work. It was defined in the 2005 World Summit Outcome Document, which states that "each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity,"⁴⁸ adding that "the international community, through the United Nations, also has the responsibility [...] to help protect populations [...] we are prepared to take action [...] through the Security Council in accordance with [...] Chapter VII."⁴⁹ This means, in effect, that in case a state is unwilling or unable to protect its population the international community has a "responsibility to react [...] to fill the void—including, as last resort, by using force."⁵⁰ At the core of the whole idea of R2P is the limitation or "reconceptualization"⁵¹ of state sovereignty, which leads

⁴⁸ 2005 World Summit Outcome, adopted by UN General Assembly resolution A/RES/60/1 on 15 September 2005, paragraph 138.

⁴⁹ Ibid., paragraph 139.

⁵⁰ Neville F. Dastoor, "The Responsibility to Refine: The Need for a Security Council Committee on the Responsibility to Protect," *Harvard Human Rights Journal*, Winter 2009, p. 3.

⁵¹ Ibid.

many countries, especially in the developing world, to perceive it as a new form of imperialism disguised as humanitarian intervention. The fact that its most notable realization, the intervention in Libya in 2011, approved by UNSC resolution 1973 (S/RES/1973), yielded mixed results—and the subsequent veto by Russia and China of R2P-based draft resolutions regarding the Syrian civil war—has led many to affirm that the concept of Responsibility to Protect has reached the end of its course.⁵² Despite these perceived setbacks, the R2P doctrine might still be relevant to many aspects of the work of the UNSC, especially in the area of prevention of and accountability for mass atrocities in conflict. In December 2015, elected members Chile and Spain organized an Arrria-formula meeting of the Council on Responsibility to Protect and non-state actors in which the Special Representative of the UNSG for R2P addressed Council members for the first (and, so far, last) time. Significantly, the last UNSG report on R2P, which bears the signature of Ban Ki-moon, includes what can be considered “legacy comments” in defense of the concept: “It is time for member states to show greater resolve in defending and upholding the norms that safeguard humanity, on which the responsibility to protect rests. [...] In a time of crisis, we should not retreat but should rather rally around and strengthen what we have built.”⁵³

C. International Tribunals

One of the main and most extended criticisms of the international system of human rights protection is the lack of accountability, especially for mass atrocities or core human rights violations. The idea of establishing international criminal tribunals was already in place at the Paris Peace Conference after World War I, and was first put into practice through the military tribunals of Nuremberg and Tokyo after World War II. During the drafting of the Universal Declaration of Human Rights, Australia proposed to establish an International Court for Human Rights, including a detailed mechanism for an individual petition process and individual and state accountability, but it was rejected by most members of the Commission on Human Rights, including the UNSC permanent members.⁵⁴ At the United Nations, the idea of establishing an International Criminal Court, long on the informal agenda

⁵² Chris Keeler, “The End of the Responsibility to Protect?,” *Foreign Policy Journal*, October 2011. Available at <https://www.foreignpolicyjournal.com/2011/10/12/the-end-of-the-responsibility-to-protect/>. Accessed on 12 June 2017

⁵³ UNSG Report, “Mobilizing collective action,” p. 18.

⁵⁴ A detailed account of the initiative and its negotiation can be found in Annemarie Devereux *Australia and the Birth of the International Bill of Human Rights 1946-1966* (Annandale, NSW: Federation Press, 2005), p. 180ff.

of the International Law Commission and based on a common desire for universal justice, did not revive until the end of the Cold War. As the Rome Statute of the International Criminal Court (ICC) would later describe: “the most serious crimes of concern to the international community as a whole must not go unpunished and [...] their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation, [...] to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.”⁵⁵ But before the Rome Statute was adopted and the ICC became a reality, the Security Council was to establish in 1993 an international criminal tribunal for the former Yugoslavia and, a year later, for Rwanda, two of the country-specific conflict situations addressed by the UNSC and regarded as some of its biggest failures, with widely reported mass atrocities and a clear risk of impunity of those responsible. The statutes of both tribunals, as adopted by the Council, contain a “supremacy clause” granting both the ICTY and ICTR (Articles 8 and 9, respectively) “primacy over national courts,” thereby overriding the principle of non-interference in domestic affairs enshrined in Article 2.7 of the UN Charter.

According to William Schabas, “the role of the Security Council in the recent revival on international criminal justice [...] has been controversial,”⁵⁶ yet it cannot be denied that the impact it had on effective accountability for mass atrocities and the negotiations to establish the ICC was enormous. The International Criminal Tribunal for the former Yugoslavia (ICTY) was created pursuant to UNSC resolution 827 (S/RES/827) on 25 May 1993, following the recommendations of the report of a commission of experts appointed by the UNSG at the requirement of UNSC resolution 780 (S/RES/780) of July 1992. Resolution 827 invoked the powers bestowed upon the UNSC by Article 29 of the UN Charter, which states that “the Security Council may establish [...] subsidiary organs as it deems necessary for the performance of its functions” and added that the creation of the Tribunal was an “ad hoc measure by the Council” which “would contribute to the restoration and maintenance of peace.” The legitimacy of the UNSC for creating an international tribunal was contested from the start. The first defendant in front of the court, Dusko Tadic, challenged the legal basis of the tribunal’s establishment, but the motion was dismissed on the grounds of Articles 29 and 42 of the UN Charter.⁵⁷ The ruling affirmed that even if the conflict were internal in nature, the establishment of the tribunal would fall under the scope of Chapter VII of the UN Charter. The actual mandate of the ICTY, as per resolution 827, was to prosecute “persons responsible for serious violations of

⁵⁵ Preamble of the Rome Statute of the International Criminal Court.

⁵⁶ William A. Schabas, “Accountability for International Crimes –Special Tribunals and referrals to the International Criminal Court,” in Genser and Stagno Ugarte (eds.), *The United Nations Security Council in the Age of Human Rights*, p. 173.

⁵⁷ ICTY, “Prosecutor vs Tadic,” case No. IT-94-1-AR72, Decision on the defense motion on jurisdiction.

international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace.” Since 1994 and to date, the ICTY has indicted 161 persons and concluded proceedings for 154 accused; 83 were sentenced, 19 acquitted, 13 referred to a national jurisdiction, and 37 had their indictments withdrawn or are deceased (including former Serbian President Slobodan Milosevic). Only one person is currently on trial: Ratko Mladic, former Bosnian Serb military leader.⁵⁸ The ICTY is expected to reach completion and closure before the end of 2017.

The International Criminal Tribunal for Rwanda (ICTR) was established by UNSC resolution 955 (S/RES/955) in November 1994. The process of its establishment (recommendation by an *ad hoc* commission of experts) and its mandate are very similar to the ICTY just described. There are two main differences: on the one hand, the ICTR was established at the request of the government of Rwanda, and on the other, its mandate goes beyond serious violations of international humanitarian law and includes genocide “committed in the territory of Rwanda and neighboring states between 1 January 1994 and 31 December 1994.” The Tribunal, before its closure on 31 December 2015, indicted 93 individuals of whom 62 were sentenced, 14 acquitted, 10 referred to national jurisdictions for trial, and 7 had their indictments withdrawn or were deceased.⁵⁹

The work of both tribunals is fully independent from the Security Council, although two semi-annual briefings are held by the presidents of both and the members of the UNSC. Furthermore, the Council established an informal working group on the International Tribunals. In December 2010, UNSC resolution 1966 (S/RES/1966) created the International Residual Mechanism for Criminal Tribunals as a temporary structure with a mandate to perform a number of functions previously carried out by the ICTR and the ICTY, including tracking and prosecuting remaining fugitives, conducting retrials or referring cases to national jurisdictions, protecting victims, and enforcing sentences of the tribunals.

Although their legal and political nature is different to that of the ICTY and the ICTR, two other tribunals must be mentioned since they were established with the intervention of the Security Council. At the request of the Government of Sierra Leone for the establishment of an international tribunal to deal with the civil war in the country, the UNSC adopted in August 2002 resolution 1315 (S/RES/1315), requesting the UNSG to negotiate with the government an agreement to create an “independent special court” with jurisdiction over “crimes against humanity, war crimes and other

⁵⁸ Figures available at <http://www.icty.org/en/cases/key-figures-cases>. Accessed on 12 June 2017.

⁵⁹ Figures available at <http://unict.r.unmict.org/en/tribunal>. Accessed on 12 June 2017.

serious violations of international humanitarian law.” It added that “a credible system of justice and accountability for the various serious crimes committed there would end impunity and could contribute to the process of national reconciliation and to the restoration and maintenance of peace.” The Special Court for Sierra Leone (SCSL) was born of this resolution after the negotiations between the government and the United Nations.

The final *ad hoc* international tribunal is the Special Tribunal for Lebanon, created after the assassination of Prime Minister Rafik Hariri at the proposal of the UNSG following consultations with the Lebanese government. The idea was to follow the same path as the SCSL but, when it was not possible to reach consensus amongst the political forces in the country, the UNSC was called to intervene. Resolution 1757 (S/RES/1757) of 30 May 2007 decided to create the Special Tribunal but, contrary to ICTY and ICTR, stressed the negotiated nature of the tribunal and justified its action as simply to break the impasse in the negotiations with the government. Another difference is that, contrary to resolutions 827 and 955, which created ICTY and ICTR respectively, resolution 1757 was not unanimously adopted but saw five abstentions, including those of two of the Council’s permanent members, China and Russia.

In Schabas’s words, “international justice is a profoundly political venture, and it is inevitable that its exercise involves a profoundly political institution such as the Security Council.”⁶⁰ The conflicts in the former Yugoslavia and Rwanda count as some of the United Nations’ biggest failures to protect civilians in conflict. The Security Council was unable to respond in a timely manner to mass atrocities, and even genocide, committed in war zones where it had deployed peace operations. It did however react, putting aside the political interests of its five permanent members, and used the powers bestowed by Chapter VII of the UN Charter in establishing both international criminal tribunals with the purpose of avoid impunity for war crimes and crimes against humanity.

The most relevant and ambitious of all international tribunals tasked with the mandate to prosecute those responsible for mass atrocities is the International Criminal Court, the statute of which was negotiated in parallel to those of the tribunals mentioned above. The Rome Statute of the ICC offers the Security Council a trigger mechanism to refer a situation to the Court, thereby assigning it the right to start an accountability procedure that could lead to sentencing those responsible of mass

⁶⁰ Schabas, “Accountability for International Crimes,” p. 192.

atrocities and therefore preventing impunity. The role of the ICC in connection with the Security Council will be studied in the next section of this paper.

III. The Use of the Security Council Tools in Coordination with the Wider United Nations System: Preventing and Accounting for Mass Atrocities

The aftermath of World War II brought along not just a new international system of governance with the United Nations at its center, but also the realization of the mass atrocities and indiscriminate targeting of civilians during the conflict. The discovery of the horrors of the Holocaust triggered the demand for accountability of those responsible for it, as well as the need for an international bill of human rights. The International Military Tribunal opened its sessions in Nuremberg on 19 November 1945 and indicted twenty-four Nazi and army leaders for crimes against peace, war of aggression, war crimes, and crimes against humanity (the Tokyo Tribunal was convened in April 1946 and indicted twenty-eight defendants). Until that moment, nobody had been held accountable by an international tribunal, and the Nuremberg and Tokyo trials, despite predating the Universal Declaration of Human Rights and despite their military nature, are the first precedent of personal accountability for crimes against humanity decided by an international court, something that would not happen again until fifty years later, with the ICTY and ICTR.

Almost in parallel to the trials in Nuremberg and Tokyo, the United Nations was working on its first international human rights treaty. Contrary to general belief, the first UN-produced human rights document was not the Universal Declaration of Human Rights (UDHR), but the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by UNGA on 9 December 1948 as resolution 260 A/RES/3/260,⁶¹ one day before the adoption of the UDHR. Raphael Lemkin, a Polish Jew who sought refuge in the United States and denounced Nazi atrocities, “invented the word ‘genocide’ and secured the passage” of the Convention.⁶² The iteration of the UDHR⁶³ shows that throughout the drafting negotiations, “the United Nations was inundated with human rights petitions from aggrieved individuals and groups. At its first session in 1947 the Commission on Human Rights (CHR) concluded

⁶¹ The Convention entered into force in January 1951, and currently 143 states are parties to it. The text of the Convention can be consulted at <http://www.un-documents.net/a3r260.htm>. Accessed on 12 June 2017.

⁶² Samantha Power, *A Problem from Hell: America and the Age of Genocide* (New York: Perseus, 2002), p. 5.

⁶³ The proceeds of the drafting negotiations of the UDHR can be consulted at <http://research.un.org/en/undhr/chr/2> and make a fascinating account of the views and goals of the various member states. Accessed on 12 June 2017.

that it did not have power to take any action”⁶⁴ and the Economic and Social Council, of which the CHR was a subsidiary body, agreed.

Beginning with the UDHR, the United Nations established a thick web of human rights treaties and intergovernmental and independent bodies, with the aim of protecting and promoting human rights at the international level. It is the human rights international edifice. There are nine core human rights conventions and nine optional protocols.⁶⁵ Each one of the Conventions has a committee of independent experts (collectively known as the Treaty Bodies) that carries out national evaluations of the states parties. Some of them also accept independent petitions. As mentioned earlier, the Commission on Human Rights was replaced in 2006 by the Human Rights Council (HRC), a subsidiary body of the General Assembly. The main tool of this intergovernmental body, in addition to its regular (and extraordinary) sessions devoted to thematic issues and country-specific situations, is the Universal Periodic Review, a procedure by which the human rights situation of every member state of the United Nations is reviewed on a regular basis. The Council has in addition a series of “special procedures,” that is, independent human rights experts with thematic or country-specific mandates who undertake country visits, advise governments (and warn them in case of perceived abuses), and report to the HRC and also to UNGA,⁶⁶ whose Third Committee reviews human rights themes and situations every year. The main figure responsible for human rights in the UN Secretariat is, since the World Conference on Human Rights held in Vienna in 1993, the UN High Commissioner for Human Rights (UNHCHR), and her or his office.

In the words of former High Commissioner Navanethem Pillay, “there is hardly a gross violation that is not documented by the universal system of human rights mechanisms composed of United Nations Treaty Bodies, the Special Procedures of the Human Rights Council, Commissions of Inquiry established

⁶⁴ Devereux, *Australia and the Birth of the International Bill of Human Rights*, p. 225.

⁶⁵ The nine conventions, with their date of adoption are the following: International Convention on the Elimination of All Forms of Racial Discrimination (CERD) 1965; the International Covenant on Civil and Political Rights (CCPR) 1966; the International Covenant on Economic, Social and Cultural Rights (CESCR) 1966; the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 1979; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) 1984; the Convention on the Rights of the Child (CRC) 1989; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) 1990; International Convention for the Protection of All Persons Against Enforced Disappearance (CED) 2006 and; Convention on the Rights of Persons with Disabilities (CRPD), 2006. The full text of all nine instruments and the optional protocols is available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>. Accessed in May 2017.

⁶⁶ At the time of writing this paper, there were 43 thematic special procedures and 13 country mandates. For further detailed information, <http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcompage.aspx>. Accessed on 12 June 2017.

on an ad hoc basis [...] and our 58 United Nations human rights field presences across the world.”⁶⁷ The work of non-governmental organizations, whether global or local, is also essential in building the documentation of human rights violations and, all the more important, in the sensitization of the general public, which has been transformed by the means of mass media and social networks into an informed global community with the ability to influence the decision-making process and the determination to put an end to the unnecessary suffering of innocent people.

The gigantic and complex international human rights edifice and the myriad of resolutions, decisions, reports, opinions, and recommendations it produces annually has hardly ever prevented mass atrocities or core human rights violations from happening. Furthermore, it has not been able or allowed to build a proper system of accountability for human rights violations. Where it has, there were no provisions for personal accountability, since only the state, shielded behind its sovereignty and the principle of non-interference, could be named and, occasionally, shamed. As Kathryn Sikkink has observed, “the Nuremberg and Tokyo trials were in many ways both the beginning of the trend and the exception that proved the rule: only in cases of complete defeat in war was it possible to hold state perpetrators criminally accountable for human rights violations. The Nuremberg precedents then lay dormant for decades.”⁶⁸ Even the judicial regional mechanisms set up in Europe, the American continent, and Africa for human rights examination and accountability target the state, not the persons responsible for rights violations.⁶⁹

As mentioned in the introduction, Article 25 of the UN Charter asserts that the member states “agree to accept the decisions of the Security Council in accordance of the present Charter.” This provision has been interpreted to mean that decisions taken by the Council using the tools provided by Chapter VII of the Charter are applicable *erga omnes*, i.e., are considered legally binding on all member states.⁷⁰ What the Security Council can precisely bring to the United Nations human rights edifice is those tools,

⁶⁷ Navanethem Pillay, “Establishing Effective Accountability Mechanisms for Human Rights Violations,” *U.N. Chronicle*, vol. 49 (4), (December 2012).

⁶⁸ Kathryn Sikkink, *The Justice Cascade: How human rights prosecutions are changing world politics* (New York: W.W. Norton, 2011), p. 5.

⁶⁹ The European Court of Human Rights established in 1959 by the Council of Europe’s European Convention on Human Rights (detailed information at <http://www.echr.coe.int/Pages/home.aspx?p=home>, accessed on 12 June 2017); the Inter-American Court of Human Rights, established in 1979 by the Organization of American States’ American Convention on Human Rights (detailed information at <http://www.corteidh.or.cr/index.php/en>, accessed on 12 June 2017); The African Court on Human and Peoples’ Rights was established by the Protocol to the African Charter on Human and Peoples’ Rights in 1998, coming into force in 2004 although only 8 states are parties (detailed information at <http://en.african-court.org>, accessed on 12 June 2017).

⁷⁰ Bruno Simma et al. (eds.), *The Charter of the United Nations: A Commentary* (Oxford: Oxford University Press, 2002), p. 457.

which are suitable for preventing mass atrocities and ensuring accountability for the most heinous crimes. But before those tools can be used, the UNSC must learn how to interact with the rest of the organization and take advantage of its knowledge.

A. Interaction with UN human rights bodies

“From the perspective of the Security Council, there should be an interest in receiving on a regular basis at least four categories of human rights information: (1) human rights violations that can lead to threats or breaches of international peace and security; (2) human rights information that can lead to the commission of international crimes [...]; (3) information that can lead to massive refugee outflows or internal displacements; and (4) information about potential universal disasters.”⁷¹

The reality of the United Nations is that of a super-structure with very little communication amongst its many components. Most bodies, intergovernmental and internal alike, are jealous of their competence and mandate and refuse to be “encroached” upon by other bodies. The Security Council is at the center of the system and yet it does not coordinate very well with the other principal organs or the Secretariat. If the Council is to have a more proactive role, as this paper proposes, in preventing mass atrocities and promoting accountability, it must improve its relations with other bodies within the system.

- The Secretariat: Both Boutros Boutros-Ghali and Kofi Annan produced reports, mentioned previously, that made the clear link between the maintenance of peace, development, and human rights. “An Agenda for Peace” in 1992, and, even more clearly, “In Larger Freedom” of 2005 set the tone and paved the way for a better coordination of the three “pillars” of the Organization’s action. In fact, Article 99 of the UN Charter gives the Secretary General the ability “to bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security.” However, “the Secretariat, overall, has continued to be reluctant to invoke Article 99, and there are huge sensitivities regarding the Council discussing issues that have not yet reached a stage of crisis and hence were not on the Council’s agenda.”⁷² Furthermore, in August 2001 the Council adopted resolution 1366 (S/RES/1366) on the role of the UNSC in the prevention of conflict. The text recognizes the

⁷¹ Bertrand G. Ramcharan, “Coordination with other UN organs,” in Genser and Stagno Ugarte (eds.), *The United Nations Security Council in the Age of Human Rights*, p. 157.

⁷² Security Council Report, “Human Rights and the Security Council,” p. 15.

essential role of the UNSG in the prevention of armed conflict and “the importance to enhance his role in accordance with Article 99,” acknowledges “the lessons to be learned [...] from the failure of preventive efforts that preceded such tragedies as the genocide in Rwanda and the massacre in Srebrenica,” and finally encourages “the Secretary General to convey to the Security Council his assessment of potential threats to international peace and security [...] in accordance with article 99 of the Charter.” Crucially, it also requests the UNSG “to refer to the Council information and analyses from within the United Nations system on cases of serious violations of international law, including international humanitarian law and human rights law,” expressing its “determination to give serious consideration to such information [...] which it deems to represent a threat to international peace and security.” At the request of elected members, and with the United Kingdom in the lead, in 2010 the Department of Political Affairs of the Secretariat started to offer to the members of the Council what were known as “horizon-scanning” briefings, in which emerging security issues were described, whether or not they were on the UNSC agenda. Those monthly meetings, generally attended by the political coordinators of individual permanent representations,⁷³ covered human rights violations (Guinea-Bissau, Mali, and Yemen were first discussed there) but the idea of this early-warning mechanism was eventually rejected by permanent members and created extreme worries amongst the Permanent Representatives of countries who might be “scanned.” The initiative faded gradually into informal and not regular briefings by the Undersecretary General for Political Affairs. In 2016, elected member New Zealand, with the support of other elected members (and the United Kingdom), proposed that the Secretariat start offering monthly briefings to Council members under the label “Situational Awareness”. The goal would be for the Secretariat to lead and organize a monthly cross-departmental briefing modelled on the Human Rights up Front initiative and focused on protection-of-civilians-related issues and safety and security of UN personnel. It is yet to be seen if this laudable initiative will bear any fruit.

There is no doubt that there should be a deeper communication between the Secretariat and the members of the Council. The Secretariat never communicated officially to the Council the seriousness of the atrocities that were happening in Sri Lanka in 2009, despite having a UN country team in the country. Only three years later did the UNSG produce a report on

⁷³ Political Coordinators accompany Permanent Representatives to all UNSC meetings and replace them when necessary. They coordinate and negotiate among themselves and with the Security Council Affairs Division (SCAD) of the Secretariat the monthly agenda and program of work of the Council, the rhythm of the negotiations of the various texts on the table, the participation of guest briefers at Council sessions, etc. They also coordinate the preparation and output of policy statements within their Permanent Mission and ensure the good functioning of their country’s participation in the Council’s work.

accountability in the country.⁷⁴ The report shows that, in addition to the UN presence on the ground, 19 high-level visits from headquarters were dispatched between 2007 and 2009, and despite their reports on the situation, the UNSG, having considered using the powers of Article 99, did not do so, deciding instead, in 2010, to create a panel of independent experts that produced its report in 2011. As the report says: “Sri Lanka was never formally considered by Member States at the UN, whether at the Security Council, the Human Rights Council or the General Assembly,”⁷⁵ and adds: “There was no Secretariat strategy either to seek general support or encourage specific action by the Security Council or the Human Rights Council.”⁷⁶ The report defines the UN reaction to the situation in the country as a “systemic failure [...] distilled into [...] a UN system that lacked an adequate and shared sense of responsibility for human rights violations.” In no way can it be implied that coordinated action between the UNSG and the UNSC would have spared the lives of the 40,000 civilians the internal report estimates to have been killed, but the lack thereof is, in this case, flagrant. In 2013, and in response to the systemic crisis mentioned in the internal report, UNSG Ban Ki-moon started the internal UN initiative Human Rights up Front, an excellent example of mainstreaming human rights in the organization’s work. It is a human rights due diligence policy, directed to all bodies and agencies within the UN system and “has three interlocking goals: (1) to transform the UN’s organizational culture, (2) to make operational changes that frame the UN’s work on human rights protection as a priority for all UN entities and (3) to empower UN officials as they work with member states on achieving the aforementioned goals.”⁷⁷ Its aim is to integrate effectively human rights into the daily working habits of all UN staff and implement a system of information management on human rights violations. It is still too early to evaluate the impact of this initiative, which has not yet been discussed at the Council, although mentioned by some statements during the debate on human rights held on 18 April 2017, but it has been welcomed and taken up by the new UNSG, Antonio Guterres.

⁷⁴ The Report of the Secretary General’s Panel of Experts on Accountability in Sri Lanka of November 2012 is an internal, not an official UN document, available at http://www.un.org/News/dh/infocus/Sri_Lanka/The_Internal_Review_Panel_report_on_Sri_Lanka.pdf. Accessed on 12 June 2017.

⁷⁵ Ibid., p. 24.

⁷⁶ Ibid., p. 25.

⁷⁷ Gerrit Kurtz, “With Courage and Coherence: The Human Rights up Front initiative of the United Nations” (Global Public Policy Institute, 2015), p. 4. Available online at http://www.gppi.net/fileadmin/user_upload/media/pub/2015/Kurtz_2015_Courage_and_Coherence_UN_Human_Rights.pdf. Accessed on 12 June 2017.

- The United Nations High Commissioner for Human Rights: The UNHCHR is the principal human rights official of the United Nations. The position was established by the Vienna Declaration and Action Plan of the 1993 Human Rights World Conference, but the UNGA resolution that creates the post⁷⁸ does not mention any form of interaction with the UNSC. The first High Commissioner to address the Council, at the invitation of the UNSG, was Mary Robinson in September 1999, during a debate on protection of civilians. In her statement, she made clear references to the role of the UNSC in preventing human rights violations as well as the importance of minimizing the effects of conflict on civilians through peace operations. It was not until ten years later that a regular, if informal, practice was established, at the initiative of elected member Austria, by which the High Commissioner participates in the bi-annual periodic debate on protection of civilians in conflict. Regular communication between the UNHCHR and the UNSC on other issues is never easy. Whenever a member of the Council, permanent or elected, requests a briefing by the High Commissioner, all other members must be in agreement and very often a permanent member with a vested political interest in the issue to be debated blocks the participation of the UNHCHR in the debate.⁷⁹ The Deputy High Commissioner, based in New York, had a prominent briefing role during the Council's early treatment of the situation in Ukraine (2014-2016), where he presented the reports of the Human Rights Monitoring Mission in Ukraine (HRMMU) established by the Secretariat, but his participation is now limited to Arria-formula meetings. Whereas it has become common practice for the High Commissioner to address open Council briefings on horizontal, thematic issues, it is much more difficult when it comes to country-specific situations, especially in closed consultations. His participation in that format is rare and usually limited to being present in the consultations chamber, not to brief Council members but only to reply to questions on a given issue.

- The Human Rights Council and its Special Procedures: The Human Rights Council was established in March 2006 as a successor to the Commission on Human Rights, but with an enhanced status within the UN system. It was the product of long negotiations that did not produce a consensus text,⁸⁰ yet followed the mandate of the September 2005 Summit Outcome

⁷⁸ Resolution A/RES/48/141 of 7 January 1994.

⁷⁹ Author's note: I am drawing from my own experience as Spain's UNSC political coordinator during its membership of the Council in 2015-2016, as well as from discussions with colleagues from permanent and elected members of the Council alike. Having the agreement of all members of the Council to receive briefers from within the UN system on potentially sensitive political issues, human rights being at the top of the list, is tricky and often hard work: it is clearly the case with UNHCHR but also UNHCR or OCHA.

⁸⁰ The resolution was adopted by a vote, 170 in favor, 4 against (Israel, Marshall Islands, Palau, the United States), 3 abstentions (Belarus, Iran, Venezuela), and 6 absent (including the Democratic People's Republic of Korea).

Document that stressed that the future Council should promote the effective coordination of the whole UN system with respect to human rights. Before the creation of the HRC, the Commission on Human Rights seldom interacted with the UNSC, but it did so three times in 1992, in the wake of the Security Council first summit-level meeting. The CHR Special Rapporteur for Iraq addressed the Council on two occasions, in August and November of that year, and the Special Rapporteur for the Former Yugoslavia briefed the UNSC, also in November 1992. There was open opposition to these briefings though, from permanent (China) and elected (India, Zimbabwe, Ecuador⁸¹) members alike. The CHR-adopted mandate of the Special Rapporteur for the Former Yugoslavia included a request to the UNSG to make the Rapporteur's reports available to the UNSC, and with this provision, "at the height of the Balkan War [...] the Security Council began receiving human rights information periodically."⁸²

One of the best legacies of the Commission on Human Rights is the Special Procedures. The holders of the mandates are independent investigators who, despite being mandated by a resolution, do not receive a salary from the United Nations and are therefore at liberty to expose the reality of the human rights situation they are requested to research without having to calculate the political consequences it may have. Their reports are generally thorough and well informed, drawing from government sources, academia, and civil society organizations alike, and they can easily become official Security Council documents at the request of one of the member states. Requesting that human rights documents be distributed as UNSC official documents, however, is a practice that is not as extended and common as it perhaps should be. The Secretary General also has the power to include direct references of the special procedures' reports in his own, especially those directed to the UNSC and referring to country-specific situations on the Council's agenda, but such inclusions are the exception to general practice. "More could be done to recognize the vital role that human rights mechanisms can play in identifying risks and preventing atrocity crimes, and to increase engagement between the Security Council and the Human Rights Council, including its special procedures mandate holders."⁸³

⁸¹ The case of Ecuador is particularly interesting. Its Permanent Representative to the UN at the time was José Ayala Lasso, who was very vocal against the participation of the Special Rapporteurs and any role of the UNSC in human rights matters. In an ironic twist, one year later he was appointed High Commissioner for Human Rights, the first person ever to hold the position. As UNHCHR, he never had any predisposition to cooperate with the Security Council.

⁸² Security Council Report, "Human Rights and the Security Council," p. 5.

⁸³ UNSG Report, "Mobilizing collective action," p. 11.

The situation did not change much with the creation of the Human Rights Council. UNGA Resolution 251 does not foresee direct links between the HRC—which, like its predecessor, has its seat in Geneva—and the Security Council, and there have been few, albeit interesting, cross-communications between the two bodies. In the area of the protection of human rights while countering terrorism, “the HRC mandated its Special Rapporteur and the relevant officials within the Office of the High Commissioner [...] to interact with the relevant subsidiary bodies of the Security Council,”⁸⁴ namely the Counter-Terrorism Committee. Another relevant event happened in 2014, when the HRC Special Rapporteur for Internally Displaced Persons was invited to address the UNSC during an open debate on Women, Peace and Security. But the lack of communication between UN main bodies, especially those of intergovernmental nature, seems to be the rule. A clear example is illustrated by the Commission of Inquiry on Syria mandated by the Human Rights Council. In March 2015 the HRC adopted resolution 28/20 (A/HRC/RES/28/20), which included a decision “to transmit all reports and oral updates of the Commission of Inquiry to all relevant bodies of the United Nations,” and recommending that “the Assembly submit the reports to the Security Council for appropriate action.” A similar recommendation was formulated in HRC resolution 30/10 (A/HRC/RES/30/10) of October 2015. No reports have yet been transmitted by the General Assembly to the Security Council. Without official communication, members of the Security Council can ignore the findings of the document as suits their own interests, even though it is a relevant and official UN document.

The nature of the UN system, however, is such that its main intergovernmental bodies have been allowed to become non-communicating siloed compartments and any unwelcome interference between them is quickly labelled “encroachment” by member states with vested interests. But it is precisely member states which can overcome the situation created, by requesting, as mentioned earlier, that documents emanating from other bodies are distributed as official Security Council documents. A more difficult but more substantial route is achieved by negotiating and including clauses in UNSC resolutions that can open the way for the Council to receive direct information on human rights situations. As mentioned earlier, resolution 2242 of October 2015 on Women, Peace and Security includes a reference to the need to mainstream the issue throughout country-specific situations on the Council’s agenda and also to invite women’s organizations to brief the Council in country-specific considerations. This is the first occasion that civil society organizations have been invited to address the Council in a systematic manner. It was put into practice in December 2016, in the debate on the

⁸⁴ Security Council Report, “Human Rights and the Security Council,” p. 5.

situation in Liberia, during which Victoria Wollie, a representative of the Women in Peacebuilding Network in Liberia, a local NGO, addressed the Council and its members. Building on this precedent, resolution 2331 of 2016 on human trafficking included an almost identical clause. Civil society representatives, the direct witnesses and victims of conflict, can bring to the Security Council an input that cannot be matched by any other actor.

B. Preventing mass atrocities

“Although member states have repeatedly emphasized their support for the prevention of atrocity crimes, this has not been sufficiently translated into concrete support for preventive strategies—even when there have been credible assessments of imminent threats to populations.”⁸⁵

The search for better mechanisms for prevention of conflict, one of the purposes enunciated in Article I of the Charter, has been a recurring theme in the more than seventy years of history of the United Nations.⁸⁶ Respecting human rights is a responsibility of states, and monitoring the respect for human rights is the first and essential step in the prevention of mass atrocities. International oversight is, however, necessary. Prevention of conflict, and therefore the prevention of genocide, war crimes, and crimes against humanity, is the area where the UNSC can best deploy its powerful toolbox.

The realization of the deep failure of the entire UN system when faced with the genocide in Rwanda and the massacre in Srebrenica was a turning point, at least on paper, when addressing issues of prevention of mass atrocities. A number of years passed, however, before the Security Council took action on the issue as a concept. As mentioned earlier, in August 2001 the Council adopted resolution 1366 (S/RES/1366) on the role of the UNSC in the prevention of conflict, in which it resolves “to take appropriate action within its competence, combined with the efforts of member states, to prevent the recurrence of such tragedies,” a direct reference to the Rwandan genocide and the massacre in Srebrenica which were explicitly mentioned in the text. It is a landmark resolution, but it was adopted with improbably bad timing, twelve days before the September 11 terrorist attacks on New York and the Pentagon. The agenda of the Security Council would be dominated in the following years (as, in

⁸⁵ UNSG Report, “Mobilizing collective action,” p. 8.

⁸⁶ For an in-depth insight on the Security Council’s action on conflict prevention, see Security Council Report research paper “Can the Security Council Prevent Conflict?,” February 2017. Available at http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/research_report_conflict_prevention_2017.pdf. Accessed on 12 June 2017.

many ways, it still is today) by counter-terrorism efforts. In 2002, however, one year after adopting 1366, the Council created its only subsidiary body tasked with a prevention mandate, the Ad Hoc Working Group on Conflict Prevention and Resolution in Africa, whose activity has not matched the hopes it raised when established. A few years later, on the occasion of the tenth anniversary of the Rwandan genocide, UNSG Kofi Annan appointed a Special Adviser on the prevention on genocide, using resolution 1366 as the source of the mandate. The Special Adviser would inform the UNSG of potential situations that could result in genocide and the UNSG would inform the Council. The interaction of the Council with the Special Adviser has evolved modestly: he addressed open briefings of the Council on Burundi (November 2015) and South Sudan (November 2016), issue on which, most significantly, he also briefed Council members in closed consultations. The relationship of the Special Adviser and the Council has however not developed much further.⁸⁷

The September 2005 Summit Outcome Document decided to establish a Peacebuilding Commission (PBC) to “advise on and propose integrated strategies for post-conflict peacebuilding and recovery.”⁸⁸ In origin, the PBC was envisaged as endowed with powerful conflict prevention tools, yet that aspect of its mandate was lost during the negotiations of the Outcome Document which, in exchange, contained the references to the Responsibility to Protect outlined above.

In August 2014, the Council held a new meeting on conflict prevention and unanimously adopted resolution 2171 (S/RES/2171), which again reiterates the intention to help coordinate the activity on conflict prevention carried out by different bodies, including regional organizations, as well as the Council’s “willingness to give prompt consideration to early-warning cases brought to its attention by the Secretary General.” The fact that it was deemed necessary to include that mention in a resolution on prevention of conflict shows that what should be automatic still depends on the good will (“willingness to give prompt consideration”) of the Council members, especially the permanent five.

One of the most interesting aspects of resolution 2171 is the fact that it lists some of the tools included in Chapter VI of the Charter that could be used for prevention purposes, namely “negotiation, enquiry,

⁸⁷ In 2014, the Special Adviser on the Prevention of Genocide and the Special Adviser on the Responsibility to Protect issued a very interesting in-depth document called “Framework of Analysis for Atrocity Crimes: A tool for prevention,” with a foreword by UNSG Ban Ki-moon, who had just launched his “Human Rights up Front” initiative. The document is available online at http://www.un.org/en/preventgenocide/adviser/pdf/framework%20of%20analysis%20for%20atrocity%20crimes_en.pdf. Accessed on 12 June 2017.

⁸⁸ 2005 Summit Outcome Document, adopted by UNGA resolution 60/1 (A/RES/60/1), paragraphs 97-105, pp. 24-25.

mediation, conciliation, arbitration, judicial settlement and resort to regional and sub-regional organizations and arrangements, as well as the good offices of the Secretary-General.” But there are other tools that the Council could use to reinforce its action on conflict prevention.

- Commissions of Inquiry: Article 34 of the Charter says that “the Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.” As mentioned earlier, the decision to establish both international criminal tribunals for the former Yugoslavia and Rwanda was based on the recommendations of commissions of inquiry dispatched by the Council. An interesting fact is that in its early years, the Security Council used this tool rather more frequently than it subsequently has. Resolution 4 (S/RES/4) of 29 April 1946, “keeping in mind the unanimous moral condemnation of the Franco régime,” established a Sub-Committee to “determine whether the situation in Spain has led to international friction and does endanger international peace and security.” Later that year, on 19 December 1946, the Council established by resolution 15 (S/RES/15) a “Commission of Investigation to ascertain the facts relating to the alleged border violations along the border between Greece on the one hand and Albania, Bulgaria and Yugoslavia on the other.” The commission requested the Greek authorities to postpone the execution of persons sentenced to death for political offenses, yet the Council later resolved, by resolution 17 (S/RES/17), “that it was not ready to adopt a principled position on the matter in contradiction with the principle of noninterference.”⁸⁹

In the last couple of decades, and in addition to the cases of the former Yugoslavia and Rwanda, the Council has dispatched a limited number of commissions of inquiry with a strong human rights mandate: Burundi in 1995; Côte d’Ivoire in 2004 (with the mandate to “investigate all human rights violations” since September 2002 “and determine responsibility”); Darfur (the Commission recommended referring the situation to the ICC, issue which will be addressed in the next section of this paper); and Central African Republic in 2013 (“to investigate reports of violations of international humanitarian law, international human rights law and abuses of human rights”). Council members, however, were unable or unwilling to agree on dispatching a commission of inquiry to Sri Lanka, let alone Syria. Such a commission of inquiry could be a crucial instrument in preventing mass atrocities and conflict itself, but that would require swift

⁸⁹ Stagno Ugarte and Gesner, “Evolution of the Security Council’s Engagement on Human Rights,” p. 5.

and determined action by Council members, something that is hardly ever achievable. In addition to their actual findings and recommendations, the relevance of commissions of inquiry derives from their usefulness in fleshing out the human rights dimension of the Council's agenda.

- Council Missions: Until the end of the Cold War, the Council “resorted to this tool about a dozen times”; since 1992, it has undertaken almost sixty.⁹⁰ The usefulness of this tool is to gather direct, first-hand information and meet with actors, government, and civil society alike, in conflict areas. A telling example of the usefulness of this tool was a Council's mission to the Democratic Republic of Congo in 2009, when a visit to a hospital for rape victims in the east of the country showed a horrific reality that reports neither had nor could. The members of the mission raised the issue with the DRC authorities, including President Joseph Kabila, demanding that judicial proceedings were started against five army officers who were accused of sexual violence. Within weeks, the legal proceedings started and President Kabila declared a zero-tolerance policy within the armed forces regarding all human rights violations. On a more modest scale, the Council mission to South Sudan in September 2016 yielded a Joint Communiqué by the Transitional Government and Council Members Council announcing an agreement on deploying the Regional Protection Force that had been authorized by Council resolution 2304 (S/RES/2304).

The higher frequency of the visits (and the higher degree of preparation) has not, however, translated into more determined action on human rights matters, since the original practice of producing written reports with recommendations seems to have been discontinued.

- Sanctions: Article 41 of the Charter allows the Security Council to “decide what measures not involving the use of armed force are to be employed to give effect to its decision.” Sanctions have been used by the Council since the very early years of the United Nations and “human rights violations have almost always been part of the overall landscape of the situation the Council was striving to ameliorate with the use of sanctions.”⁹¹ As mentioned earlier, the first UNSC sanctions committee was established in 1968 by resolution 253, regarding Southern Rhodesia, modern-day Zimbabwe, which condemned “all measures of political repression, including arrests, detentions, trials and executions which violate fundamental freedoms and rights of the people of Southern Rhodesia.” Similar language can be found in resolution 418

⁹⁰ Security Council Report, “Human Rights and the Security Council,” p. 12.

⁹¹ Ibid., p. 13.

(S/RES/418) establishing a comprehensive sanctions regime against South Africa.

Since the end of the Cold War, sanctions have moved from comprehensive measures, which often ended up hurting the populations that the Council was supposed to protect, to individual targeted measures, such as travel bans or assets freezes, directed towards persons with decision making power. “Ironically, it was the international community’s concern about the human rights implications of general sanctions than initially led the Security Council to implement targeted sanctions.”⁹² Human rights language was included in the resolutions imposing sanctions on Haiti (S/RES/841 of 16 June 1993) and Afghanistan (S/RES/1267 of 15 October 1999), and seven of the fifteen sanctions regimes currently in existence have human rights violations among their listing criteria, namely Darfur, Democratic Republic of Congo, Libya, Somalia and Eritrea, Central African Republic, Yemen, and South Sudan.⁹³ Each sanction regime has its own committee, which decides by consensus the individuals to whom the sanctions will be applied. Yet no individual has ever been listed only on grounds of human rights violations, and human rights criteria are seldom mentioned when imposing individual sanctions.

- The veto: The word “veto” is never mentioned in the UN Charter, and yet it is at the very core of the global governance system embodied by the United Nations, with the Security Council at its center. The veto is implicit in Article 27 of the Charter, which states that decisions of the Security Council on non-procedural matters “shall be made by an affirmative vote of nine members *including the concurring votes of the permanent members*” (my emphasis). It was inherited from the Council of the League of Nations, all of whose members, permanent and elected alike, had a veto on non-procedural issues, therefore making decision-making virtually impossible. At the Yalta Conference, the United States, the Soviet Union, and the United Kingdom agreed on veto power for the permanent members of the Security Council, a condition without which the United Nations could not have existed. The veto is not a “tool” of the Security Council, it is a privilege at the disposal of the five permanent members, who have used it profusely throughout the years for colonial, political, and geostrategic reasons. The Soviet Union/Russia has used it

⁹² Jared Genser and Kate Barth, “Targeted Sanctions and Due Process of Law,” in Stagno Ugarte and Gesner (eds.), *The United Nations Security Council in the Age of Human Rights*, p. 197.

⁹³ The sanctions regimes were respectively established by the following resolutions: Darfur S/RES/1591 of 29 March 2005; Democratic Republic of Congo S/RES/1698 of 31 July 2006; Libya S/RES/1970 of 26 February 2011; Somalia and Eritrea S/RES/2002 of 2 December 2011; Central African Republic S/RES/2134 of 28 January 2014; Yemen S/RES/2140 of 26 February 2014; and South Sudan S/RES/2206 of 3 March 2015. The sanctions regime for Côte d’Ivoire, established by resolution S/RES/1572 of 15 November 2004, was terminated by resolution S/RES/2283 on 28 April 2016.

more than any other permanent member. China has used it less than any other, but more frequently in recent times. France and the United Kingdom have not used it publicly since 1989. The United States has used it often on many issues and almost in an automatic manner on texts referring Israel/Palestinian Occupied Territories, yet, during the eight years of the Obama Administration, it only exercised the right to veto, publicly, on one occasion. Every US-vetoed text on Israel/Palestine is mirrored in every Russian (and Chinese) veto on Syria.⁹⁴ It is often forgotten that seven members of the Council, permanent or elected, can also “veto” a draft resolution by simply abstaining *en bloc*, since nine affirmative votes are necessary for adopting a text or even a procedural decision.

Many of the vetoes exercised by permanent members, moreover, addressed human rights elements or concerns. Bruno Stagno Ugarte and Jared Genser have put together an extremely interesting chart with the breakdown of vetoes of draft resolutions that contained textual or other references to human rights, and the result shows a “counterintuitive imbalance in responsibility for countering action by the Security Council to address human rights concerns,”⁹⁵ since it shows that the United States leads the list, having vetoed almost as many draft resolutions containing textual references to human rights as all other permanent members combined. The United Kingdom and France follow. The Soviet Union/Russia and China close the list.⁹⁶ The list only shows public vetoes, exercised when voting on a draft resolution tabled for action. Most of the vetoes, however, are exercised in a “hidden” manner, during the negotiations of a text in the consultations room, or even at expert level. Those hidden vetoes, used as a tool in the negotiation process, are proof of the great privilege enjoyed by permanent members. One example: the reason why the 2009 atrocities in Sri Lanka were not addressed by the Council was not just, as expressed earlier, the “systemic failure” of the entire United Nations in bringing it to the attention of the UNSC. Another factor was no doubt the expression “my delegation is not in a position to support the draft resolution,” expressed by the representative of a permanent member, so often heard during negotiations in the consultations room, where no records are kept.

⁹⁴ The specialized think tank Security Council Report has compiled a complete list of all the vetoes throughout history, available at http://www.securitycouncilreport.org/un-security-council-working-methods/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/working%20methods_the%20veto.pdf. Accessed on 12 June 2017.

⁹⁵ Stagno Ugarte and Gesner, “Evolution of the Security Council’s Engagement on Human Rights,” p. 25.

⁹⁶ Revealing and fascinating as those statistics are, they were put together in 2014, which means the most recent texts, mostly on Syria, vetoed by Russia and/or China, are not included.

In the run-up to the 2005 UN Summit—whose Outcome Document created the Human Rights Council and the Peacebuilding Commission, and also adopted the principle of Responsibility to Protect—a high-level panel on “threats, challenges and change” produced a report in which it called on the permanent members “to pledge themselves to refrain from the use of the veto in cases of genocide and large-scale human rights abuses.”⁹⁷ In 2012, Laurent Fabius, French Foreign Minister, proposed to institute a “code of conduct” by which the five permanent members would “voluntarily regulate their right to exercise their veto”⁹⁸ in cases of decisions “with regard to a mass crime.” His proposal was as follows: at the request of at least fifty member states, the Secretary General would decide upon the nature of the crime. The code of conduct “would exclude cases where the vital national interests of a permanent member of the Council were at stake” and would restore the credibility of the Council. The French idea has now become a joint French-Mexican initiative.⁹⁹ The Secretary General, in the most recent report on the Responsibility to Protect, makes reference to a code of conduct and to the need that the permanent members demonstrate leadership and “agree to exercise restraint in the use of the veto in situations involving atrocity crimes.”¹⁰⁰

Limiting the use of the veto in cases of mass atrocities would be a great step forward in the effort to prevent mass atrocities and seek accountability for those responsible, yet it could also be an excuse for delaying action until the Secretary General (or the General Assembly, as has also been informally suggested) decides upon the nature of the crime. It would not deter the P-5 either from using their usual negotiation tactics, the usual veiled but obvious threat of a veto to remove, for instance, a mention of human rights law, or accountability mechanisms, or end of impunity.

⁹⁷ Report of the High-Level Panel on Threats, Challenges and Time, “A More Secure World: Our Shared Responsibility,” included in document A/59/665 of 2 December 2004.

⁹⁸ Laurent Fabius, “A Call for Restraint at the U.N.,” Opinion Pages, *The New York Times*, 4 October 2013. Available at <http://www.nytimes.com/2013/10/04/opinion/a-call-for-self-restraint-at-the-un.html>. Accessed on 12 June 2017.

⁹⁹ There have been other initiatives to limit the veto, notably the code of conduct proposed by the Accountability, Coherence and Transparency (ACT) Group for better working methods for the UNSC, launched in 2015. It does however lack the legitimacy of the French initiative since it does not come originally from a permanent member (although it is supported by both France and the UK) but from Costa Rica, Jordan, Liechtenstein, Singapore and Switzerland, a group known at the UN as the “S5”. More details on the ACT initiative available at <http://www.centerforunreform.org/?q=node/679> Accessed on 16 June 2017.

¹⁰⁰ UNSG Report, “Mobilizing collective action,” p. 14.

- Coordination with regional organizations: Chapter VIII of the Charter foresees a system of regional arrangements which could be used “for enforcement action under its authority.”¹⁰¹ Formal dialogues with regional organizations with strong human rights mandates (the African Union, the Organization of American States, or the Organization of Security and Cooperation in Europe, for instance), or an invitation to a representative of a regional organization to address the Council on a given country-specific situation of its agenda, can bring about not just more thorough information than that available to delegations in New York but also a different focus. Dialogues with regional organizations tend to be sparse, too structured, and not spontaneous. A more focused approach would help the UNSC improve its information on many country situations.

- Arria-formula meetings and interactive dialogues: Arria-formula meetings have become an extremely useful tool to raise awareness amongst Council members (and the wider UN membership) about issues that are not on the agenda or to hear from civil society or other speakers who cannot be invited to address the Council—or whose presence might have been vetoed by a permanent member. Their name comes from Ambassador Arria of Venezuela, who in 1991 decided to organize an informal meeting outside the Council chamber and consultations room in order to hear from witnesses in the early stages of the war in the former Yugoslavia. Arria meetings have become more and more common and they help find ways around the Council’s agenda. There have been meetings on the development dimension of peace and security, the effect of climate change on international peace and security, and many meetings on cases of mass atrocities, war crimes, or the rampant impunity due to lack of accountability. These meetings, which some members do not attend or do so only at a low level of representation, are extremely useful in widening the scope of the Council’s agenda and interests, and although there are no official public records, they are useful to set the tone for further Council action. The same can be said about informal interactive dialogues, which have a similar format but are often open for the wider membership to attend. However, as Stagno Ugarte points out, “caution is required, as at times these informal formats are used to cover for the absence of formal Council action, as best exemplified by the informal interactive dialogues on the situation in Sri Lanka.”¹⁰² Three informal interactive dialogues on Sri Lanka were held in 2009 at the initiative of elected members Austria, Costa Rica, and Mexico, yet as stated earlier,

¹⁰¹ UN Charter, Article 53.1.

¹⁰² Stagno Ugarte, “Security Council Diplomacy on the Protection of Civilians,” p. 303.

the Council never took action on the issue.

- **“Any Other Business”**: Another interesting tool, increasingly used both by Council members and the Secretariat, is raising issues under the “Any Other Business” (AOB) agenda item at the end of informal consultations. Some of the most interesting debates of the Council happen on those issues, when most Permanent Representatives are not bound by the straitjackets of pre-drafted remarks or statements and are required to react and give an opinion on an issue that was not formally on the agenda. The use of the AOB agenda item is in many ways the heir of the short-lived “horizon-scanning” exercise that was mentioned earlier. The Secretariat has used AOB to brief Council members on issues such as Myanmar, and member states have used it to discuss urgent developments, either on country-specific items on the agenda of the Council or on fast-evolving situations that could lead to necessary Council action. The usefulness of this informal tool in preventing conflict and mass atrocities could prove extremely important.

Preventing conflict, let alone mass atrocities, is not an easy task. Like his predecessors, Secretary General Antonio Guterres has made prevention of conflict one of the main objectives of his mandate. In his first address to the Security Council, on 10 January 2017, he affirmed that “prevention should never be used to serve other political goals” and encouraged Council members to make better use of the toolbox provided in Chapter VI to solve disputes before they become conflict.¹⁰³ The Security Council has powerful tools, but its members are not always ready or willing to use them, and no matter how well-oiled all UN prevention mechanisms may be, there is no doubt that there will be conflict, which will lead to renewed mass atrocities and loss of civilian life. Just as respecting human rights is a responsibility of each state, every state has to develop its capacity to investigate and judge gross violations of human rights. But when a state is unable or unwilling to provide accountability mechanisms, the international system must intervene.

C. Accountability for mass atrocities

“The norm that state officials should be held accountable for human rights violations has gained new strength and legitimacy.”¹⁰⁴

¹⁰³ UNSG Antonio Guterres is a former UN High Commissioner for Refugees. The text of his address to the UNSC is available at <https://www.un.org/sg/en/content/sg/speeches/2017-01-10/secretary-generals-remarks-maintenance-international-peace-and> Accessed on 12 June 2017.

¹⁰⁴ Sikkink, *The Justice Cascade*, p. 12.

As noted earlier, the edifice built by the United Nations for international protection of human rights put state responsibility at its center and did not consider establishing mechanisms for individual accountability, despite the Nuremberg and Tokyo precedent. As Sikkink points out, “The state accountability model went hand-in-hand with the idea that state officials were immune from prosecution for human rights violations.”¹⁰⁵ At the core of any effort to establish accountability for mass atrocities are three rights: the right to truth, the right to justice, and the right to an effective remedy and reparation. It is the responsibility of each state to create accountability mechanisms, but many governments are not ready or willing to exercise jurisdiction over their own officials, and at the international level the state accountability model cannot provide truth, justice, remedy and reparation. As Grant and Keohane state, “claims to legitimacy at the global level depend on inclusiveness of state participation and of general norms of fairness.”¹⁰⁶ It took almost fifty years after Nuremberg and Tokyo for the international community to devise the first tools for individual accountability for mass atrocities, and those first tools, the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, were created by the UN Security Council. Furthermore, the Rome Statute of the International Criminal Court has provided the Security Council with a new and extremely powerful tool.

National prosecution, domestic courts trying foreign officials on the principle of “universal jurisdiction,” and international courts form the three cornerstones of what Sikkink eloquently calls the “Justice Cascade,” which implies that “there has been a shift in the *legitimacy of the norm* of individual criminal accountability for human rights violations and an increase in criminal prosecutions of behalf of that norm.”¹⁰⁷ An essential aspect of the Rome Statute is that it provides a legal frame to the concept of “mass atrocities” or even “core human rights violations,” a “subset of rights sometimes referred to as ‘physical integrity rights’, the ‘rights of the person’ or, when violated, ‘core crimes’”. This model involves an important convergence of international law (human rights law, humanitarian law or the laws of war and international criminal law) and domestic criminal law.”¹⁰⁸ Article 5 of the Rome Statute says that “The jurisdiction of the Court shall be limited to the most serious crimes” and enumerates them “(a)

¹⁰⁵ Ibid., p. 14.

¹⁰⁶ Ruth W. Grant and Robert O. Keohane, “Accountability and Abuses of Power in World Politics,” in *American Political Science Review*, vol. 99 (1) (February 2005), p. 35.

¹⁰⁷ Sikkink, *The Justice Cascade*, p. 5.

¹⁰⁸ Ibid., p. 16.

The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression.”¹⁰⁹ Articles 6, 7 and 8 define the meaning, respectively, of genocide, crimes against humanity, and war crimes.¹¹⁰ The Court, which does not belong to the United Nations system, works on the principle of complementarity, which means that it steps in to undertake its own prosecutions only where national governments fail to prosecute and where the Court has jurisdiction. “In reality there is need for the ICC, since states may be unwilling to exercise jurisdiction over international crimes.”¹¹¹

The role of the Security Council in relation to the ICC was at the core of the negotiations of the Rome Statute. The possibility of the Council blocking an ICC prosecution was included in the original draft of the International Law Commission to the UN General Assembly, but the report of UNGA’s *ad hoc* committee on the establishment of the ICC showed a clear dissent within the wider UN membership: “It was observed in particular that the judicial functions of the court should not be subordinated to the action of a political body.”¹¹² In the end, a compromise solution was reached, by which the Council could block a prosecution but only by an affirmative resolution: “No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect” (Article 16 of the Rome Statute). On the other hand, the Statute provides the Council with a “trigger mechanism” to refer situations to the Court. During the Rome conference, a clear majority of delegations supported the power of the UNSC to initiate proceedings of the Court, but some opposed it on the grounds that, “it would subject the functioning of the Court to the

¹⁰⁹ Paragraph 2 of Article 5 excludes the crime of aggression pending its international legal definition, “consistent with the relevant provision of the Charter of the United Nations.”

¹¹⁰ Article 7, paragraph 1, of the Rome Statute is of special importance since it defines the scope of “mass atrocities”: “For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”

¹¹¹ John Holmes, “Complementarity: National Courts versus the ICC,” in Antonio Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), p. 667.

¹¹² UNGA document A/50/22, Report of the *ad hoc* Committee in the Establishment of an International Criminal Court, 6 September 1995, p. 125.

decisions of a political body and therefore undermine the Court's independence and credibility."¹¹³ Article 13, on exercise of jurisdiction, states that "the Court may exercise its jurisdiction with respect to a crime referred to in article 5 [...] if: (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations." It must be noted that the Prosecutor is not required to act upon the referral by the Council, she "must first determine that there is reasonable basis to proceed" and "may decline to act if she considers that prosecution is not in the 'interest of justice'."¹¹⁴ Article 12 of the Statute limits the jurisdiction of the Court to states that are parties to the Rome Statute or to nationals of state parties, but the Security Council is not bound by these preconditions and it can refer any situation, regardless of whether the state in question is a party to the ICC statute, hence the importance of the trigger mechanism.

Three of the five permanent members, China, Russia, and the United States, are not parties to the Rome Statute. Russia and the United States signed it in 2000 but have not ratified it. In November 2016, Russia withdrew its signature, the day after the Court issued a report in which it qualified Russia's annexation of Crimea as an occupation.¹¹⁵ When the Rome Statute came into force in June 2002, the United States requested that all UN-authorized missions be shielded from prosecution from the Court. The Council adopted resolution 1422 (S/RES/1422) on 12 July 2002, by which it exempted nationals of states that are not parties to the Statute from prosecution for a twelve-month period "over acts or omissions relating to a United Nations established or authorized operation." The resolution was extended for another year in 2003, but in 2004 the United States withdrew its request.¹¹⁶ Despite this lack of support from three of the P-5, the Security Council has managed to refer two situations to the ICC.

On 31 March 2005 the Security Council adopted resolution 1593 (S/RES/1593), referring the situation in Darfur to the ICC, with 11 votes in favor and 4 abstentions (Algeria, Brazil, China, and the United States), following the recommendation of a commission of inquiry it had dispatched to Sudan, which is not a party to the Rome Statute. The United States had presented a first draft that would have established a special court for Sudan, following the example of ICTY and ICTR, but accepted referring

¹¹³ Lionel Yee, "The International Criminal Court and the Security Council: Articles 13(b) and 16," in Roy S. Lee (ed.) *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (Cambridge, MA: Kluwer Law International, 1999), pp. 146-147.

¹¹⁴ Schabas, "Accountability for International Crimes," p. 187.

¹¹⁵ Shaun Walker and Owen Bowcott, "Russia withdraws signature from International Courts Statute," *The Guardian*, 16 November 2016, available at <https://www.theguardian.com/world/2016/nov/16/russia-withdraws-signature-from-international-criminal-court-statute>. Accessed on 13 June 2017.

¹¹⁶ The United States request was withdrawn after pictures emerged of US troops abusing Iraqi prisoners in Abu Ghraib.

the Darfur situation to the ICC after a clause excluding from prosecution “nationals, current or former officials or personnel from a contributing state outside Sudan which is not a party to the Rome Statute,” reminiscent of resolution 1422, was included in the text. The US, which eventually abstained in the vote, also requested to exempt the United Nations from any expense “related to investigations and prosecutions” and that all costs should be borne “by the parties to the Rome Statute” or others who wish to contribute. Because of those two caveats, the referral was labeled “tailor-made” since it sets “limits on the scope of the investigation” and funding.¹¹⁷ The Court started its proceedings and indicted and issued arrest warrants for four members of the Sudanese government, including its President Omar Al Bashir. Twelve years later, all four are at large, and President Al Bashir travels to other countries, including many that are parties to the Rome Statute, without any consequences to date.

The second referral happened in 2011. Resolution 1970 (S/RES/1970), adopted unanimously, referred the situation in Libya to the ICC. It included the same tailor-made clauses as 1593, again at the request of the United States. Three government officials, including President Muammar Gaddafi, were indicted and arrest warrants were issued. President Gaddafi was killed during the popular uprising in the country and the other two indictees are under arrest in Libya but have not been transferred to The Hague. Resolution 1970 is intrinsically linked to resolution 1973 (S/RES/1973), by which the UNSC imposed a no-fly zone over Libya, and, acting on the principle of the Responsibility to Protect, authorized “all means,” including military intervention, to protect civilians.

There was a third draft resolution on referral to the ICC in front of Council members, this time regarding the situation in Syria. As the Syrian civil war evolved and news of mass atrocities emerged, Switzerland, on behalf of 56 states from all UN regional groups (including permanent Council members France and the United Kingdom), sent a letter on 13 January 2013 to then President of the Security Council (Pakistan) requesting that the Security Council refer the situation of Syria “as of March 2011” to the ICC.¹¹⁸ The Human Rights Council had established in August 2011 an Independent International Commission on Inquiry with a mandate to investigate all alleged violations of human rights law since March 2011 in Syria.¹¹⁹ On 22 May 2014 a draft resolution was put to the vote of the Security Council. Its main provision was the referral of the situation in Syria to the International Criminal Court. Russia and China voted against, thereby vetoing the resolution. In spite of constant calls from the High

¹¹⁷ David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford: Oxford University Press, 2014), p. 110.

¹¹⁸ The letter is contained in UN Document A/67/694-S/2013/19.

¹¹⁹ Resolution S-17/1, available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/ResS17_1.pdf. Accessed on 13 June 2017.

Commissioner for Human Rights since 2012 for a referral and the recommendations of the HRC Commission of Inquiry,¹²⁰ political and geostrategic considerations prevailed over legal and moral obligations. During a high-level panel discussion held on 14 March 2017 by the Human Rights Council on the situation in Syria, High Commissioner Zeid Ra'ad Al Hussein said that, "the entire country has become a torture chamber: a place of savage horror and absolute injustice [...] this is the worst man-made disaster the world has seen since World War II."¹²¹ Not all efforts have been in vain: the Commission on Inquiry, as well as civil society, has elaborated a long list of atrocities, war crimes, and crimes against humanity, committed during the on-going Syrian civil war. Furthermore, in December 2016 the General Assembly adopted resolution 71/248 (A/RES/71/248), by which it decided to establish the "International Impartial and Independent Mechanism" to assist in the investigation and prosecution of those responsible for the most serious crimes under international law committed in Syria since March 2011. Whenever the international community is ready to hold accountable those responsible, the documentation will be available for use.

There have been other calls to the UNSC to refer situations to the ICC, most notably the Goldstone report on Gaza¹²² of September 2009, which had been commissioned by the Human Rights Council, but the Council has not taken any action after the Libya referral. Another development relevant to the Security Council, not related to a referral to the Court, is resolution 2098 (S/RES/2098) of March 2013, which authorizes the peacekeeping force in the Democratic Republic of Congo (MONUSCO) to cooperate with the government on the arrest of individuals subject to ICC arrest warrants.

A fundamental factor that prevents better interaction between the Security Council and the ICC is the lack of a solid institutional relationship between them. There is a caucus of Council members that are also parties to the Rome Statute, which is supposed to function as an internal pro-ICC lobby, but its efforts have not yielded many results. The only official joint meeting between the two institutions was held, at the initiative of elected Council member (and party to the Rome Statute) Guatemala, on 17 October 2012, on the occasion of the tenth anniversary of the Statute's coming into force. The debate produced no other outcome than the exchange of opinions and the expressed wish of further cooperation, which unfortunately has not taken place since. It has been suggested that an interesting way

¹²⁰ UN Document A/HRC/28/69.

¹²¹ The full statement of the UNHCHR is available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=21373&LangID=E>. Accessed on 13 June 2017.

¹²² "Report of the United Nations Fact-Finding Mission on the Gaza Conflict," UN Document A/HRC/12/48, paragraph 1969 (e).

forward would be for the Council to create a working group on international justice and accountability matters or expand the existing *ad hoc* Tribunals working group, as well as creating a liaison committee between the Court registry and the Council's sanctions committees.¹²³ But no further developments have occurred regarding the relationship between them.

The lack of response by the Security Council to requests for assistance from the Court on cases that the Council itself has referred to the ICC is perhaps the most worrying aspect of the relationship (or lack thereof) between the two bodies, especially when looking towards the future. In her address to the Council in the June 2016 debate on the situation in Darfur, ICC Prosecutor Fatou Bensouda lamented that her repeated requests for UNSC assistance in the face of Sudan's "flagrant disregard for this Council's resolution" were regrettably met with "conspicuous silence" over "non-compliance of its own resolutions." She added that "this evolving trend risks setting an ominous precedent, which unless it sees redirection, will not bode well for similar genuine efforts aimed at bringing those responsible for mass atrocities to justice."¹²⁴

Recent developments have not been kind to the International Criminal Court. In addition to Russia's withdrawing its signature from the Rome Statute, the African Union passed a non-binding resolution calling for a mass withdrawal of African states from the ICC, on the grounds of a supposed "anti-African bias" as well as "undermining national sovereignty." Burundi, Gambia, and South Africa announced their intention to withdraw from the Court, although Gambia and South Africa seem to have reversed course. Many in the human rights community, on the other hand, are also disappointed in the performance of the Court for its lack of teeth and what they perceive as excessive deference to state parties and the Security Council. Yet it cannot be forgotten that the mere existence of the Court serves as a deterrent, not just for state parties but also for non-signatories since they can always be referred by the Security Council. It has been suggested that the Court could shift its role through a policy of "proactive complementarity," engaging actively with national governments and encouraging and assisting them in undertaking domestic prosecutions for atrocity crimes, linking national and international

¹²³ Both proposals are recommendations contained in David Kaye et al., "The Council and the Court: Improving Security Council support of the International Criminal Court" (University of California, Irvine, School of Law 2013). The Report was the result of a research project by UC Irvine and UCLA. It is available online at <http://councilandcourt.org>. Accessed on 13 June 2017.

¹²⁴ Statement of ICC Prosecutor Fatou Bensouda to the United Nations Security Council on the Situation in Darfur, Sudan pursuant to UNSCR 1593 (2005), 9 June 2016. Available at <https://www.icc-cpi.int/Pages/item.aspx?name=160609-otp-stat-UNSC> Accessed on 18 June 2017.

elements to create a “Rome System of Justice.”¹²⁵ The deterrent aspect of the Court’s existence, together with complementarity, constitute essential elements of the “Justice Cascade”; as Luis Moreno-Ocampo, the first Prosecutor of the Court, said: “as a consequence of complementarity, the number of cases that reach the Court should not be a measure of its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.”¹²⁶

Conclusion: Building a Human Rights Culture at the Security Council:

The United States initiative to organize a Security Council debate on human rights on 18 April 2017 is certainly a recognition of the evolving role human rights play in the work of the Council. But it does not seem like a good idea, as the US intended, to insert a new item on the Council’s agenda on human rights, since it would get lost in the endless list of items on the agenda and would be limited, most likely, to one debate every year where well-known positions would be on show.¹²⁷ Working on human rights issues at the United Nations can lead to frustration. Many of us have witnessed with disappointment the failings of the complex and vast human rights edifice that “we the peoples” ourselves constructed, an edifice of universal declarations, treaties, covenants, councils, committees, bodies, investigators, and special procedures that has for too long limited itself to naming and shaming, unable to prevent mass atrocities and even more powerless when trying to seek accountability for the individuals responsible for those crimes.

The purpose of this paper is not to suggest that the United Nations Security Council should be given the mandate to protect and promote human rights. That is the role of the Human Rights Council. The HRC, with its imperfections, has the means to pursue a complete agenda and identify, compile, and condemn rights violations, while at the same time setting new standards. But the Security Council can, and must, deepen the “evolving role” that human rights play in its work, forgetting any linguistic phobia or excuses of encroachment. A human rights culture has to be inculcated throughout the Council’s work so that

¹²⁵ See William W. Burke-White, “Proactive Complementarity: The International Criminal Court and the Rome System of International Justice,” *Harvard International Law Journal*, vol. 49 (1) (Winter 2008), pp. 53-108.

¹²⁶ Luis Moreno-Ocampo, Prosecutor of the ICC, Statement made at the ceremony for the solemn undertaking of the Chief Prosecutor of the International Criminal Court (16 June 2003), available at https://www.icc-cpi.int/nr/rdonlyres/d7572226-264a-4b6b-85e3-2673648b4896/143585/030616_moreno_ocampo_english.pdf. Accessed on 13 June 2017.

¹²⁷ In his statement at the April debate, the representative of China did not mention even once the words “human rights.”

issues pertaining to the prevention of conflict (and therefore the likely occurrence of mass atrocities) cannot be set aside just because they relate to an issue that belongs to another body within the UN system. As the representative of Italy simply and eloquently put it during the April debate, “we must allow human rights to become part of our DNA.”¹²⁸

In order to ingrain human rights into the activity of the Council, work needs to be done at all levels, within the organization at large but very particularly with the five veto-wielding permanent members, whose will is essential to overcome the failings of the system. A few recommendations emerge as practical and desirable:

- The United Nations system at large must improve its internal communication system. As evidenced by the “systemic failure” to act when faced with the Sri Lanka atrocities, better and faster communication can lead to decisive preventive action. The Human Rights up Front initiative is a very positive step forward, but it will require determination on the part of the Secretariat, always too fearful of the permanent members’ reactions, for it to become a useful tool.
- Elected Council members have been instrumental in advancing many of the issues discussed in this paper, and they should be more assertive in their determination to influence policy. Those who are ready and willing to work should be given more space for maneuver by the P-5 and not just offered the chair of a couple of sanctions committees or a subsidiary body of the Council. They should also insist on using the preventive tools of the Council more frequently and more effectively.
- In the words of former UNSG Ban Ki-moon, in what is considered as his legacy document, “it is also vital that the Council ensures compliance with the decisions it does take in relation to atrocity crimes. It is simply unacceptable that some states and non-state armed groups continue to violate international human rights and humanitarian law and commit atrocity crimes in defiance of the Security Council. Members of the Council must therefore be better prepared to adopt measures targeting those who refuse to comply with its resolutions in contravention of article 25 of the Charter. Failing to act against those who brazenly ignore the Security Council’s

¹²⁸ The webcast of the debate is available at <http://webtv.un.org/meetings-events/watch/human-rights-and-prevention-of-armed-conflict-security-council-7926th-meeting/5402647967001> . Accessed on 13 June 2017.

will undermines the credibility of the United Nations.”¹²⁹

- France and Mexico should pursue their efforts in promoting a “code of conduct” by which permanent members would voluntarily decline to use the veto in cases of mass atrocities. The United Kingdom should also put its weight behind this initiative, which should become the objective of as big a coalition as possible. Even though it does not seem possible to reach agreement on a code of conduct any time soon, it is a goal worth pursuing and it could also help the efforts to reform the Security Council.

- The Security Council has a central role when it comes to ensuring accountability for atrocity crimes; it was instrumental in establishing the first two international criminal tribunals, and it can and must deepen its cooperation with the International Criminal Court. Once again, in the words of the latest report of the Secretary General on the protection of civilians, the Security Council should “ensure accountability for serious violations of international humanitarian and human rights law including, as appropriate, by applying targeted measures; supporting national prosecutions and hybrid mechanisms; mandating commissions of inquiry, fact-finding missions and investigation commissions; referring situations to the International Criminal Court; and providing consistent support to the Court to enable it to fulfil its mandate.”¹³⁰

Building a human rights culture at the Security Council will not end conflict, but it would help to prevent atrocities and ensure accountability, two faces of the same coin. In the end, they are a matter of justice, as much as they are essential for maintaining peace and security, which is the mandate of the United Nations Security Council. The Council has the tools to implement both goals, it now needs to show it is willing to do so. And the will of the Council is that of its members, and in particular of its five permanent members.

¹²⁹ UNSG Report, “Mobilizing collective action,” p. 14.

¹³⁰ Report of the Secretary General on the protection of civilians in conflict, UN Doc S/2017/414, 10 May 2017.