



**FACULTY OF BUSINESS AND SOCIAL SCIENCES**

# The Role of the UN Human Rights Council in the Prevention and Response to Mass Atrocity Crimes

*A Thesis submitted in partial fulfilment of the requirements for the degree of  
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## Abstract

It is amongst the different measures taken within the United Nations framework with the purpose of stimulating a culture of prevention in addressing human rights violations and atrocity crimes, that the UN Human Rights Council (HRC) was established in 2006. Despite of its subsidiary body status, the HRC was mandated at its inception with a wide-embracing role in addressing “situations of violations of human rights, including gross and systematic violations” but also in “respond(ing) promptly to human rights emergencies”.<sup>1</sup>

While acknowledging the actual scale and recurrence of mass atrocity crimes (genocide, war crimes, crimes against humanity and ethnic cleansing) and their categorization as the worst and most serious violations of international human rights and humanitarian law; this work aims at exploring the extent in which the HRC, and its mechanisms have a role in their prevention and response. With this objective in mind the thesis has engaged in interpretation of two case-studies based on the human rights situation of Myanmar and Cameroon. This has enabled the testing of the body’s mechanisms effectiveness, as well as, their impact on the evolution of the cases.

After having introduced the HRC’s mandate, its mechanisms, the theoretical framework of atrocity prevention and response, and the pertinent analysis of the two different case-studies, the thesis concludes that the human rights body’s role in preventing and responding to mass atrocity crimes, is limited. Moreover, while its mechanisms do appear to be suitable, on one hand, for strengthening structural prevention efforts, early-warning and accountability processes, their capacity of engaging with direct prevention of impending mass atrocities is severely constrained. That is how the HRC’s endeavours do seem to fall in two opposite sides of a spectrum.

Finally, it is further argued that this essential role should be understood within the larger framework of the UN: the HRC cannot and should not act alone. Holistic and coordinated efforts, especially between the human rights and the peace and security pillars of the UN, are extremely needed when dealing with crimes that involve such catastrophic impacts.

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<sup>1</sup> UN General Assembly resolution 60/251, *Human Rights Council*, UN Doc. A/RES/60/251, 3 April 2006, para. 3.

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## List of Abbreviations

<b>AI</b>	Amnesty International
<b>Art.</b>	Article
<b>CoI</b>	Commission of Inquiry
<b>ECOSOC</b>	United Nations Economic and Social Council
<b>FFM</b>	Fact-Finding Mission
<b>GCR2P</b>	Global Centre for the Responsibility to Protect
<b>HRC</b>	Human Rights Council
<b>HRW</b>	Human Rights Watch
<b>ICC</b>	International Criminal Court
<b>ICG</b>	International Crisis Group
<b>ICISS</b>	International Commission on Intervention and State Sovereignty
<b>ICJ</b>	International Court of Justice
<b>ICL</b>	International Criminal Law
<b>ICTR</b>	International Criminal Tribunal for Rwanda
<b>ICTY</b>	International Criminal Tribunal for the former Yugoslavia
<b>ID</b>	Interactive Dialogue
<b>IE</b>	Independent Expert
<b>IHL</b>	International Humanitarian Law
<b>IHRL</b>	International Human Rights Law
<b>IIM</b>	International Impartial and Independent Mechanism
<b>IL</b>	International Law
<b>IO</b>	International Organization
<b>MS</b>	Member State
<b>NGO</b>	Non-Governmental Organization
<b>NHRI</b>	National Human Rights Institution
<b>OHCHR</b>	Office of the United Nations High Commissioner for Human Rights
<b>Para/Paras.</b>	Paragraph/Paragraphs.

<b>R2P</b>	Responsibility to Protect
<b>Res.</b>	Resolution
<b>SP</b>	Special Procedure
<b>SR</b>	Special Rapporteur
<b>SuR</b>	State under Review
<b>UN</b>	United Nations
<b>UNCHR</b>	United Nations Commission on Human Rights
<b>UNGA</b>	United Nations General Assembly
<b>UNHCHR</b>	United Nations High Commissioner for Human Rights
<b>UNSC</b>	United Nations Security Council
<b>UNSG</b>	United Nations Secretary-General
<b>UNSG</b>	United Nations Secretary-General
<b>UPR</b>	Universal Periodic Review
<b>URG</b>	Universal Rights Group
<b>WG</b>	Working Group

# 1. Introduction

In the aftermath of the devastating Second World War, the foundations for worldwide peace and stability were expected to be developed around the establishment of the United Nations (UN), the international organization endowed with the challenging and wide-embracing purpose of taking “effective collective measures for the prevention and removal of threats to the peace.”<sup>2</sup> This period of time would also be witness of the adoption, among others of the *Universal Declaration of Human Rights*<sup>3</sup> and the *Convention on the Prevention and Punishment of the Crime of Genocide*,<sup>4</sup> two far-reaching documents of an aspirational character, envisioned as representing bases for the promotion of human rights and the protection against human rights abuses.

This promising inception illustrating the UN as a beacon of hope for the society of peoples, would be progressively threatened by the organization’s inability to respond to some of the gravest violations of human rights perpetrated in conflicts such as Cambodia, Rwanda or Yugoslavia.<sup>5</sup> The outrageous number of deaths, wounded, displaced and traumatized clearly displayed that the international community not only failed in the prevention, but also in the response to such catastrophes. While these tragic events would remain negatively embedded in the world’s expectations of the UN, they did appear to stimulate a wave of international initiatives flagged by the “never again” promise.

It is amongst the different measures taken particularly within the framework of the UN to swift its capacities from a culture of reaction to a culture of prevention in addressing human rights violations and atrocity crimes, that the UN Human Rights Council (HRC) was established in 2006. The replacement of the former UN Commission for Human Rights (UNCHR) which had been active since 1946 but whose reputation had progressively declined, represented a

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<sup>2</sup> *Charter of the United Nations*, San Francisco, 24 October 1945, *United Nations Treaty Series XVI*, (available at: <https://www.un.org/en/charter-united-nations/>).

<sup>3</sup> *Universal Declaration of Human Rights*, Paris, 10 December 1948, *United Nations General Assembly*, res.217 A (III) (available at <https://www.un.org/en/universal-declaration-human-rights/>).

<sup>4</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, Paris, 9 December 1948, *United Nations Treaty Series*, vol.78 (available at [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-1&chapter=4&clang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&clang=en)).

In following references to this treaty, the short form “Genocide Convention” will be used.

<sup>5</sup> For more information on the UN engagement with the Rwandan genocide see: Michael Barnett, *Eyewitness to a Genocide: The United Nations and Rwanda*, 2003. In the case of Yugoslavia, the reader is referred to: Bertrand G.Ramcharan, *Human Rights and UN Peace Operations: Yugoslavia*, 2011.

promising initiative on the reform process led by the UN prioritization of civilian protection worldwide.

These forward-looking initiatives were accompanied by the emergence of the Responsibility to Protect (R2P) doctrine, first presented by the International Commission on Intervention and State Sovereignty (ICISS) in 2001<sup>6</sup> and unanimously adopted at the 2005 UN World Summit,<sup>7</sup> whose outcome document clearly endorsed human rights as a pillar of the UN. R2P emphasizes the primary responsibility of sovereign states, supported by the international community's efforts, in the protection of civilians from the four specific international crimes or mass atrocity crimes: genocide, war crimes, crimes against humanity ethnic cleansing.

Despite of the dynamic efforts taken in this regard, the aforementioned essential reforms are being vigorously challenged by the current security sphere characterized by the spread of intra-state conflict, the rise of non-state actors or the changes in the modalities and character of war. Unremitting tragic events, recurrently identified as involving mass atrocity crimes, are taking place in a wide range of states, from Syria to South Sudan or Yemen. Other instances involve grave human rights violations that pose a critical risk for further escalation.<sup>8</sup> The outcomes of such situations have a long-lasting negative impact: they often lead to humanitarian crises, to further violence and destabilization, to substantial refugee flows and economic collapse.<sup>9</sup>

More than often the international community's response to these cases has heavily relied on the UN Security Council (UNSC) to act in order to mitigate and halt conflicts and mass atrocity situations in the materialization of its "*primary responsibility for the maintenance of international peace and security*" as endowed by the UN Charter. However, the body leading the security and peace pillar of the UN has often find itself unable, and even politically unwilling to act. The UNSC as the UN's principal decision-making body has been deadlocked in many critical situations that required a timely and decisive action, often derived from the veto power of its five permanent members.

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<sup>6</sup> International Commission on Intervention and State Sovereignty, "The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty," December 2001 (available at <http://www.responsibilitytoprotect.org/ICISS%20Report.pdf>).

<sup>7</sup> UN General Assembly resolution 60/1, *World Summit Document*, UN Doc. A/RES 60/1, 24 October 2005.

<sup>8</sup> UN General Assembly and UN Security Council, *A Vital and Enduring Commitment: Implementing the Responsibility to Protect: Report of the Secretary General*, UN Doc. A/69/981 and S/2015/500, 13 July 2015, para. 1.

<sup>9</sup> UN General Assembly and UN Security Council, *A Vital and Enduring Commitment: Implementing the Responsibility to Protect: Report of the Secretary General*, *supra* note 8, paras. 15-16.

## 1.1 The Topic: its Current Relevance

It is in that void of unfulfilled necessary action where the focus can shift towards the potential of other UN bodies in advancing the core principles of the Charter, and more importantly, their opportunity in working towards the development and protection of human rights. That is how the HRC, a fairly new subsidiary body of the UN General Assembly (UNGA), appears to take the lead in such occasions while placing itself as the head of the UN human rights pillar. This opportunity, nevertheless, is paired with substantive challenges on such endeavours, and the rhetoric and debate that characterizes its forum, in different occasions does not find a place in the reality on the ground.

The establishment of the HRC, which at its inception was endowed with the crucial role of addressing “*situations of violations of human rights, including gross and systematic violations*,”<sup>10</sup> was reinforced by the creation of certain mechanisms and procedural rules which were intended not only to address the problematics in terms of politicization, questionable membership and selectivity of its predecessor, but also, to reinforce the body’s mandate in the protection of human rights.<sup>11</sup> The founding of the Universal Periodic Review (UPR), a unique process by which the human rights situations of all the UN members would be periodically scrutinized, is a clear illustration of this.

The comprehensiveness of the work of the HRC is also noteworthy: its reach can be considered to be universal in the sense that it not only monitors the human rights situation of all the members of the United Nations, but as recently mentioned by the UN Secretary General (UNSG) António Guterres, “*the Human Rights Council is the epicentre for international dialogue and cooperation on the protection of all human rights: civil, political, economic, social and cultural*.”<sup>12</sup>

Genocide, crimes against humanity, war crimes and ethnic cleansing are the so-considered mass atrocity crimes, and they represent the gravest forms of human rights violations. Furthermore, while being internationally prohibited, it has been recognized that the scale and

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<sup>10</sup> UN General Assembly resolution 60/251, *Human Rights Council*, *supra note 1*, para. 3.

<sup>11</sup> For more information, see: Veronique Joosten, “The UN Human Rights Council at Work: From High Hopes Back to Reality,” *United Nations Association Flanders Belgium*, 2011 (available at [http://www.vvn.be/wp-content/uploads/2011/04/VVN\\_HRC\\_at\\_work\\_-\\_Definitieve\\_versie.pdf](http://www.vvn.be/wp-content/uploads/2011/04/VVN_HRC_at_work_-_Definitieve_versie.pdf)).

<sup>12</sup> António Guterres, UN Secretary-General, “Remarks to the Human Rights Council,” UNSG Website, 25 February 2019 (available at <https://www.un.org/sg/en/content/sg/speeches/2019-02-25/remarks-the-human-rights-council>).

the recurrence of these crimes has been increasing over the last decades.<sup>13</sup> By acknowledging that and the previously mentioned mandate of the HRC, which also includes its responsibility on contributing “*towards the prevention of human rights violations*” and “*respond(ing) promptly to human rights emergencies*”<sup>14</sup> it becomes rather evident that the body has a direct link with the prevention and response to mass atrocity crimes.

Rather unexpectedly, the potential role of the HRC in the prevention and response to mass atrocity crimes has not been extensively discussed neither on the UN framework of discussion nor in academic and policy-making spheres. While there’s a slight increased attention of the body towards its position on preventing human rights violations, a strategy or coherent framework that explicitly defines its capacities in these endeavours has not been developed.

Along the same lines, whereas the HRC has been active in dealing with situations that have involved gross human rights violations especially through the use of its mechanisms, such as the UPR, the Special Procedures (SP) or fact-finding missions (FFM), commissions of inquiry (CoI) and different investigative mechanisms (IM), a proper impact assessment of the body’s efficiency on these specific cases has not been conducted. In these terms, the HRC impact “on the ground” and the visibility of its resolution’s effects remain challenges that the body has to address.

In this context, it is essential not only to discuss the current functioning of the human rights body but as well, to assess its potential impact in specific cases with the purpose of advocating for advancement opportunities in its work and acting in a timely and decisive manner. The relevance of the topic is also closely linked to the need of addressing the specific case-studies that are to be discussed, those being Myanmar and Cameroon. The past and current human rights situations in both states are at the centre of debate in the international security and peace and human rights fora, and their course is developing at the time that the thesis is being elaborated.

Moreover, and by taking into account that both the HRC and R2P emerged as responses to the need of the UN as a whole to avoid the systemic failures of the past but also share objectives in the processes of preventing and responding to mass atrocity crimes, the potential mutually-

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<sup>13</sup> UN General Assembly and UN Security Council, *Mobilizing Collective Action: The Next Decade of the Responsibility to Protect: Report of the Secretary-General*, UN Doc. A/70/999 and S/2016/620, 22 July 2016, para. 8.

<sup>14</sup> UN General Assembly resolution 60/251, *supra* note 1, para. 5(f).

reinforcing link between the norm and the Geneva-based body will be analysed in view of determining whether the HRC can become a venue for the doctrine's implementation.

On a side final note, and by remarking that this thesis is presented under the auspices of the University of Southern Denmark, it is relevant to briefly mention the fact that Denmark has been recently elected and has initiated its first membership in the HRC for the 2019-2021 term. This fact provides the state with voting rights that have a direct impact on the decisions to be taken by the Council, it allows for the projection of a stronger voice in influencing the potential development of the body and it endows Denmark with the opportunity of leading crucial discussions on universal human rights issues.<sup>15</sup>

## **1.2 Research Question and Thesis Statements**

In light of the aforementioned debates and especially motivated by the lack of research on the topic, this thesis aims at exploring *to what extent the Human Rights Council and its mechanisms have a role in preventing and responding to mass atrocity crimes*. With this objective in mind, the preventative and responsive actions taken by the HRC in two case-studies focused on the situations of Myanmar and Cameroon will be used for ascertaining the human rights body's actions and impact.

The thesis departs from the argument that while the HRC's actions in cases involving mass atrocities have followed a reactive approach, prevention should stand at the forefront of the body's objectives. This statement arises from the acknowledgement of the grave consequences of the failure in prevention, which might entail severe human rights violations, a high toll of deaths and grave and traumatic experiences for civilians. It can be contended that these situations which must be averted, become with time, even more intricate and difficult to be resolved. Moreover, the analysis departs from the hypothesis that the body's mechanisms are fitter for preventative endeavours in view of the cooperative and constructive nature embedded in the HRC's efforts.

## **1.3 Thesis Outline**

In order to properly develop on the chosen topic of discussion and bearing in mind that the analysis of this thesis is targeted towards providing a coherent answer to the aforementioned

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<sup>15</sup> Janne Bruvold, "Denmark will join the UN Human Rights Council," *The Danish Institute for Human Rights*, 12 October 2018 (available at <https://www.humanrights.dk/news/denmark-will-join-un-human-rights-council>).

questions, this thesis will comprise, besides the current introduction and methodology, three chapters core chapters.

First of all, in Chapter 3 the background and procedures of the HRC will be introduced in order to provide the reader with a general understanding of the body's functioning as well as the mechanisms to which it can resort to enforce its mandate. Moreover, a context in the discussions of prevention and response to mass atrocity crimes will be presented in view of enabling the proper development of the following case-studies. It is here where the essential concepts that are to be used throughout the thesis will be defined and also, where the nexus HRC-R2P is to be first displayed.

Chapter 4 and 5 will follow a similar outline while presenting two different case-studies. Chapter IV will focus on the human rights situation of Myanmar: a brief factual background will be followed by an analysis of the HRC's actions based on the use of its mechanisms in the case moving from preventative approaches towards responsive ones. Furthermore, the two spheres of actions of the human rights body will be comparatively studied in view of assessing the effectiveness of both approaches.

Finally, Chapter V is centred around the on-going case of Cameroon, where the impact of the paths of action led by the HRC in an early stage will be scrutinized both from a preventative and responsive lens, based primarily on the identification of risks and indicators pointing towards the possible perpetration of mass atrocity crimes in the country. Moreover, in this chapter, recommendations for further action on the case, as well as, for the strengthening of the overall functioning of the body will be suggested.

## **2. Methodology**

This analytical thesis will be principally built upon a multi-disciplinary approach following the inherent nature of the Master of Social Sciences in International Security and Law. In this manner, it is to be remarked that the analysis will draw upon international public law, politics and international relations as main areas of discussion, supported by potential ethical, cultural or social perspectives. Moreover, and in view of the HRC's framework, the sphere of human rights law will be predominant from a legal perspective.

With the purpose of answering the research question that focuses on the role of the HRC and its mechanisms in the prevention and response to mass atrocity crimes, the analysis will develop from a relevant theoretical discussion to a specific application of this information to

particular case-studies. In this manner, the overall establishment and procedures of the HRC will be presented as a general context. Furthermore, and with the same goal it is relevant to determine how prevention and response are defined and how this debate can be framed under the body's current functions. For this first part of the overall analysis, it will be essential to engage not only with official UN information but also with academic literature, practitioner's inputs and other stakeholder's relevant resources.

The bulk of information utilised and referenced through the thesis will derive from a variety of sources. Legal interpretation of sources of public international law as laid down under art. 39 of the International Court of Justice (ICJ) Statute<sup>16</sup> will be carried out with the purpose of establishing the legal framework of mass atrocity crimes definition and their identification. In these cases, the Genocide Convention, the Rome Statute of the International Criminal Court (ICC) and the Geneva Conventions will become a main reference for the definition of mass atrocity elements. These are to be sustained by international customary law and principles of international law.

Additionally, and by bearing in mind the non-binding character of the HRC's resolutions, the functioning and outcomes of its mechanisms and its engagement with R2P, "soft law" defined as "non-legally binding instruments used in contemporary international relations by States and international organizations"<sup>17</sup> will implicitly acquire a central role in the discussions. From these sources it is important to remark the UN Framework of Analysis for Mass Atrocity Crimes<sup>18</sup> and the annual reports of the UNSG on R2P as fundamental tools for identifying risks and indicators pinpointing towards the potential commission of mass atrocities.

The core of the thesis, however, will rely on the qualitative analysis of two different case-studies that will be used not only to illustrate the current practice of the HRC in engaging with mass atrocity cases but also, to analyse the application of the tools and mechanisms identified on the third chapter. That is how the theoretical background will be assessed on its application into particular real situations which will allow to determine how law is interpreted and applied

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<sup>16</sup> *Statute of the International Court of Justice*, San Francisco, 18 April 1946, *United Nations Treaty Series TS* 993, art. 39 (available at <https://www.icj-cij.org/en/statute>).

<sup>17</sup> Alan Boyle, *Soft-Law in International Law-Making*, in: Malcom Evans (ed.), *International Law*, 2014, p. 118.

<sup>18</sup> United Nations Office on Genocide and the Responsibility to Protect, *Framework of Analysis for Atrocity Crimes - A tool for prevention*, 2014 (available at [https://www.un.org/en/genocideprevention/documents/about-us/Doc.3\\_Framework%20of%20Analysis%20for%20Atrocity%20Crimes\\_EN.pdf](https://www.un.org/en/genocideprevention/documents/about-us/Doc.3_Framework%20of%20Analysis%20for%20Atrocity%20Crimes_EN.pdf)).

in these cases, how can discussions become actions and how law and politics are inevitably interlinked when dealing with human rights.

The first chosen case-study focuses on the human rights situation of Myanmar and the involvement of the HRC in both the prevention and response to mass atrocity crimes in this particular context. The second one, moves to the different setting of Cameroon. While both chapters will follow a similar outline with the purpose of better understanding the dynamics of moving from prevention to response, they differ significantly in their core and that is why they have been selected from the deplorably wide range of on-going cases and conflicts involving mass atrocities.

On one hand, the case-study on Myanmar presents itself as a wide-debated situation in the international arena which has been rather negatively developing throughout the last decade. This facilitates the identification of the HRC measures moving from its preventative-labelled actions to the more recent responsive endeavours. By the time of the development of this thesis, it is widely recognized that mass atrocities have taken place in Myanmar thus allowing for a “before and after” of the occurrence while acknowledging that the engagement of the human rights body with the case is noteworthy.

Alternatively, Cameroon is a much more recent case which finds itself at the verge between prevention and response as the state has found itself in a growing escalation of violence which presents indicators and risks factors that could lead to the occurrence of mass atrocities. Whether these have already happened has not yet been clearly identified by the international community as in the case of Myanmar. Therefore, this case will enable to determine whether the HRC is currently active in preventing further violence and whether it has already enforced responsive approaches in view of the ongoing severe human rights violations.

With the purpose of briefly addressing the thesis’ encountered limitations, it is first worth mentioning that while mass atrocities on one hand, and the HRC on the other, are widely debated subjects with plenty of information available for both; the interrelation of the two areas of discussion has been limitedly addressed as mentioned before. This can be considered both, a limitation and an opportunity as whereas wide debate for the framing of the thesis especially in the academic sphere is not substantive, this in a certain way contributes towards the originality of the work.

Moreover, while in the case of Myanmar the information and bibliography available are various and derived from different sources, the fact that Cameroon is suffering from an on-going

conflictual situation, severely restricts the availability and needs for a constant update following the more recent events. In the same manner as before, while posing a limitation for the proper development, this also enables for an up-to-date relevant discussion.

Finally, it is to be taken into account that the HRC and some of its mechanisms, such as the UPR, in comparison to other UN bodies which have been functioning for decades, they have been established just 13 years ago, fact that does not exclude, but still limits the possibilities when trying to assess long-term impacts which are essential when discussing about structural prevention and other long-term endeavours.

### **3. The Human Rights Council: Prevention and Response to Mass Atrocity Crimes**

#### **3.1 Introduction: What is the HRC and how Does it Function?**

The HRC is an inter-governmental body, established in 2006 as a subsidiary body of the UNGA by its core founding resolution 60/251, which called for the creation of an entity “responsible for promoting universal respect for the protection of all human rights”<sup>19</sup> and in charge of contributing “towards the prevention of human rights violations” and “respond(ing) promptly to human rights emergencies.”<sup>20</sup> The human rights body, which is composed by 47 Member States (MS)<sup>21</sup> expected to uphold the highest human rights standards, contribute to the protection of human rights and ensure their cooperation with the Council,<sup>22</sup> held its first meeting on the 19<sup>th</sup> June of 2006. The MS are to be elected according to the different geographical regions of the world, from and by the UNGA, for a 3-year term that can be renewed for an additional one.<sup>23</sup>

The body meets regularly within no less than three sessions per year comprised by at least ten weeks.<sup>24</sup> The sessions are organized around ten agenda items<sup>25</sup> which encompass a wide spectrum of topics for discussion, ranging from procedural matters to technical assistance and including the work of its mechanisms. The activities undertaken by the Council during its

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<sup>19</sup> UNGA resolution 60/251, *supra* note 1, para. 2.

<sup>20</sup> UNGA resolution 60/251, *supra* note 1, para. 5(f).

<sup>21</sup> In comparison to the 53 Member States of the former UN Commission on Human Rights.

<sup>22</sup> UNGA resolution 60/251, *supra* note 1, paras. 8-9.

<sup>23</sup> UNGA resolution 60/251, *supra* note 1, para. 7.

<sup>24</sup> UNGA resolution 60/251, *supra* note 1, para. 10.

<sup>25</sup> Organisation Internationale de la Francophonie, “The Human Rights Council: A Practical Guide,” 2015, (available at [https://www.francophonie.org/IMG/pdf/guide\\_cdh\\_anglais.pdf](https://www.francophonie.org/IMG/pdf/guide_cdh_anglais.pdf)).

meetings do not only involve the current member states; non-members, specialized agencies, National Human Rights Institutions (NHRIs), Non-Governmental Organizations (NGO's), International Organizations (IOs) and other civil society representatives ensure the body's plurality and the well-functioning of its work.

In cases of urgency or a swift necessity to address a situation that has to be dealt with in a timely manner, the HRC, if requested by at least a third of the MS can call for a *special session* outside of its already-established regular meetings.<sup>26</sup> While these exceptional gatherings have usually dealt with specific country circumstances in which the human rights situations can involve gross violations and breaches of international law, also thematics that are of interest for the protection of human rights worldwide can be discussed under this forum.<sup>27</sup>

It is also already important to mention from the beginning that an additional entity of the UN, the Office of the High Commissioner for Human Rights (OHCHR) will be present throughout the thesis as, while being part of the UN Secretariat rather than the HRC framework, it is still the main source of technical support for the human rights body and the UPR mechanism. Moreover, the OHCHR is led by the High Commissioner for Human Rights (UNHCHR) who is considered a the leading personal figure in the protection of human rights<sup>28</sup> and is mandated to objectively pronounce himself/herself on human rights violations as well as to assist by means of expertise and capacity-building in the implementation of human rights standards while supporting the different UN Country Teams and Missions around the world.<sup>29</sup>

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<sup>26</sup> The session has to be summoned in between two and five days. The following resources provides a great overview of the HRC's functioning and procedures.

Permanent Mission of Switzerland to the United Nations Office and to the other international organisations in Geneva, "The Human Rights Council: A Practical Guide, 2015," (available at [https://www.eda.admin.ch/dam/eda/en/documents/publications/InternationaleOrganisationen/Uno/Human-rights-Council-practical-guide\\_en](https://www.eda.admin.ch/dam/eda/en/documents/publications/InternationaleOrganisationen/Uno/Human-rights-Council-practical-guide_en)).

<sup>27</sup> UN Human Rights Council Website, "Special Sessions," (available at <https://www.ohchr.org/EN/HRBODIES/HRC/SPECIALSESSIONS/Pages/SpecialSessions.aspx>).

<sup>28</sup> Felice D.Gaer and Christen L.Broecker, *United Nations Commissioner for Human Rights: Conscience for the World*, 2014, p. xi.

<sup>29</sup> UN OHCHR Website, "Who we are," (available at <https://www.ohchr.org/EN/AboutUs/Pages/WhoWeAre.aspx>).

### 3.2 A Brief History: The UN Commission on Human Rights, the HRC's predecessor

The UNCHR, the HRC's predecessor was founded under the auspices of the UN Economic and Social Council (ECOSOC) in February 1946<sup>30</sup> with the purpose of carrying out of the main objectives of the UN as set out in art.1(3) of the Charter so as "to achieve international co-operation in solving international problems... and in promoting and encouraging respect for human rights and for fundamental freedoms." Amongst the key successes of the Commission which lie in the normative setting and development of the human rights framework from a legal and political perspective, the drafting that led to the adoption of the *Universal Declaration of Human Rights* of 1948 is to be emphasized. Moreover, it is significant to mention that the Commission established the Special Procedures mechanism which the HRC later incorporated as the essential tool for addressing country-specific mandates and thematic areas.<sup>31</sup>

In spite of the aforementioned accomplishments collected by the Commission, accompanied by its role in engaging with civil society and its system of human rights analysis and awareness raising; increasingly stronger criticisms based on the politicization of items, double-standards and questionable membership arose<sup>32</sup> and former UN Secretary General, Kofi Annan, argued that the Commission had become an instrument for states to prevent accusations against them and attack others, while not focusing on protecting rights which should have been at the core of the body's work.<sup>33</sup> That is how the UNCHR concluded after 60 years of activity, its sixty-second final session on March 2006. The replacement of this body by its successor was envisioned as to take further steps in addressing the mentioned shortcomings. With this purpose, several changes were introduced and amongst them, the establishment of the HRC under the auspices of the UNGA, in difference with the ECOSOC meant to elevate the influence and status of the new body both in the UN context and the international arena. Furthermore, the number of meetings were significantly increased and the possibility of

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<sup>30</sup> UN Human Rights Council Website, "HR Commission Activities," (available at <https://www.ohchr.org/EN/HRBodies/CHR/Pages/CommissionOnHumanRights.aspx>).

<sup>31</sup> Katherine Short, "From Commission to Council: has the United Nations Succeeded in Creating a Credible Human Rights Body?" *Revista Internacional de Direitos Humanos*, vol. 5, no. 9 (2008), pp. 148-151.

<sup>32</sup> Jean-Claude Buhrer, "UN Commission on Human Rights Loses all Credibility," *Reporters Without Borders*, (2003), pp. 1-14.

<sup>33</sup> UNGA resolution 59/2005, *In larger freedom: towards development, security and human rights for all: Report of the Secretary-General*, UN Doc. A/59/2005, 21 March 2005, para. 182.

holding special sessions was introduced. Finally, it brought about the creation of the UPR as an innovative tool for universal human rights scrutiny.<sup>34</sup>

### **3.3 The Human Rights Council Mechanisms**

#### **3.3.1 The Universal Periodic Review**

The HRC's mechanisms which have been already introduced and which are at the core of the thesis discussions, are the instruments to which the body can resort with the purpose of enforcing its mandates such as mainstreaming human rights, addressing violations and promoting prevention. Their functioning was settled under the so-called "Institution-building" resolution 5/1<sup>35</sup> which would become the fundamental document for the HRC procedures and mechanisms. While res 60/251 already mandated the HRC to "undertake a universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments"<sup>36</sup> it is under this package that the UPR, a rather revolutionary process by which the human rights situations of all the 193 UN member states are reviewed and scrutinized once every four and a half years, was settled.<sup>37</sup>

The procedures of the UPR begin with the collection and gathering of relevant information about and by the State's under Review (SuR) human rights situation, the challenges that is currently facing and, if needed, the requirement of assistance in certain areas. This information is to be summarized in a first report. Concurrently, the OHCHR provides two additional documents with the aim of rendering the process inclusive and transparent. On one hand, it produces a 10-pages report that comprises information gathered from UN actors such as bodies, SPs, treaty bodies etc.<sup>38</sup> On the other, an account of what is considered 'credible and reliable

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<sup>34</sup> Kevin Boyle, *The United Nations Human Rights Council: Origins, Antecedents, and its Prospects*, in: Kevin Boyle (ed.), *New Institutions for Human Rights Protection*, 2009, p.12.

<sup>35</sup> UN Human Rights Council resolution 5/1, *Institution-building of the United Nations Human Rights Council*, UN Doc. A/HRC/RES/5/1, 18 June 2007.

<sup>36</sup> UNGA resolution 60/251, *supra* note 1, para. 5(e).

<sup>37</sup> Rosa Freedman, "New Mechanisms of the UN Human Rights Council," *Netherlands Quarterly of Human Rights*, vol.29, no.3 (2011), p. 296.

The UPR Working Group reviewed (on its first four-year cycle) 48 states per year divided in three reviews, therefore focusing each session on 16 states. Nevertheless, the second cycle, beginning from May 2012, extended the timeline to four and a half years reviewing 14 states by session.

<sup>38</sup> The treaty bodies are independent mechanisms, functioning outside the HRC but in close relation, endowed with the responsibility of monitoring the national implementation of international treaties and the fulfilment of treaty obligations. They comprise independent experts, in the same manner as the special procedures, and they are established by the respective human rights treaty or convention which they are to monitor. For more information

information provided by other relevant stakeholders' is presented including the views of NGOs and NHRIs.<sup>39</sup>

Afterwards, these documents are presented during the sessions of the UPR Working Group (WG) on which all the HRC's MS conduct a review that is directed by the so-called Troika of Rapporteur States. The Troika is composed by three Council members which have been drawn respecting the various regional groups. During these interactive discussions, the SuR in question presents its own report and receives different inquiries and recommendations from different states, MS and observers, to which it can consequently respond. Following these discussions, an outcome document is drafted by the troika with the involvement of the SuR and the OHCHR, which mentions the recommendations that have been accepted or noted by the State. Editorial adjustments can be made and finally, the report is to be adopted at the consequent regular session of the HRC. Further questions can be addressed and this time not only by other states; NGO's, NHRIs and other stakeholders are allowed to make their remarks. As a last step the SuR has the principal role in implementing the recommendations and it is demanded to share the advancements that it has carried out in terms of human rights, especially on its next review. The international community is also responsible of providing assistance when needed in technical terms.

In its 2017 Report on R2P the UNSG António Guterres when discussing on the UPR under his prevention agenda characterized it as "especially well placed to support efforts to prevent atrocity crimes."<sup>40</sup> Such a statement can derive from the abilities of the process to address root causes such as discrimination, economic inequality or the weakness of the rule of law.<sup>41</sup> Equally important, states, find in the UPR the right setting which provides equality in having the opportunity of expressing their views and critiques. As a result of this, countries feel somehow pressured to fulfil the recommendations that have been made during the different sessions, and their commitments lead in many times to improvements in their domestic systems. Moreover, a common form of recommendation shared by many states on the

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see: International Service for Human Rights, "A Simple Guide to the UN Treaty Bodies," 2015 (available at [https://academy.ishr.ch/upload/resources\\_and\\_tools/ishr\\_simpleguide\\_treatybodies\\_2015\\_en.pdf](https://academy.ishr.ch/upload/resources_and_tools/ishr_simpleguide_treatybodies_2015_en.pdf)).

<sup>39</sup> Edward R. McMahon, "The Universal Periodic Review: A Work in Progress," *Friedrich-Ebert-Stiftung: Dialogue on Globalization*, 2012, pp. 8-10.

<sup>40</sup> UN General Assembly and UN Security Council, *Implementing the responsibility to protect: accountability for prevention: Report of the Secretary-General*, UN Doc. A/71/1016 and S/2017/556, 10 August 2017, para. 34.

<sup>41</sup> Kirsten Ainley, "From Atrocity Crimes to Human Rights: Expanding the Focus of the Responsibility to Protect", *Global Responsibility to Protect*, vol. 9, no. 3 (2017) pp. 20-21.

discussion deals specifically with the ratification of human rights treaties, in this manner, they are pushing for the UPR to become a driving platform for their progressive universal ratification<sup>42</sup> and their consequently positive potential impact.

### 3.3.2. Fact-Finding Missions, Commissions of Inquiry and Investigative Mechanisms

An OHCHR-published report defines FFMs and COIs as temporary mechanisms, of a non-judicial character, “*tasked with investigating allegations of violations of international human rights, international humanitarian law or international criminal law and making recommendations for corrective action based on their factual and legal findings.*”<sup>43</sup> They can be established not only by the HRC but also the UNSC, UNGA, UNSG and UNHCHR as responses to human rights violations as well as mass atrocity crimes.<sup>44</sup> While an official definition for other investigative mechanisms<sup>45</sup> appears to not have been established yet, the subsequent chapter of this thesis will look into their characteristics and their core distinctions from FFMs and CoIs.<sup>46</sup>

These bodies comprise a team of three to five experts possessing the required experience and skills accompanied by a secretariat in charge of providing support and technical expertise. The procedures that are commonly followed by these mechanisms begin with the identification of the specific events, incidents and alleged violations which are to be analysed through the prism

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<sup>42</sup> Rhona Smith, “To see Themselves as Others see Them: The Five Permanent Members of the Security Council and the Human Rights Council’s Universal Periodic Review,” *Human Rights Quarterly*, vol. 35, no. 1 (2013), p.23.

<sup>43</sup> United Nations Office of the High Commissioner for Human Rights, *Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice*, 2015 (available at [https://www.ohchr.org/Documents/Publications/CoI\\_Guidance\\_and\\_Practice.pdf](https://www.ohchr.org/Documents/Publications/CoI_Guidance_and_Practice.pdf)).

It is not clear on which bases the distinction between FFM and CoI is made: while the aforementioned OHCHR report uses both concepts interchangeably, other frameworks determine CoIs as a type of FFMs. In this thesis they are going to be used as synonyms, however the concept of FFM will be the most utilised.

<sup>44</sup> United Nations Office of the High Commissioner for Human Rights, *Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice*, *supra* note 43, pg.v.

<sup>45</sup> Here it is primarily referred to 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 the Syrian Arab Republic since March 2011* and *Independent Mechanism to Collect, Consolidate, preserve and analyse evidence of the most serious International Crimes and violations of International Law committed in Myanmar since 2011*.

<sup>46</sup> Until present times the HRC has established 36 of such mechanisms. More information to be consulted at United Nations Library Geneva, “International Commissions of Inquiry, Fact-finding Missions: Mandating authority,” *Research Guides*, (available at <http://libraryresources.unog.ch/c.php?g=462695&p=3162812>).

of specific frames of law.<sup>47</sup> The source of information for such endeavours range amongst others, from interviews, filed missions and public hearings that can be sustained by satellite imagery, social media, other stakeholders' reports etc.<sup>48</sup> The process can be concluded by the presentation of a final public report which includes a sub-section of recommended path of actions such as “remedies and reparations for victims, changes in law, policies and practice”<sup>49</sup> that are to be carried out by the inquired actors or states, the UN and the international community. Moreover, it is important to note that while these reports are not of a binding character, they might be considered as relevant for potential judicial processes.<sup>50</sup> The implementation of the recommendations usually falls on the addressed state, and in many cases, it strongly relies on its political will to undertake such an endeavour and redress the situation. These recommendations can include stringent measures such as the adjustment of certain governmental practices, the commencement of criminal prosecutions and the imposition of penalties.<sup>51</sup>

### 3.3.3. Special Procedures

The HRC Special Procedures are mechanisms that can be established as to examine, monitor, advise and report on human rights situations. They took shape under the UNCHR more than six decades ago and they have evolved into a full body of monitorization and reporting. SP can be constituted by either a WG (of 5 members each from a different regional group), a Special Rapporteur (SR) or an Independent Expert (IE) and they can be appointed, for a maximum period of six years, in view of addressing special thematic issues, which are of global interest, or either to tackle a determined country situation.<sup>52</sup>

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<sup>47</sup> United Nations Office of the High Commissioner for Human Rights, *Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice*, supra note 43, pp. 9-11.

<sup>48</sup> United Nations Office of the High Commissioner for Human Rights, *Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice*, supra note 43, pp. 40-64.

<sup>49</sup> United Nations Office of the High Commissioner for Human Rights, *Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice*, supra note 43, p. 94.

<sup>50</sup> Dapo Akande and Hannah Tonkin, “International Commissions of Inquiry: A New Form of Adjudication?,” *EJIL:Talk!*, 6 April 2012 (available at <https://www.ejiltalk.org/international-commissions-of-inquiry-a-new-form-of-adjudication/>).

<sup>51</sup> *Ibid.*

<sup>52</sup> International Justice Resource Center, “Special Procedures of the UN Human Rights Council,” (available at <https://ijrcenter.org/un-special-procedures/>). This resource also provides a detailed list of all SPs whether country-specific or thematic.

While the SPs work is interlinked with the work of the UN, their professional category falls under the label of “professional volunteers” as they position is unpaid in view of assuring states and other actors of their motives and impartiality.<sup>53</sup> Nevertheless, this fact also provides them with a higher degree of flexibility, as while they are not direct UN employees, they can make use of UN channels and networks in order to engage with states, NGOs, media etc. Likewise, the HRC’s resolutions on the establishment of their mandate are usually characterised as being rather open and ambiguous, allowing for the SP to further define its scope and specific objectives.<sup>54</sup>

Their primary activity, also being the one which allows them to effectively carry out their duties and assess human rights situations on the ground, are country visits.<sup>55</sup> Nevertheless, these missions can be restricted as the state of concern has to consent and invite mandate-holders within its sovereign territory. The nature of the SPs work, which is focused on inquiring about sensible questions, holding governments accountable, and informing on the actual situation on the ground, puts them in a difficult situation in which states can be reluctant in cooperating with them.<sup>56</sup> Country visits are to be followed by a dialogue about the findings with the state in question, which can react to the findings and propose the correction of factual mistakes. The final report is then presented to the HRC and in different occasions also to the UNGA.<sup>57</sup>

### **3.4 Prevention and Response to Mass Atrocity Crimes**

The HRC has as an essential duty under its mandate to address situations of human rights violations, including gross systematic violations, in accordance with para. 3 of the UNGA Resolution 60/251.<sup>58</sup> Mass atrocity crimes<sup>59</sup> are often categorized as the gravest forms in which

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<sup>53</sup> Joanna Naples-Mitchell, “Perspectives of UN special rapporteurs on their role: inherent tensions and unique contributions to human rights,” *The International Journal of Human Rights*, vol. 15, no. 2 (2011), p.234.

<sup>54</sup> *Ibid.*

<sup>55</sup> The Terms of Reference provide guidance for States on how to engage with SPs and their visits. A revised version of the Terms can be consulted under: UN Human Rights Council, *Revised Terms of Reference for country visits by Special Procedures mandate holders of the United Nations Human Rights Council*, 2016 (available at <https://www.ohchr.org/Documents/HRBodies/SP/ToRs2016.pdf>).

<sup>56</sup> Surya P. Subedi, “The UN Human Rights Special Rapporteurs and the Impact of their Work: Some Reflections of the UN Special Rapporteur for Cambodia,” *Asian Journal of International Law*, vol. 6, no.1 (2016), pp.1-2.

<sup>57</sup> A list of all the Special Procedure’s annual reports submitted to the HRC can be found here: OHCHR Website, “Annual reports to the Human Rights Council,” (available at <https://www.ohchr.org/EN/HRBodies/SP/Pages/AnnualreportsHRC.aspx>).

<sup>58</sup> UNGA resolution 60/251, *supra* note 1, para. 3.

<sup>59</sup> In this thesis the concepts of *mass atrocities*, *mass atrocity crimes* and *atrocity crimes* will be used interchangeably.

human rights violations can develop into, as they refer to three universally recognized international crimes: genocide, crimes against humanity and war crimes, usually complemented with the concept ethnic cleansing.<sup>60</sup> It is important to clarify that while not all gross systematic human rights violations incur mass atrocity crimes, the former represent the most visible risk factor indicating prospects for the escalation towards the commission of the latter.

### 3.4.1 The Definition of Mass Atrocity Crimes

*The Convention on the Prevention and Punishment of the Crime of Genocide*, the first UN human rights treaty, defines the first mass atrocity crime that is to be discussed under the framework of this thesis. The crime's definition has also been strengthened by its incorporation to the Rome Statute of the ICC and both, the Statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Under Article 2, the Convention legally defines **genocide** as:

*Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.*<sup>61</sup>

The definition for **crimes against humanity** can be found on Article 7(1) of the Rome Statute,<sup>62</sup> and it has also been developed under the jurisdiction of international courts such as the ICTR and ICTY. Article 7(1) defines crimes against humanity as a list of acts “*when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.*”<sup>63</sup> Amongst the acts included are murder, enslavement, forcible

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<sup>60</sup>While the use of the word “crime” would be unsuitable in referring to acts taking place before the legal establishment of the crime per se, following the principle of *nullum crimen sine lege*, both of the case-studies that are to be analysed are happening in a context in which the crimes considered as mass atrocities, have been already legally defined under a number of sources. Additionally, it is to be stated that while the characterisation of the aforementioned crimes does not, in all cases, need to encompass a large number of victims; that is the case for the majority of scenarios, justifying the inclusion of the adjective “mass” to the expression.

<sup>61</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, supra note 4, art.2.

<sup>62</sup> *Rome Statute of the International Criminal Court*, Rome, 1 July 2002, *United Nations Treaty Series*, vol.2187, no. 38544, art.7 (available at <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>).

<sup>63</sup> *Ibid.*

transfer of population, torture, rape, sexual slavery, enforced disappearances or “*other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.*”<sup>64</sup>

**War Crimes** “*refers to serious breaches of international humanitarian law (IHL) committed against civilians or enemy combatants during an international or domestic armed conflict, for which the perpetrators may be held criminally liable on an individual basis.*”<sup>65</sup> They have not been codified under a single source, rather this list of violations can be found in IHL and International Criminal Law (ICL) treaties, such as the 1949 Geneva Conventions and its Additional Protocol I of 1977. As expressed in Article 8 of the Rome Statute, war crimes include acts such as wilful killing, torture or inhumane treatment, wilfully causing great suffering or serious injury to body or health, destruction and appropriation of property or taking of hostages, amongst an extensive list.<sup>66</sup>

**Ethnic cleansing**, differently that the three previously mentioned concepts, it has not yet been recognized as an independent crime under international law. Nevertheless, it has been used in UNSC and UNGA resolutions providing it with certain recognition, given the binding character of the former’s resolutions and the international acknowledgment of the latter’s ones. A possible definition has been provided by a commission of experts inquiring on violations committed in the former Yugoslavia, which described it as “*a purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas.*”<sup>67</sup> This Commission also noted that ethnic cleansing practices can “*... constitute crimes against humanity and can be assimilated to specific war crimes. Furthermore, such acts could also fall within the meaning of the Genocide Convention.*”<sup>68</sup>

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<sup>64</sup> *Ibid.*

<sup>65</sup> OHCHR, *Info Note: War Crimes, Crimes against Humanity and Genocide*, (available at [https://www.ohchr.org/Documents/Countries/CD/FS-2\\_Crimes\\_Final.pdf](https://www.ohchr.org/Documents/Countries/CD/FS-2_Crimes_Final.pdf)).

<sup>66</sup> *Rome Statute of the International Criminal Court*, *supra* note 62, art.8.

<sup>67</sup> UN Security Council, *Letter Dated 24 May 1994 from the Secretary-General to the President of the Security Council*, UN Doc. S/1994/674, 27 May 1994, para. 130.

<sup>68</sup> UN Office on Genocide Prevention and the Responsibility to Protect, *Ethnic Cleansing*, (available at <https://www.un.org/en/genocideprevention/ethnic-cleansing.shtml>).

### 3.4.2 Prevention of Mass Atrocity Crimes

For the purpose of this thesis, which is centred around two potential procedures these being prevention and response to mass atrocities, the distinction between the concepts must be clarified. The discourse surrounding *prevention* pivots around a complex spectrum of actions or operations whose core objective is to protect civilians by addressing causal sources of risk of a political, social, economic or cultural nature, among others, that may give rise to the materialization of mass atrocity crimes.<sup>69</sup> While there is not an established practice that is to be followed in such cases, in this sub-chapter mainly structural and direct prevention measures are to be introduced.

*Structural prevention* emphasises on dealing with core embedded situations or risks, while consolidating the capacity-building of societies. It addresses root causes or long-term causes of violence with the aim of halting the problem before the occurrence of mass atrocities.<sup>70</sup> “The promotion of democracy, ethnic integration, international regional cooperation, arms control, and disarmament”<sup>71</sup> are some of the potential measures involved in this primary type of prevention. In contrast, *direct prevention* targets impending cases of atrocities,<sup>72</sup> meaning that it addresses specific cases in which there’s a perceptible need of action that must be taken with urgency in order to prevent the occurrence of mass atrocities. Direct prevention often overlaps with early-response measures envisaged towards the avoidance of escalation in the commission of mass atrocities.

Another distinction that is fundamental for the proper understanding of the concepts which are to be utilised throughout the thesis, is the one between *mass atrocity prevention* and *conflict prevention*. While they can be interrelated, in terms of armed conflict providing a probable context for the commission of mass atrocities; neither armed conflicts involve in all cases mass atrocity crimes nor mass atrocities happen exclusively under the circumstances of armed

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<sup>69</sup> Friends Committee on National Legislation, “Understanding Genocide & Mass Atrocities Prevention,” 27 October 2016 (available at <https://www.fcnl.org/updates/understanding-genocide-mass-atrocities-prevention-392>).

<sup>70</sup> David A. Hamburg, *Preventing Deadly Conflict*, 1997, p.69.

<sup>71</sup> Peter Wallensteen, *Reassessing Recent Conflicts: Direct vs Structural Prevention*, in: Fen Osler Hampson and David M. Malone (eds.), *From Reaction to Conflict Prevention: Opportunities for the UN System*, 2004, p. 214.

<sup>72</sup> Stephen Mc.Loughlin, “Rethinking the Structural Prevention of Mass Atrocity Crimes,” *Global Responsibility to Protect*, vol.6, no.4 (2014), p.407.

conflict.<sup>73</sup> Thus, both frameworks can be mutually reinforcing. However, there is also legal implications linked to this distinction: armed conflicts are regulated under international law, specifically under the UN Charter, which contains two exceptions to the prohibition of the use of force contained in art.2(4). The first being the exercise of the “inherent right of individual and collective self-defence” as laid down in art.51 and the authorization to use force by the UNSC or the body itself acting under chapter VII. Contrarily, mass atrocities are “categorically outlawed as unacceptable without any exception.”<sup>74</sup>

### 3.4.3 Response to Mass Atrocity Crimes

While prevention has been defined as efforts taken in order to avoid the perpetration of atrocity crimes; in the understanding of this thesis, *response* will be illustrated by the actions carried out once it has been determined that mass atrocities have already been committed or are currently occurring in early or advanced stages, with the aim of avoiding their further perpetration, or acting in order to redress and halt them while also addressing their consequences.<sup>75</sup> Despite some perceptions, the response to mass atrocity crimes does not need to translate into coercive or military interventions: developing approaches include early-warning capabilities, diplomatic cooperation and civilian response consolidation.<sup>76</sup> Moreover, accountability processes which seem to be acquiring a growing interest in the international community, will be central in the ensuing response sub-chapters.

### 3.4.4 Prevention and Response to Mass Atrocity Crimes under the Human Rights Council’s Framework

By having clarified the different definitions of prevention and response, it is essential to link these approaches to the role that the HRC has in implementing them. It has already been mentioned that the HRC’s mandate does entail the responsibility of the body in addressing

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<sup>73</sup> Alex J. Bellamy, “Mass Atrocities and Armed Conflict: Links, Distinctions, and Implications for the Responsibility to Prevent,” *Policy Analysis Brief: The Stanley Foundation*, February 2011 (available at <http://www.stanleyfoundation.org/publications/pab/bellamypab22011.pdf>).

<sup>74</sup> Lawrence Woocher, *The Responsibility to Prevent: Toward a Strategy*, in: W.Andy Knight and Frazer Egerton (eds.), *Routledge Handbook of the Responsibility to Protect*, 2012, pp.27-28.

<sup>75</sup> Friends Committee on National Legislation, “Understanding Genocide & Mass Atrocities Prevention,” 27 October 2016 (available at <https://www.fcnl.org/updates/understanding-genocide-mass-atrocities-prevention-392>).

<sup>76</sup> Gareth Evans, “The Responsibility To Protect: Ending Mass Atrocity Crimes Once and for All,” *International Crisis Group*, 15 December 2008 (available at <https://www.crisisgroup.org/global/responsibility-protect-ending-mass-atrocity-crimes-once-and-all>).

human rights violations and responding “promptly to human rights emergencies.”<sup>77</sup> Nonetheless, what is often overlooked is the fact that, under paragraph 5 of the UNGA resolution 60/251, the Council has the also the duty of contributing “through dialogue and cooperation, towards the prevention of human rights violations.”<sup>78</sup>

Different assumptions can be drawn from the above-mentioned obligations. First of all, the HRC is mandated to work towards the prevention of human rights violations and thus, mass atrocity crimes, before they happen. The HRC has a number of mechanisms that are based on dialogue and cooperation, which can assist in capacity-building and the strengthening of resilience, such as the *UPR* and the *Special Procedures*. These tools and their functioning are to be introduced subsequently on the chapter. Furthermore, it shall be assured that in the case of failing preventative approaches, and where there are emerging signs of violations, the HRC must act in a prompt and decisive manner in order to avoid a further escalation of the potential crisis. The Council can deliberate on these urgent matters by calling for a *special session*. Nevertheless, while focusing its debate on thematic issues it can also contribute towards structural preventative efforts in the way that these may help in building resilience in certain areas.

Lastly, through the use of the notion of “contribution” it can be argued that the HRC’s policies for implementing its mandate should build-up on the prevention and response agenda of the whole UN framework by closely cooperating with other bodies, mutually strengthening their decisions and avoiding unnecessary overlaps.<sup>79</sup> This discussion is embraced under the wider argumentation for the need of better coordination between Geneva and New York; and among the three pillars of the UN, Human Rights, Peace and Security, and Development.

It is true that despite of the fact that the HRC appears for now to have a suitable position and the right mechanisms under its umbrella to enforce its preventative and responsive approaches, a proper explicit policy framework especially tailored to guide the body, its tools and the involved actors towards the goal of preventing mass atrocities, is yet not developed. Notwithstanding an initiative presented by Norway and Switzerland in 2017 through a

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<sup>77</sup> UNGA resolution 60/251, *supra* note 1, para. 4(f).

<sup>78</sup> UNGA resolution 60/251, *supra* note 1, para. 5.

<sup>79</sup> Marc Limon, “How to Operationalize the Council’s Prevention Mandate, and where does it fit within the Secretary-General’s UN ‘prevention agenda’,? *Universal Rights Group*, 10 April 2019 (available at <https://www.universal-rights.org/blog/how-to-operationalize-the-councils-prevention-mandate-and-where-does-it-fit-within-the-secretary-generals-un-prevention-agenda/>).

statement sustained by more than 60 states on the “operationalization of the Council’s prevention mandate”<sup>80</sup> has developed into resolution 38/18 adopted by the HRC during its 38<sup>th</sup> session. The resolution while reaffirming “The contribution of the Human Rights Council to the prevention of human rights violations” also requested to convene two inter-sessional seminars involving a wide range of stakeholders to further discuss on the topic.<sup>81</sup>

An additional resourceful initiative worth to be mentioned for potentially assisting in the Council’s guidance and which will be further developed and applied late into relevant elements of this thesis’ case-studies is the UN Framework of Analysis for Atrocity Crimes. This tool was developed in 2014 by the UN Office of the Special Adviser on Genocide Prevention and the Responsibility to Protect and built-upon an initial document of 2009.<sup>82</sup> The Framework provides an analysis and risk assessment tool of indicators that can conduce to the commission of mass atrocities.

#### 3.4.5. The Mutually Reinforcing Link Between R2P and the HRC

As stated in the introductory chapter of this thesis, the establishment of the HRC and the emergence of the R2P doctrine were developed under the umbrella of the former UNSG Kofi Annan’s agenda for UN reforms. The 2005 World Summit Outcome embraced both, the creation of a new body which was meant to strengthen the human rights approach of the UN and the Responsibility to Protect populations from mass atrocities.<sup>83</sup> Consequently, the relationship between the HRC and R2P when examining possible agendas for the operationalization of prevention and response, emerges as a prospective mutually beneficial one. In order to better understand this link, first it is essential to comprehend what does R2P entail.

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<sup>80</sup> Permanent Mission of to the United Nations, “Operationalization of the Council’s ‘prevention’ mandate: the effective implementation of paragraph 5f of GA res. 60/251. Joint Statement,” (available at [https://embassies.gov.il/UnGeneva/HumanRightsCouncil/RegularSessions/Documents/HRC36/HRC36\\_Item2\\_GD-HC\\_Joint%20Statement.pdf](https://embassies.gov.il/UnGeneva/HumanRightsCouncil/RegularSessions/Documents/HRC36/HRC36_Item2_GD-HC_Joint%20Statement.pdf)).

<sup>81</sup> UN Human Rights Council resolution 38/18, *The contribution of the Human Rights Council to the prevention of human rights violations*, UN Doc. A/HRC/RES/38/18, 17 July 2018.

While the 1<sup>st</sup> intersessional seminar has taken place in 9-10 April 2019, the information available is yet very limited as it has not been posted on the official Extranet of the body; however, relevant points of view which are to be found on statements that are posted by some NGOs and organizations will be included in the discussions of the following chapters.

<sup>82</sup> United Nations Office on Genocide and the Responsibility to Protect, *Framework of Analysis for Atrocity Crimes - A tool for prevention*, *supra* note 18.

<sup>83</sup> UN General Assembly resolution 60/1, *World Summit Document*, *supra* note 7.

The Canadian government-sponsored International Commission on Intervention and State Sovereignty and its report entitled “The Responsibility to Protect” are commonly credited with the emergence of concept.<sup>84</sup> The core notions of this document were largely debated, modified and finally adopted unanimously and endorsed by all UN member states under paragraph 138-139 of the 2005 *World Summit Outcome Document*.<sup>85</sup> The concept was developed around the understanding that neither atrocities should be treated as domestic affairs anymore, nor sovereignty to be used to “shield regimes committing gross human rights violations from international scrutiny.”<sup>86</sup> Within R2P, the responsibility of states to protect their populations from atrocity crimes derives not only from the sovereign duties of the state, but also, from international law with special focus on international human rights law, treaties and declarations which express the need to prevent violations of protected rights.<sup>87</sup>

The concept as projected by the UN has evolved around three main interlinked pillars. The first re-affirms the state’s primary responsibility of protecting its population from the aforementioned mass atrocity crimes. Secondly, it becomes the duty of the international community to assist and cooperate with states for the purpose of fulfilling their obligations to protect. Lastly, if a state is unwilling or unable to uphold its responsibility and manifestly fails in its duty, it becomes the responsibility of the UN member states to respond collectively and in a timely and decisive manner to protect that population.<sup>88</sup>

During the 65<sup>th</sup> anniversary of the *Genocide Convention* taking place under the auspices of the HRC in 2014, the role of the body in atrocity prevention was debated in relation to its connection with R2P and especially the *World Summit Outcome Document* of 2005.<sup>89</sup> Under

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<sup>84</sup> International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, *supra* note 6.

<sup>85</sup> UN General Assembly resolution 60/1, *World Summit Document*, *supra* note 7, paras. 138-139.

<sup>86</sup> Martin Mennecke, “Denmark and the Responsibility to Protect: How to put Atrocity Prevention into Practice in Danish Foreign Policy,” *University of Southern Denmark*, December 2017, p. 6 (available at <http://um.dk/~media/UM/English-site/Documents/Danida/Partners/Research-Org/Research-studies/DANISH%20FOREIGN%20POLICY%20AND%20R2P%20MartinMennecke%2011December2017docx.pdf?la=en>).

<sup>87</sup> International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, *supra* note 6.

<sup>88</sup> UN General Assembly and UN Security Council, *Implementing the Responsibility to Protect: Report of the Secretary General*, UN Doc. A/63/677, 12 January 2009, para.11.

<sup>89</sup> 16 states made explicit reference of R2P during these discussions as accounted for in: Global Centre for the Responsibility to Protect, “Meeting Summary: High-level Panel Discussion Dedicated to the 65th Anniversary of the Genocide Convention,” 1 April 2014 (available at <http://www.global2p.org/media/files/hrc-high-level-panel-march-2014-1.pdf>).

this context it appears that the HRC is modestly increasing the doctrine's visibility in its resolutions; as of the 1<sup>st</sup> April 2019, it has been mentioned more than 40 times, especially under country-situations and usually referencing exclusively its first pillar.<sup>90</sup> This presents itself as an opportunity for consolidating the body and the doctrine's relation; while R2P is considered as non-binding under international law,<sup>91</sup> the HRC could become a forum where by means of MS statements, resolutions and other fora of debates the use of the concept could lead to a potential crystallization of the *opinio juris* element necessary for the establishment of a norm under international customary law.

However, it is relevant at this point to identify a noticeable difference in the work of the HRC and the objectives of R2P. First of all, while the human rights body is mandated to promote human rights and respond to all kinds of human rights violations, the doctrine is targeted towards the prevention exclusively of mass atrocity crimes. In the same manner, the implementation of R2P centres around specific human rights linked to atrocity crimes.<sup>92</sup> However, they correspond in the wide variety of actions that can be involved in carrying out prevention measures while R2P can even be used as a guide for such endeavours.

Furthermore, some actions and mechanisms of the HRC can be placed under the three R2P pillars. For example, under the UPR and embraced in Pillars I and II, states can present their initiatives and progress in implementing atrocity prevention while sharing best practices. The UPR also allows to identify risks and recommend redressing paths under structural prevention efforts,<sup>93</sup> at the same time that states can request assistance for carrying out such duties. Equally, SPs whether thematic or country-specific, and their early-warning tasks, their potential cooperative relationship with governments and other stakeholders, and their essential recommendations, can make use of R2P to frame their actions and can mention the doctrine in their final reports.

Finally, it can be argued that while pillar III of R2P while still focusing on prevention, can include measures that under the definition of this thesis might fall in the response category. Such is the example of the Council holding special sessions, setting up FFM or COIs or

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<sup>90</sup> Global Centre for the Responsibility to Protect, "Human Rights Council Resolutions Referencing R2P," 1 April 2019 (available at <http://www.globalr2p.org/resources/977>).

<sup>91</sup> Mennecke, *supra* note 86, p.8.

<sup>92</sup> Mennecke, *supra* note 86, p.13.

<sup>93</sup> Ainley, *supra* note 41, pp.20-21.

adopting resolutions targeted towards specific follow-up measures.<sup>94</sup> Accordingly, “R2P will help to identify warning signs and assist in designing adequate and non-forceful responses.”<sup>95</sup> This demonstrates that while the general impression for Pillar III is that is going to be delivered by coercive military actions, that is not the intended practice, but rather, the last resort.

### **3.5 Interim Conclusions**

This introductory chapter allows the reader to familiarize with the work of the HRC, a relatively recent body which has as a prerogative to protect and promote human rights, while also mandated with preventing and responding human rights violations and their worst embodiment, mass atrocity crimes. In order to carry out such duties it has a number of mechanisms under its auspices to which it can resort such as the UPR, SPs, FFM/COIs, IMs and special sessions. Moreover, the potential of strengthening the engagement of the HRC with the R2P doctrine presents itself as an opportunity for enforcing prevention as core objective of the human rights body.

In the following chapter, this theoretical framework and the effectiveness of the HRC’s preventative and responsive measures will be analysed through the case-study of the human rights situation in Myanmar, departing from the acknowledgment that mass atrocities have been reportedly perpetrated. While the mandate of the body in dealing with such cases seems straightforward, its application on the ground and the positive impact for the protection on populations, seem to be challenged in different ways. Finally, the actions of other UN bodies and relevant stakeholders will be mentioned throughout the chapter as coordination and support are essential in such endeavours.

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<sup>94</sup> UN General Assembly and UN Security Council, *Responsibility to protect: timely and decisive response. Report of the Secretary General*, UN Doc. A/66/874 and S/2012/578, 25 July 2012, para 34.

<sup>95</sup> Mennecke, *supra* note 86, p.17.

## 4. The HRC's Prevention and Response to Mass Atrocity Crimes: Case-Study on Myanmar

### 4.1. Introduction and Factual Background: A Mass Atrocity Situation?

Myanmar has found itself under the radar of the international community for some time, but special attention to the state's situation has been given since the growing tensions rising in the last decade, peaked by the tragic events of what has been dubbed as the 2017 "clearance operations." The gravely deteriorating human rights situation has made the headlines as being considered one of the worst crises of our present times.

To put the situation in context, in 1948, Burma<sup>96</sup> gained its independence from the British colonial rule but just a decade later would become a military regime commanded by General Ne Win, which would result in the inception of a prolonged period of gubernation by the state's armed forces, the Tatmadaw.<sup>97</sup> While the regime was centred around the state's religious and ethnic majority, the Bamar-Buddhists, it is important to note that at least a third of Myanmar's population is formed by ethnic minority groups, which inhabit half of the land area.<sup>98</sup> From this wide umbrella, the Rohingya, which are principally Muslims, are the largest minority. Nevertheless, these elements which demonstrate Myanmar's cultural richness and ethnic diversity, has represented one of the country's chief challenges.

A progressive marginalization policy led by the military regime targeting Muslim and other minorities crystallized already in the 1960's into a protracted conflictual situation. The Tatmadaw's rhetoric was based on blaming the Rohingya as causers of the State's economic instability,<sup>99</sup> which led to the adoption of the 1974 Emergency Immigration Act, directed towards expelling the minority from its territories by means of denying their access to basic

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<sup>96</sup> The current denomination of the state is the Republic of the Union of Myanmar, its anterior name, Burma, is still used by many States as considering the change, which was carried out by the military junta in 1989 illegitimate. See: BBC News, "Should it be Burma or Myanmar?," 26 September 2007 (available at <http://news.bbc.co.uk/2/hi/7013943.stm>).

<sup>97</sup> Penny Green, Thomas MacManus and Alicia de la Cour Venning, *Countdown to Annihilation: Genocide in Myanmar*, 2015, p.7.

<sup>98</sup> Martin Smith, "Ethnic Groups in Burma," *Anti-Slavery International*, no.8 (1994), p.17.

<sup>99</sup> Jen Kirby, "What the Hell is Happening in Myanmar?" *Intelligencer*, 15 September 2017 (available at <http://nymag.com/intelligencer/2017/09/what-the-hell-is-happening-in-myanmar.html?gtm=top>).

services such as education and healthcare, while violating their rights as freedom of expression and belief.<sup>100</sup>

The policy of ethnic exclusion of the Rohingyas became even more entrenched within the state by means of the 1982 Citizenship Law, which demanded the Rohingyas to provide conclusive evidence demonstrating that the nationality of their ancestors was Burmese before the state gained its independence, a task that was not attainable for most of the families.<sup>101</sup> By means of these set of laws, the state recognized more than 135 “national races” but denied the recognition of the Rohingyas justifying that they were not Burmese but immigrants from Bangladesh.<sup>102</sup> This resulted in the removal of nationality to more than 1 million Rohingyas, thus leaving them into a stateless situation, depriving them of their citizenship and the rights derived from it.<sup>103</sup>

As a response to the harsh military regime and its policies, the democratic opposition centred around the National League for Democracy led by the current *de facto* leader and Nobel Peace Prize laureated Aung San Suu Ky, won the elections on 1990. However, the military regime denied the transfer of power and furthered the suppression of rights.<sup>104</sup> Since then, Myanmar has been attempting to undergo a process of democratization and allegedly, the military domination of the state’s affairs has been gradually reduced, nevertheless, in the 2008 reformed Constitution it remained clear that military was still entrenched in Myanmar’s state of affairs.<sup>105</sup> Concurrently, the oppression policies directed towards minorities and especially the Rohingya population have visibly intensified. Since 2012 the threshold of violence has progressively escalated leading not only to the displacement of more than 120,000 Rohingyas by 2015<sup>106</sup> but also to the adoption of further restrictive laws which supplemented by the 2015 “Protection of

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<sup>100</sup> Green, McManus and de la Cour Venning, *supra* note 97, p.15.

<sup>101</sup> José-Maria Arraiza, “Re-imagining Myanmar citizenship in times of transition,” *Statelessness Working Paper Series*, no.2017/01 (2017), pp.2-3.

<sup>102</sup> Kirby, *supra* note 99.

<sup>103</sup> Simon Adams, “If not now, when? The Responsibility to Protect, the Fate of the Rohingya and the Future of Human Rights,” *Global Centre for the Responsibility to Protect*, 2019, p.6 (available at [http://www.globalr2p.org/media/files/adamsrohingya\\_opaper\\_final.pdf](http://www.globalr2p.org/media/files/adamsrohingya_opaper_final.pdf)).

<sup>104</sup> Sérgio Pinheiro and Meghan Barron, *Burma (Myanmar)*, in: Jared Genser, Irwin Cotler, Desmond Tutu, and Vaclav Havel (eds.), *The Responsibility to Protect: The Promise of Stopping Mass Atrocities in our Time*, 2011, p. 262.

<sup>105</sup> International Center for Transitional Justice, “Impunity Prolonged: Burma and its 2008 Constitution,” September 2009, pp.7-9, 31 (available at <https://ictj.org/sites/default/files/ICTJ-Myanmar-Impunity-Constitution-2009-English.pdf>).

<sup>106</sup> Global Centre for the Responsibility to Protect, “Persecution of the Rohingya in Burma/Myanmar and the Responsibility to Protect,” 5 March 2015 (available at <http://www.globalr2p.org/media/files/2015-march-burma-brief-1.pdf>).

Race and Religion package” that resulted in the deprivation of fundamental religious, reproductive, educational and marital rights of the Rohingyas and other non-Buddhist minorities.<sup>107</sup>

In October 2016, the state’s security forces initiated a “counter-insurgency” strategy directed towards the upheaval of Rohingya militants of the Arakan Rohingya Salvation Army who attacked border police posts.<sup>108</sup> The response of the Tatmadaw is reported to have involved torture, sexual violence, extrajudicial killings and forced displacement amongst other attacks.<sup>109</sup> This would be followed by further outbreaks taking place in February 2017, which precluded the gravest wave of violence which began in August 2017 with the so-called military “clearance operations” characterized by a systematic destruction of Rohingya homes, summary executions, mass arrests, indiscriminate attacks targeting civilians and other widespread human rights violations which were labelled as a “textbook example of ethnic cleansing by the former UNHCHR, Zeid Ra’ad Al Hussein.<sup>110</sup>

Since 2018 and until April 2019, abuses have continued mainly in the context of fights between Myanmar’s army and different ethnic armed groups. As a result of these, it has been reported that more than 730,000 Rohingyas have fled to Bangladesh since the “clearance operations” of August 2017,<sup>111</sup> deepening the humanitarian catastrophe. The response of the government has been based on the denial of atrocities and the refusal of allowing investigations to access its territory. Moreover, Myanmar has stated that it is willing to accept repatriated refugees, yet the conditions for the safe and dignified return appear not to be in place, and the core causes of the conflict seem to be as present in the situation as years before.<sup>112</sup>

This chapter therefore will analyse the human rights situation in Myanmar and will assess the facts that have already been determined to involve mass atrocity crimes, in view of establishing

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<sup>107</sup> Adams, *supra* note 103, p.7.

<sup>108</sup> Wa Lone and Shoon Naing, “At least 71 killed in Myanmar as Rohingya insurgents stage major attack,” *Reuters*, 25 August 2017 (available at <https://www.reuters.com/article/us-myanmar-rohingya/at-least-71-killed-in-myanmar-as-rohingya-insurgents-stage-major-attack-idUSKCN1B507K>).

<sup>109</sup> UN Office of the High Commissioner for Human Rights, “Report of OHCHR Mission to Bangladesh: Interviews with Rohingyas fleeing from Myanmar since 9 October 2016,” 3 February 2017 (available at <https://www.ohchr.org/Documents/Countries/MM/FlashReport3Feb2017.pdf>).

<sup>110</sup> UN News, “UN human rights chief points to ‘textbook example of ethnic cleansing’ in Myanmar,” 11 September 2017 (available at <https://news.un.org/en/story/2017/09/564622-un-human-rights-chief-points-textbook-example-ethnic-cleansing-myanmar#.WjkEbN919PZ>).

<sup>111</sup> Human Rights Watch, “Myanmar: Events of 2018,” (available at <https://www.hrw.org/world-report/2019/country-chapters/burma>).

<sup>112</sup> *Ibid.*

if the measures taken by the HRC have followed a preventative approach or whether the Council has been led by its “reactive” mindset once again. In order to do so, the discussions around the situation in the human rights forum of the HRC and the mechanisms that have been instituted and used will be examined. The tools under the umbrella of the HRC mentioned in the previous chapter and utilised in this specific case, will be tested in view of establishing their effectiveness in dealing with the state of affairs in Myanmar. This assessment will be followed by a number of recommendations of potential redressing actions, especially in view of providing justice to the victims and holding perpetrators accountable.

## **4.1 The Effectiveness of the HRC’s Prevention Measures in Myanmar**

### **4.2.1. Country-Specific Special Rapporteurs**

#### **The Special Procedures under the Commission on Human Rights**

It is interesting to note already from the beginning of the analysis that the engagement of the main UN human rights bodies with Myanmar dates back to almost three decades ago. It was first under the UNCHR, in 1990 at its 46<sup>th</sup> session that the situation of human rights in Myanmar was first debated.<sup>113</sup> Two years later, under res. 1992/58, the Commission, growingly aware of the limitations imposed on fundamental freedoms, the oppressiveness led towards minorities and the growing flows of refugees to Bangladesh, decided to take action on the matter and established for the first time the position of the *SR on the Situation of Human Rights in Myanmar*.<sup>114</sup>

Mr. Yozo Yokota, the first mandate-holder, presented his initial report in 1993, after being allowed to undertake a country-visit, to meet with government officials and to access specific regions of concern. In this first time that an international examination was being carried out under a public procedure of the Commission, the SR already warned the Commission and subsequently, the UNGA of the fact that severe human rights violations, including forced relocation, inhuman treatment, arbitrary executions and enforced disappearances were occurring in Myanmar.<sup>115</sup> In his final report SR concluded that Myanmar was characterized by

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<sup>113</sup> UN Commission on Human Rights, *Official Records:1990*, UN Doc. E/CN.4/1990/22, 29 January-9 March 1990.

<sup>114</sup> UN Commission on Human Rights resolution 1992/58, *Situation of human rights in Myanmar*, UN Doc. E/CN.4/RES/1992/58, 3 March 1992.

<sup>115</sup> UN Commission on Human Rights, *Report on the situation of human rights in Myanmar, prepared by Mr. Yozo Yokota, Special Rapporteur of the Commission on Human Rights, in accordance with Commission resolution 1992/58*, UN Doc. E/CN.4/1993/37, 17 February 1993, para.136.

an atmosphere of fear and repression and that accountability mechanisms of the government were clearly lacking.<sup>116</sup>

In light of the identified worrying situation, the mandate of the SR was successively extended by the Commission in 1993, 1994 and 1995. In 1996 Judge Rajsoomer Lallah was appointed as the new SR on Myanmar.<sup>117</sup> Mr. Lallah was faced with a major challenge, which other SPs have to confront in different occasions; while undertaking the mandate, Myanmar did not agree to the appointment of the SR and his requests for country-visits were not responded by the government.<sup>118</sup> Hence, during his tenure the SR was not granted a single entry to the state. It is relevant to mention that the lack of cooperation by the state with international human rights mechanism, as well as, the limited presence of these bodies and their access to populations are also recognized as risk indicators that pinpoint towards the potential perpetration of mass atrocity crimes.<sup>119</sup> Despite of the non-cooperative behaviour of the government, the SPs in the same manner that Mr.Lallah proceeded, can fulfil their mandate by means of collecting relevant information and establishing communication with third-parties that do have primary access to the situation on the ground. The SR was thus able to conclude that the lack of fulfilment of rights such as freedom of expression or association, supplemented by repression and a rhetoric of denial were at the core of the human rights violations taking place in Myanmar.<sup>120</sup>

Until that time more than five SR reports, which had been presented in front of the Commission and the UNGA, had already visibly pointed out towards increasing rise of violence, portrayed by the policies of discrimination and denial of fundamental rights by the government and the military. The international community became increasingly aware of the situation that had been guarded behind Myanmar's walls. And the responses of the UN followed similar patterns: different bodies adopted resolutions without clear follow-up actions calling for the state to respect its obligations under international law.<sup>121</sup> A single event worth mentioning is the

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<sup>116</sup> UN Commission on Human Rights, *Report on the situation of human rights in Myanmar, prepared by Mr. Yozo Yokota, Special Rapporteur of the Commission on Human Rights, in accordance with Commission resolution 1992/58*, *supra* note 115, para.241.

<sup>117</sup> UN General Assembly, *Situation of human rights in Myanmar*, UN. Doc. A/51/466, 8 October 1996, para.1.

<sup>118</sup> UN General Assembly, *Situation of human rights in Myanmar*, *supra* note 117, paras.9-10.

<sup>119</sup> United Nations Office on Genocide and the Responsibility to Protect, *Framework of Analysis for Atrocity Crimes - A tool for prevention*, *supra* note 18, p.15.

<sup>120</sup> UN General Assembly, *Situation of human rights in Myanmar*, *supra* note 117, paras.147-151.

<sup>121</sup> As an example, see: UN General Assembly resolution 51/117, *Situation of human rights in Myanmar*, UN Doc. A/RES/51/117, 12 December 1996.

creation by the former UNSG Boutros- Boutros-Ghali of the position of Special Envoy of the Secretary-General on Myanmar.<sup>122</sup> Its mandate, differing from the SR's is to allow the UNSG to implement his "good offices" in endeavouring to settle the disputes in Myanmar.<sup>123</sup> On the contrary, the SR's mandate is more in line with a fact-finding effort as to "examine, monitor, advise and publicly report."<sup>124</sup> Despite of their different nature, both of the offices have had a strong presence in in the UNGA's resolutions on Myanmar.

### **The Special Procedures under the Human Rights Council**

From 2000 and until 2008, Mr. Paulo Sérgio Pinheiro occupied the position of SR, first under the auspices of the UNCHR and subsequently, under the HRC, when the procedure of appointing SPs was adopted by the new body. His mandate began by portraying a cooperative relation with the government of Myanmar; the SR welcomed several positive initiatives undertaken by the State and would call for a further engagement of the international community with Myanmar.<sup>125</sup> Nevertheless, the appearance of progress followed by a wave of aggravated violence which will characterize the international community perspective of the state, was demonstrated by the growing presence in the last reports of the SR's of his implicit identification of crimes against humanity taking place in the state.<sup>126</sup>

The humanitarian situation in Myanmar already by 2006 was worsening and different UN agencies were depicting it as a "silent humanitarian crisis in the making."<sup>127</sup> The recommendations that were advanced all the years by the UN by means of the UNSG, his Special Envoy and the SRs were undoubtedly not implemented in Myanmar.<sup>128</sup> The succeeding reports of the SR on Myanmar comprised references to elements that are to be found under the definitions of the identified four mass atrocity crimes: the SR detailed the destructions of

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<sup>122</sup> For more information on the Special Envoys of the Secretary-General on Myanmar, see: Anna Magnusson and Morten B. Pedersen, *A Good Office? Twenty Years of UN Mediation in Myanmar*, 2012.

<sup>123</sup> Magnusson and Pedersen, *supra* note 122, p.10. Good offices are defined in the book as "entail(ing) a process of dialogue and negotiation in which a third party assists two or more conflicting parties, with their consent, to prevent, manage or resolve a conflict without recourse to force."

<sup>124</sup> UN OHCHR Website, "Special Procedures of the Human Rights Council," (available at <https://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx>).

<sup>125</sup> UN Commission on Human Rights, *Report on the situation of human rights in Myanmar*, UN Doc. E/CN.4/2003/41, 27 December 2002, paras. 51-55.

<sup>126</sup> Jürgen Haacke, *Myanmar*, in: Alex J. Bellamy and Time Dunne (eds.), *The Oxford Handbook of the Responsibility to Protect*, 2016, p.805.

<sup>127</sup> UN Commission on Human Rights, *Situation of human rights in Myanmar*, UN Doc. E/CN.4/2006/34, 7 February 2006, p.3

<sup>128</sup> UN Commission on Human Rights, *Situation of human rights in Myanmar*, *supra* note 127, para. 108.

villages taking place in the state as “the direct result of systematic human-rights abuse and the conflict between the military authorities and non-State armed groups.”<sup>129</sup> This view was sustained by other UN agencies, which emphasized that the military had directly targeted civilians on its operations and that as a result, thousands of civilians were forcibly displaced.<sup>130</sup> The SR’s findings had also defined this displacement as being part of a deliberate strategy by the military.

While apparently Myanmar had been implementing a “Seven-step Roadmap to Democracy” that would lead to the adoption of a new Constitution,<sup>131</sup> other thematic SRs such as those on extrajudicial, summary or arbitrary executions, framed the military’s policy of extrajudicial killings of civilians in eastern Burma as being widespread and systematically directed towards civilians and executed in the context of an internal conflict.<sup>132</sup> The political tensions caused by severe political repression as well as “social instability caused by exclusion or tensions based on identity issues,” are clear-cut examples of risk indicators present in the Framework of Analysis for Atrocity Crimes.<sup>133</sup> The numerous reports which included cases of murder, torture, persecution against an identifiable group and rape, amongst others, when carried out as a “part of a widespread or systematic attack directed against any civilian population”<sup>134</sup> can constitute crimes against humanity. Moreover, when these attacks that are similarly described and are “committed against persons taking no active part in the hostilities”<sup>135</sup> do occur in the context of an international, or in this case, internal armed conflict,<sup>136</sup> they can rise to the level of war crimes.

While the SR did not explicitly mentioned the terms *mass atrocities* and neither any of the four crimes, possibly with the purpose of maintaining a certain degree of cooperation with the

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<sup>129</sup> UN Commission on Human Rights, *Situation of human rights in Myanmar*, *supra* note 127, para. 99.

<sup>130</sup> International Human Rights Clinic, “Crimes in Burma,” *Harvard Law School*, 2009, p. 49 (available at <https://hrp.law.harvard.edu/wp-content/uploads/2009/05/Crimes-in-Burma.pdf>).

<sup>131</sup> UN Human Rights Council, *Myanmar National Report Submitted in Accordance with Paragraph 15 (a) of the Annex to Human Rights Council resolution 5/1*, UN Doc. A/HRC/WG.6/10/MMR/1, 10 November 2010, para. 27.

<sup>132</sup> UN Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston*, UN Doc. A/HRC/4/20/Add.1, 12 March 2007, pp. 222-223.

<sup>133</sup> United Nations Office on Genocide and the Responsibility to Protect, *Framework of Analysis for Atrocity Crimes - A tool for prevention*, *supra* note 17, p. 10.

<sup>134</sup> United Nations Office on Genocide and the Responsibility to Protect, *Framework of Analysis for Atrocity Crimes - A tool for prevention*, *supra* note 17, p. 27.

<sup>135</sup> United Nations Office on Genocide and the Responsibility to Protect, *Framework of Analysis for Atrocity Crimes - A tool for prevention*, *supra* note 17, p. 30.

<sup>136</sup> International Human Rights Clinic, “Crimes in Burma,” *supra* note 130.

government, which is of importance for the well-functioning of his mandate, it can be evidently argued that the SR did imply that those crimes were taking place. This approach is confirmed by the fact that under a chapter co-authored by Mr. Pinheiro and published in 2012, 4 years after his tenure as SR, he exposed that the systematic human rights abuses that were committed by Myanmar's military are to be identified as crimes against humanity and war crimes, in occasions citing his own past reports.<sup>137</sup>

The international community's response to the increasing identified human rights abuses in Myanmar since the 1990's fluctuated from cooperation to isolation. During the 2000's with the aforementioned accounts which implied the occurrence of mass atrocity crimes, the level of preoccupation increased, and enhanced attention was given to the situation. As follows, in December 2005 the UNSC held its first briefing on the situation of Myanmar after the United States had taken the initiative considering that the actions of Myanmar's military posed severe threats for the security and regional stability.<sup>138</sup> Other P5 states, namely Russia and China whose position would remain stable even and even leading them to block resolutions on the matter by means of their veto power,<sup>139</sup> argued that what was happening in Myanmar had to be framed under a human rights discussion not appropriate for Security Council's discussion.<sup>140</sup>

Tomás Ojea Quintana, whose SR mandate went from 2008 and until 2014, was the first to specifically mention that some of the human rights violations taking place in Myanmar "may entail categories of crimes against humanity or war crimes under the terms of the Rome Statute of the ICC."<sup>141</sup> In a conference held in 2014 the SR made striking declarations: "There are elements of genocide in Rakhine with respect to Rohingya...The possibility of a genocide needs to be discussed. I myself do not use the term genocide for strategic reasons."<sup>142</sup> In order to address the question of these international crimes, he called for the UN to consider the

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<sup>137</sup> Pinheiro and Barron, *supra* note 104, p.263.

<sup>138</sup> International Coalition for the Responsibility to Protect, "UN Security Activity in Burma 2005-2008," (available at <http://www.responsibilitytoprotect.org/index.php/crises/128-the-crisis-in-burma/1788-timeline-un-security-activity-on-burma-20052008>).

<sup>139</sup> Haacke, *supra* note 126, p.276.

<sup>140</sup> Security Council Report, "Update Report No.6," 26 May 2006 (available at [https://www.securitycouncilreport.org/update-report/lookup\\_c\\_glkwlemtisc\\_b\\_1715687.php](https://www.securitycouncilreport.org/update-report/lookup_c_glkwlemtisc_b_1715687.php)).

<sup>141</sup> UN Human Rights Council, *Progress Report of the Special Rapporteur on the Situation of Human Rights in Myanmar*, Tomás Ojea Quintana, UN. Doc A/HRC/13/48, 10 March 2010, para.121.

<sup>142</sup> Tomás Ojea Quintana, "Remarks," London Conference on Decades of Persecution and Destruction of Myanmar's Rohingya, 28 April 2014 (available at <https://scholarcommons.usf.edu/cgi/viewcontent.cgi?article=1572&context=gsp>).

establishment of “a commission of inquiry with a specific fact-finding mandate.”<sup>143</sup> While the establishment of such mechanism did not materialize under his mandate, it did take place later as it will be detailed in the response part of the chapter.

Under these examples it becomes easily identifiable how the SRs, while being one of the most prominent figures in the monitorization of the human rights situation of a specific state, and being an essential tool for early warning to the HRC and the UNGA are constrained by those “strategic reasons” which probably refer to the need of maintain cooperation with relevant stakeholders. Moreover, while undertaking such endeavours, the follow-up of the SRs recommendations relies first of all on the political will of the state but also, on the HRC which is often also challenged by the non-binding character of its resolutions.

It is also important to especially highlight from its mandate, the engagement of the SR with R2P. While not explicitly making reference to the doctrine, he did include its core ideas on different occasions. As an example, in his 2010 report, he expressed that while it is the primary role of the Government to “address the problem of gross and systematic human rights-violations by all parties, and to end impunity... If the Government fails to assume this responsibility, then the responsibility falls to the international community.”<sup>144</sup> An important remark to be made in this issue is that R2P is limited to the aforementioned four crimes and in this case the SR is referring to gross and systemic human rights violations and not specifically to mass atrocity crimes. Nevertheless, by context and interpretation it can be argued that he is moderately sustaining the doctrine’s principles.

Ms. Yanghee Lee who has been holding the position of SR on Myanmar since 2014 and until present times, began her two first years of mandate under an atmosphere of fruitfulness as stating that “four years of wide-ranging reforms have undeniably changed the situation of human rights.”<sup>145</sup> This declaration came as a result of the elections that Myanmar held in 2015 which formed a new Government and Parliament, and which included the participation of more than 100 former political prisoners.<sup>146</sup> In a totally opposite site of the spectrum, despite of this

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<sup>143</sup> UN Human Rights Council, *Progress Report of the Special Rapporteur on the Situation of Human Rights in Myanmar*, Tomás Ojea Quintana, *supra* note 141, para. 122.

<sup>144</sup> UN General Assembly, *Report of the Special Rapporteur on the Situation of Human Rights in Myanmar*, UN Doc. A/65/368, 15 September 2010, para. 67-68.

<sup>145</sup> UN Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in Myanmar*, UN Doc. A/HRC/31/71, 18 March 2016, para. 2.

<sup>146</sup> UN Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in Myanmar*, *supra* note 145, para. 76.

visible progress, attacks carried out by the military and the “2017 clearance operations” put Myanmar again at the centre of discussions on human rights abuses. Resulting from this, the SR restated the need for establishing a CoI “to investigate the systematic, structural, and institutional discrimination in policy, law and practice, as well longstanding persecution, against the Rohingya and other minorities in Rakhine State...”<sup>147</sup> Moreover she called for an urgent discussion, that being a special session, under the auspices of the HRC to deal with the escalating tensions in Kachin and Shan States.<sup>148</sup>

A clear case of the Special Rapporteur’s impact for in the UN’s response is to be identified in this case: the anterior recommendations put forward by Ms. Lee were indeed implemented. In March 2017 an independent international fact-finding mission was appointed by the President of the HRC<sup>149</sup> and a few months later, in December 2017 the 27<sup>th</sup> *special session of the HRC on the human rights situation of the minority Rohingya Muslim population and other minorities in the Rakhine State of Myanmar* was held.<sup>150</sup>

Notwithstanding the progress that these mechanisms were to impulse, the SR’s 2018 report appeared to demand from the UN apparatus more than a FFM: whereas she urged Myanmar to cooperate and grant access to the mechanism,<sup>151</sup> she also mentioned the need for an impartial investigation as to “to investigate, document, collect, consolidate, map, and analyse evidence of human rights violations and abuses.”<sup>152</sup> This recommendation will again be fulfilled in 2018, with the creation of an international accountability mechanism for Myanmar by the HRC.<sup>153</sup> These are essential steps that must be taken not only from a responsive side, but also from a preventative in view of non-recurrence as the “practice of impunity for or tolerance...of

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<sup>147</sup> UN Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights in Myanmar*, UN Doc. A/HRC/34/67, 1 March 2017, para. 88(a).

<sup>148</sup> UN Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights in Myanmar*, *supra* note 147, para. 88(b).

<sup>149</sup> UN Human Rights Council Website, “Independent International Fact-Finding Mission on Myanmar,” (available at <https://www.ohchr.org/en/hrbodies/hrc/myanmarffm/pages/index.aspx>).

<sup>150</sup> UN Human Rights Council Website, “27th special session of the Human Rights Council on the human rights situation of the minority Rohingya Muslim population and other minorities in the Rakhine State of Myanmar – 5 December 2017,” (available at <https://www.ohchr.org/EN/HRBodies/HRC/SpecialSessions/Session27/Pages/27thSpecialSession.aspx>).

<sup>151</sup> UN Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in Myanmar*, A/HRC/37/70, 9 March 2018, para. 73.

<sup>152</sup> UN Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in Myanmar*, *supra* note 151, para. 74(g).

<sup>153</sup> Advocates for Justice and Human Rights, “Myanmar: creation of UN mechanism a step toward accountability,” 27 September 2018 (available at <https://www.icj.org/hrc39-myanmarres/>).

atrocities crimes, or their incitement,”<sup>154</sup> as well as the failure to condemn actions of those accused of committing such violations, are unequivocal risk factors.<sup>155</sup> These latter initiatives which have situated the HRC at the forefront of the fight for justice and accountability will be further analysed under the “response” sub-chapter.

#### 4.2.2 The Universal Periodic Review of Myanmar

As mentioned in the anterior chapter, the UPR is a unique human rights mechanism under the mandate of the HRC that allows to scrutinize the human rights situation, obligations and commitments of all the UN members. The cooperative nature of this process allows for a “peer-to-peer” dialogue among states that can share recommendations for addressing worrying situations about the all-encompassing range of human rights. The UPR seeks not to follow a “naming and shaming” perspective, rather it aims at engaging states in the debates. In its wide range of discussions, early signs that could potentially develop towards the occurrence of mass atrocities crimes can be recognized and addressed by states. Moreover, it is under structural prevention and long-term efforts that the UPR could have an increased impact by reviewing the human rights of states and working towards building resilience.

One of the main challenges inherent in the UPR’s procedure is the fact that its agenda is a timely and structured one, meaning that each state is scheduled to have its review on a certain year, that does not allow for flexibility. There are no options under the UPR to deal with a specific case if considered that a state is undergoing severe human rights, until its review takes place. This issue on one hand, works in benefit of ensuring “non-selectivity” and “non-bias” that the Council must aim at, but on the other, it means that the UPR of a certain state can take place when it’s too late. That is the case of Myanmar: the state has undergone two UPR cycles, the first one being in 2011 followed by the subsequent in 2015. By the time that the latter one took place, there were already accounts for mass atrocities happening or having happened in the State. That is why it can be argued, but not tested, that a UPR review of Myanmar in earlier stages could have been more fruitful.

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<sup>154</sup> United Nations Office on Genocide and the Responsibility to Protect, *Framework of Analysis for Atrocity Crimes - A tool for prevention*, supra note 18, p. 11.

<sup>155</sup> *Ibid.*

### **Myanmar's UPR Review under the First Cycle (2011)**

The review of the first cycle of the UPR for Myanmar was held in January 2011 and its outcome was adopted under the HRC regular session in June.<sup>156</sup> The first of the three documents that are to be submitted for the well-functioning of the procedure was the national report. The report was grounded on a more general basis for presenting the state's apparatuses in dealing with human rights and the state's initiatives in protecting and promoting them, including its path in implementing obligations, cooperation with human rights mechanisms and finally its successes and best practices, as well as the challenges it considers that lay ahead or potential restrictions that might be encountered in doing so. From these, the state reiterates that prohibition of torture, inhuman treatment or arbitrary arrests are provided under its constitution and penal code.<sup>157</sup> However, there's no mentioning of human rights violations or much less of mass atrocities and neither their prevention. It can be argued that in the case of Myanmar, but also as common practice, states can take advantage of the process in promoting an image that consider best suitable for their purpose of maintaining a good international status, while not making visible efforts for dealing or mentioning the real challenges that it must confront. On an opposite side, Myanmar did mention that the constraint it faces actually comes from political pressures that it suffers through UN mechanisms which somehow hinders its efforts into protecting human rights.<sup>158</sup> The state was shielding itself with the use of the UPR while moving the spotlight towards the UN.

On a higher degree of criticism but rather maintaining a balanced position in spirit of cooperation, the compilation of UN information prepared by the OHCHR can be found.<sup>159</sup> It accounts for the numerous SR concerns on the systematic discrimination of the Muslim community,<sup>160</sup> while requesting for the government to allow an investigation of human rights

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<sup>156</sup> UN Human Rights Council, *Outcome of the Universal Periodic Review: Myanmar*, UN Doc. A/HRC/17/DEC/107, 13 July 2011.

<sup>157</sup> UN Human Rights Council, *Myanmar National Report*, *supra* note 131, para. 38.

<sup>158</sup> UN Human Rights Council, *Myanmar National Report*, *supra* note 131, para. 127.

<sup>159</sup> UN Human Rights Council, *Compilation prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council Resolution 5/1*, UN Doc. A/HRC/WG.6/10/MMR/2, 15 November 2010.

<sup>160</sup> UN Human Rights Council, *Compilation prepared by the Office of the High Commissioner for Human Rights*, *supra* note 159, para. 24.

violations.<sup>161</sup> Furthermore, is in the summary of other stakeholders<sup>162</sup> where the importance of NGOs, civil organizations and other entities in bringing and putting into paper different realities, granting voice to those suffering, and taking a step further into recognizing facts on the ground, is to be recognized. Examples of this are to be found in the information provided by Amnesty International (AI) making aware that the 2008 Constitution allowed for the control of the military on fundamental rights<sup>163</sup> or Human Rights Watch (HRW) stating that while human rights violations have continued, civilians are suffering abuses.<sup>164</sup>

The outcome document and discussions did not diverge significantly from this rhetoric and approach. As mentioned before, the call of the SR on Myanmar for an FFM was supported in the UPR primarily by NGO's and civil society representations. States on the other hand, refrained from dealing directly or raising mass atrocities under their recommendations or statements under the WG. Critically, states that are aligned with Myanmar and which do have a good political relation or economic interests, even praised the country for the great improvements on its human rights situation.

During the WG meeting and on the final outcome it is mentioned that out of the 190 recommendations that were presented, only 74 were accepted by Myanmar; a similar number, 70, were rejected and 46 were put under consideration.<sup>165</sup> The number of rejected recommendations somehow reflects a major weakness on the process: there's no follow-up to the unwilling position from the part of the state in listening and embracing positive recommendations that the other stakeholders present to it. Myanmar justified these refusals by considering the recommendations to be politicized and presented in such a manner that are not line with its sovereign rights.<sup>166</sup>

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<sup>161</sup>UN Human Rights Council, *Compilation prepared by the Office of the High Commissioner for Human Rights*, *supra* note 159, para. 27.

<sup>162</sup> UN Human Rights Council, *Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1*, UN Doc. A/HRC/WG.6/10/MMR/3, 18 October 2010.

<sup>163</sup> UN Human Rights Council, *Summary prepared by the Office of the High Commissioner for Human Rights*, *supra* note 162, para. 6.

<sup>164</sup> UN Human Rights Council, *Summary prepared by the Office of the High Commissioner for Human Rights*, *supra* note 162, para. 72.

<sup>165</sup> UN Human Rights Council, *Report of the Human Rights Council on its Seventeenth Session*, UN Doc. A/HRC/17/2, 24 May 2012, para. 424.

<sup>166</sup> UN Human Rights Council, *Report of the Human Rights Council on its Seventeenth Session*, *supra* note 165, para. 425.

### **Myanmar's UPR Review under the Second Cycle (2015)**

The second cycle of Myanmar's UPR was presented during the WG's 23<sup>rd</sup> session. Under its national report Myanmar presented first of all the advancements made since its former UPR cycle, including a significant number of ceasefires with ethnic armed groups, or its progress in judicial matters, as well as, freedom of expression.<sup>167</sup> Nevertheless, the state took the opportunity of expressing that in view of the "undeniable progress" and spirit of cooperation that the it was fulfilling, it considered that resolutions adopted by the HRC and the UNGA against Myanmar had to come to an end.<sup>168</sup> In view of the Rakhine State situation, Myanmar established a Central Committee for Implementation of Stability and Development as to cooperate with UN agencies in areas such as migration, security, reconstruction for the benefit of the region.<sup>169</sup> This was complemented by a pilot project for issuing certificates and inciting a process of naturalization.<sup>170</sup> The commendable developments undertaken by Myanmar as assuming its "state's responsibility"<sup>171</sup> could be clearly inspired by the recommendations that were advanced to the State in its first UPR process, however such a statement is difficult to prove.

Again, and from a contrary perspective to the State's view, both the compilation from UN information and the other stakeholders focused on the essential measures that Myanmar still had to take in order to address the situation. Evidence was presented on the discriminatory policies for offering citizenship,<sup>172</sup> persistent allegations of sexual violence, enforced disappearances and summary executions were still accounted as taking place<sup>173</sup> and the situation was aggravated by hate speech and incitement to violence.<sup>174</sup>

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<sup>167</sup> UN Human Rights Council, *National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21*, UN Doc. A/HRC/WG.6/23/MMR/1, 5 August 2015, paras. 7, 11, 38.

<sup>168</sup> UN Human Rights Council, *National Report*, *supra* note 167, paras. 96-97.

<sup>169</sup> UN Human Rights Council, *National Report*, *supra* note 167, para. 133.

<sup>170</sup> UN Human Rights Council, *National Report*, *supra* note 167, para. 134.

<sup>171</sup> UN Human Rights Council, *National Report*, *supra* note 167, para. 172.

<sup>172</sup> UN Human Rights Council, *Compilation Prepared by the Office of the United Nations High Commissioner for Human Rights in Accordance with Paragraph 15 (b) of the Annex to Human Rights Council Resolution 5/1 and Paragraph 5 of the Annex to Council Resolution 16/21*, UN Doc. A/HRC/WG.6/23/MMR/2, 31 August 2015, para. 18.

<sup>173</sup> UN Human Rights Council, *Compilation Prepared by the Office of the United Nations High Commissioner*, *supra* note 172, para. 91.

<sup>174</sup> UN Human Rights Council, *Compilation Prepared by the Office of the United Nations High Commissioner*, *supra* note 172, para. 17.

The review was held in November 2015.<sup>175</sup> In this occasion, Myanmar received more than 280 recommendations. It is important to mention that specifically the recommendations that involved the need for the government to address the discrimination of Rohingyas and other minorities, while ensuring their rights, work towards accountability and to put an end to violence, were not accepted.<sup>176</sup> The recommendations including the 1982 Law which is to be considered as a cause of statelessness and means of discrimination of these minorities, received the same treatment.<sup>177</sup> This fact strengthens the anterior argument about how the whole process pivots around the states and their willingness and ability, first of all, to accept recommendations but more importantly, to implement them. An accepted recommendation has the same impact as a noted one if lacking and effective follow-up.

By being aware that mass atrocities are accounted for having took place in the subsequent period of this UPR cycle, starting just a year after the outcome document was presented, it does not seem wrong to conclude that the process did not prevented the occurrence of these. However, the prevention of atrocities cannot rely on a single mechanism, an neither a single UN body. It is true that atrocities were not even mentioned in the outcome and the general discussion but rather focused on the progresses made by Myanmar in different areas. Discriminatory laws, and patterns of behaviour that are risk indicators for potential mass atrocities were discussed during both cycles and the occurrence of “war crimes” and “crimes against humanity” were addressed in the first cycle, nevertheless, the refusal of the state to even respond this issues demonstrates a further weakness in the UPR process. While it is true that different agencies stated that Myanmar presented evolution signs in democratization, the reality on the ground demonstrated the opposite: tension was growing and violence was rising, leading to the catastrophic outcome of 2016 and further on.

This analysis does not intent to deprive the UPR process of its potential for impact especially in structural prevention, one can argue that a strengthened use of the process could lead to major impacts. The main challenge encountered in this regard is the difficult visualization of the effects of structural prevention. It can't be said that precise actions taken by whether the

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<sup>175</sup> UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review*, UN Doc. A/HRC/31/13, 23 December 2015.

<sup>176</sup> UPR Info, “Responses to Recommendations & Voluntary Pledges: Myanmar,” 17 June 2016 (available at [https://www.upr-info.org/sites/default/files/document/myanmar/session\\_23\\_november\\_2015/recommendations\\_and\\_pledges\\_myanmar\\_2015.pdf](https://www.upr-info.org/sites/default/files/document/myanmar/session_23_november_2015/recommendations_and_pledges_myanmar_2015.pdf)).

<sup>177</sup> *Ibid.*

SPs or the UPR in this case, have explicitly led the prevention of a conflict. In order to conclude this sub-chapter it is to be mentioned that Myanmar will undergo its next UPR cycle in 2020 and while the UPR as a tool of prevention has not particularly functioned in this situation, this presents another opportunity for avoiding further or future atrocities and to address the core causes that have led to their occurrence.

## **4.2 Is it too late, again? The HRC's response to Mass Atrocity Crimes in Myanmar**

*“All too often it appears that the international community still prefers solemn hand wringing in the aftermath of mass atrocities to being accused of acting prematurely to avert them.”<sup>178</sup>*

By August 2017, when violence in the Rakhine State reached unprecedented levels, the occurrence of mass atrocities in Myanmar passed from a risk to become a fact. The international community which had been warned in numerous occasions about the high probability of this happening, had to recognize that it failed again in protecting those most vulnerable. Before that critical month, already more than 200.000 Rohingya refugees had fled into Bangladesh,<sup>179</sup> the situation was described by two academics as a “slow-motion genocide”<sup>180</sup> and a humanitarian catastrophe was in the making.

Despite all the warning signs that had been numerous both in the SRs reports as well as the UPR, the international community rather focused on the apparent transition and progress towards democracy that the state had been undergoing, depicted by the deceptive decreasing power of the military and the ceasefire agreements of 2015 which were portrayed as a sign of the end of violence.<sup>181</sup> That is how, by focusing on incentivizing reform rather than taking a strong stance and denouncing the situation, by October 2017 the UN Special Adviser for R2P and the UN Special Adviser on the Prevention of Genocide were calling the government of

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<sup>178</sup> Adams, *supra* note 103, p.11.

<sup>179</sup> See: UN Office for the Coordination of Humanitarian Affairs Website, “Myanmar,” (available at <https://www.unocha.org/myanmar>).

<sup>180</sup> Maung Zarni and Alice Cowley, “The Slow-Burning Genocide of Myanmar’s Rohingya,” *Pacific Rim Law & Policy Journal Association*, vol. 23, no.3 (2014), p. 681.

<sup>181</sup> Karen E.Smith, “The EU and the Responsibility to Protect in an Illiberal Era,” *The Dahrendorf Forum*, no.3 (2018), p. 13.

Myanmar to “take immediate action to stop and address the commission of atrocity crimes that are reportedly taking place in northern Rakhine state.”<sup>182</sup>

By drawing a *prima facie* conclusion from these facts, it appears that prevention measures had failed. As mentioned anteriorly, the SRs had a leading role in documenting the evolution of the human rights situation on Myanmar, and the UPR involved recommendations that were essential for the progressive reform of the state, nevertheless, the lack of a stronger stance and timely action allowed for the crisis to take place. The HRC’s resolutions since then lacked enforceability, it did become the main forum for discussion on further actions and the body in which early-warning was promoted; nevertheless, its efforts were not strongly supported by other UN bodies, especially the UNSC which had the opportunity to act to fulfil its mandate of maintaining peace and security or at least, to determine as in art. 39 the existence of a threat to the peace and under art.40 “...to prevent the aggravation of the situation” and make subsequent recommendations.

#### 4.3.1 Special Sessions: The Forum for Urgent Debate

Once having analysed the prevention measures taken by the HRC in this case though its mechanisms, it is important then to scrutinize what measures have been utilised by the human rights body in order to respond to the occurrence of mass atrocities. As described in the 3<sup>rd</sup> chapter of the thesis, in case that the HRC decides, when requested by at least a third of its members that there is a situation that needs to be addressed promptly, it can call for a special session. For the case of Myanmar this has happened in two occasions: first in October 2007 and the latter in December 2017. The former dealt with the aftermath of what has been labelled as “the Saffron Revolution” while the latter focused especially on the situation of the Rohingya minority. The special sessions while being present in the response part of these case-study, can occasionally find themselves in the fine line between prevention and response, as they deal with a situation that requires the Council’s attention in a timely manner but that doesn’t necessarily imply that mass atrocities have already occurred. That is why the fact that the HRC

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<sup>182</sup> UN Secretary-General Website, “Note to Correspondents: Statement by Adama Dieng, UN Special Adviser on the Prevention of Genocide and Ivan Simonovic, UN Special Adviser on the Responsibility to Protect, on the situation in northern Rakhine state, Myanmar,” 18 October 2017 (available at <https://www.un.org/sg/en/content/sg/note-correspondents/2017-10-18/note-correspondents-statement-adama-dieng-un-special>).

has called for two different special sessions with a 10-year gap allows to place both endeavours in the two approaches: prevention and response.

### **5th Special Session of the Human Rights Council: Situation of Human Rights in Myanmar**

The 5<sup>th</sup> Special Session of the HRC was summoned after the demonstrations of what has been dubbed as the “Saffron Revolution.”<sup>183</sup> Civil protests that began as small demonstrations against the increased prices of fuel and gas and the high cost of living, evolved into more widespread actions that even demanded the overthrow of the military regime. The first acts, which involved the participation of Buddhist monks, were violently repressed by the security forces. This reactively prompted the participation of younger monks which organized different peaceful protests around the country. They suffered from the same response, as participation increased so did the attacks aimed at stopping it.<sup>184</sup>

On its introductory statement at the Special Session SR Sergio Pinheiro condemned the use of force taken by the security forces and urged to Government of Myanmar to halt the deathly attacks. He reiterated that the “the use of excessive force, killings, arbitrary arrest or ill-treatment of peaceful protesters is strictly prohibited under international law” and that it could entail for individual criminal responsibility.<sup>185</sup> His views were sustained by Ms. Louise Arbour, former UNHCHR who added a clear reference to the 2005 World Summit and the responsibility of the international community for protecting civilians against atrocity crimes.<sup>186</sup> This was an occasion in which “preventive, reactive and rebuilding measures” the measures envisioned by the ICISS in the first R2P, had to be enforced in order to prevent further abuses.

The calls for action during this meeting were numerous, and by the different statements, it became clear that a strengthened path of action inducing tangible outcomes, had to be

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<sup>183</sup> UN Human Rights Council Website, “5th Special session of the Human Rights Council on the human rights situation in Myanmar, Geneva, 2 October 2007” (available at <https://www.ohchr.org/EN/HRBodies/HRC/SpecialSessions/Session5/Pages/5thSpecialSession.aspx>).

<sup>184</sup> Andrew Selth, “Burma’s Saffron Revolution and the Limits of International Influence,” *Australian Journal of International Affairs*, vol.62, no.3 (2008), pp. 281-283.

<sup>185</sup> Paulo Sérgio Pinheiro, “Statement by Special Rapporteur on the Situation of Human Rights in Myanmar,” Fifth Special Session Human Rights Council, 2 October 2007 (available at <https://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=7400&LangID=E>).

<sup>186</sup> Louise Arbour, “Statement by Ms. Louise Arbour, UN High Commissioner for Human Rights on the occasion of the 5h Special session of the Human Rights Council,” Fifth Special Session Human Rights Council, 2 October 2007 (available at <https://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=1472&LangID=E>).

determined. The session was not only attended by States, but also observers for other UN entities and specialized agencies, IGO's, NHRIs and NGOs.<sup>187</sup> It allowed to create a sphere of discussion which could have prompted a coordinated effort in finally taking a stronger stance against the violations that had been carried out through the years and whose re-occurrence had to be avoided.

In spite of that, the outcome resolution of the session maintained a rather balanced approach and the only actions that it involved were centered around urging the Government to restrain from using violence against protesters, to release those arrested and to guarantee fundamental freedoms.<sup>188</sup> Moreover it called for further engagement with the Special Envoy, the OHCHR and the SR which was requested to update the UNGA on the progress made.<sup>189</sup> These recommendations do not appear to fulfil the requests of many actors that demanded for robust outcomes which could have included the creation of an FFM or an accountability mechanism.

In the follow-up period of this session, the international community did seem to react in a moderate manner. While not being able to assess the impact that the special session had on these events, it can be argued that the debate on such a relevant forum did raised the issue's profile. First, the SR was granted access to the state after some years of restriction. The UNSC, by unanimity, issued a presidential statement on Myanmar's situation, unexpectedly endorsed by China and Russia which since then had been maintaining their position in considering the human rights of Myanmar an internal matter whose place of discussion was not to be the UNSC.<sup>190</sup> Moreover, other international actors such as the European Union, the United States, Canada, Japan and others enforced travel and trade bans, restricted financial deals, and cut aids to the military government<sup>191</sup> thus demonstrating that they were determined to respond moderately and individually at least.

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<sup>187</sup> UN Human Rights Council, *Report of the Human Rights Council on its Fifth Special Session*, UN Doc. A/HRC/S-5/2, 28 November 2007, para. 8, p. 6.

<sup>188</sup> UN Human Rights Council, *Report of the Human Rights Council on its Fifth Special Session*, *supra* note 187, paras. 1,3,4.

<sup>189</sup> UN Human Rights Council, *Report of the Human Rights Council on its Fifth Special Session*, *supra* note 187, paras. 5,7,9,10.

<sup>190</sup> UN Security Council, *Statement by the President of the Security Council*, UN Doc. S/PRST/2007/37, 11 October 2007.

<sup>191</sup> Reuters, "Factbox: Sanctions on Myanmar," 16 March 2012 (available at <https://www.reuters.com/article/us-myanmar-sanctions/factbox-sanctions-on-myanmar-idUSBRE82F0KJ20120316>). Also see: Lee Jones, *Societies Under Siege: Exploring How International Economic Sanctions (Do not Work)*, 2015, p. 105.

## **27th Special Session of the Human Rights Council: Human rights Situation of the Minority Rohingya Muslim Population and Other Minorities in the Rakhine State of Myanmar**

The 27<sup>th</sup> Special Session of the HRC also focused on the human rights situation in Myanmar, however in this case it came as a prompt response to the deteriorating situation that involved abuses and human rights violations directed primarily towards the Rohingya minority. The request for holding the session came from Bangladesh and Saudi Arabia and was convened on December the 5<sup>th</sup> 2017.<sup>192</sup> It is relevant to put in context this meeting. In March 2017 the HRC had already decided to establish an FFM for investigating alleged abuses by the military against the Muslim minority.<sup>193</sup> In August the so-called “clearance operations” began and by October it is estimated that the number of refugees searching refuge in Bangladesh amounted to one million.<sup>194</sup>

The outcome resolution made direct reference to different reports from the UN system that included accounts on “abuses carried out in a systematic, targeted and deliberate manner by security forces assisted by non-State actors in Rakhine State through the disproportionate use of force.”<sup>195</sup> In order to avoid repetition, a more specific account of the crimes involved, and events is better suited to be presented on the following sub-chapters. The operational paragraphs of the resolution followed a rather similar approach to the former special session; however, some important elements are to be distinguished. In this case, the Government of Myanmar was requested to end impunity and provide justice by means of an independent inquiry.<sup>196</sup> Thus, it called for the government to fully cooperate and to grant access to the FFM.<sup>197</sup> Moreover, it raised awareness of the necessity for stronger, non-discriminative humanitarian aid and development assistance that should have been provided by the

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<sup>192</sup> UN Human Rights Council, *Report of the Human Rights Council on its Twenty-Seventh Special Session*, UN Doc. A/HRC/S-27/3, 1 February 2018.

<sup>193</sup> UN Human Rights Council Website, “Independent International Fact-Finding Mission on Myanmar” (available at <https://www.ohchr.org/en/hrbodies/hrc/myanmarffm/pages/index.aspx>).

<sup>194</sup> BBC News, “Myanmar profile – Timeline,” 3 September 2018 (available at <https://www.bbc.com/news/world-asia-pacific-12992883>).

<sup>195</sup> UN Human Rights Council resolution S-27/1, *Situation of human rights of Rohingya Muslims and other minorities in Myanmar*, UN Doc. A/HRC/RES/S-27/1, 8 December 2017, p. 2.

<sup>196</sup> UN Human Rights Council resolution S-27/1, *Situation of human rights of Rohingya Muslims and other minorities in Myanmar*, *supra* note 195, para. 5.

<sup>197</sup> UN Human Rights Council resolution S-27/1, *Situation of human rights of Rohingya Muslims and other minorities in Myanmar*, *supra* note 195, para. 7.

international community.<sup>198</sup> Finally, it requested the OHCHR to monitor the situation and the UNHCHR to prepare a report on the matter including recommendations for further engagement while also being invited to orally update the HRC in the subsequent regular sessions in view “to reaching a comprehensive solution of the crisis within three years.”<sup>199</sup>

The UN High Commissioner at the time, Zeid Ra’ad Al Hussein took a step further during his statement regarding the recognition of mass atrocities occurring in the state. While he and different SRs referred during the years to the prospect of crimes against humanity and war crimes being carried out in the state, in this occasion he made a clear reference to “elements of genocide” in the form of an question.<sup>200</sup> He concluded this by considering that the systemic violence directed towards the Rohingya through the years and all the abuses that had been mentioned anteriorly, were directed towards them exactly because of their belonging to this ethnic group. He further denounced that different international and local actors did not even used the term Rohingya to refer to the group: “they are denied a name, while being targeted for being who they are.”<sup>201</sup>

The UN High Commissioner advanced that the HRC should recommend the UNGA to establish an additional mechanism in view of supplementing the work of the FFM for gathering evidence that could be of assistance for a potential individual criminal investigation.<sup>202</sup> In fact, that idea took shape with the establishment of the Independent Mechanism, which would become operational in 2019, by an overwhelming majority at the HRC in September 2018.<sup>203</sup> The follow-up of the special session also involved the release of the FFM report in that same month, while expecting the final outcome in September 2019.<sup>204</sup> It seems clear that by the time of the special session, the HRC had already taken an important step with the creation of the FFM but

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<sup>198</sup> UN Human Rights Council resolution S-27/1, *Situation of human rights of Rohingya Muslims and other minorities in Myanmar*, *supra* note 195, paras. 9, 15.

<sup>199</sup> UN Human Rights Council resolution S-27/1, *Situation of human rights of Rohingya Muslims and other minorities in Myanmar*, *supra* note 195, paras. 20-21.

<sup>200</sup> Zeid Ra’ad Al Hussein, “Special Session of the Human Rights Council on the human rights situation of the minority Rohingya Muslim population and other minorities in the Rakhine State of Myanmar,” 5 December 2017 (available at <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=22487&LangID=E>). His question was: “...given all of this (referring to an enumeration of violence, abuses etc..), can anyone rule out that elements of genocide may be present?”

<sup>201</sup> *Ibid.*

<sup>202</sup> *Ibid.*

<sup>203</sup> International Federation for Human Rights, “Myanmar: UN Human Rights Council creates independent mechanism to expedite prosecutions,” 5 October 2018 (available at <https://www.fidh.org/en/impacts/myanmar-un-human-rights-council-creates-independent-mechanism-to>).

<sup>204</sup> UN Human Rights Council Website, “Independent International Fact-Finding Mission on Myanmar” (available at <https://www.ohchr.org/en/hrbodies/hrc/myanmarffm/pages/index.aspx>).

the urgent meeting allowed to divert the spotlight towards the aggravating situation once more, and re-enforced the need for further action especially on accountability term, which was envisioned to materialize with the upcoming IM.

#### 4.3.2 Independent International Fact-Finding Mission on Myanmar

Myanmar had been pressured for years by different resolutions, by the conclusions of the SRs, international reports and the voice of the civil society for taking the lead and ensuring its responsibility to investigate the events that had occurred especially in the Rakhine State. The state did finally endeavour to do so and established not one but at least five different investigative and advisory commissions. The Advisory Commission on Rakhine State, established in August 2016 it is to be remarked as it was chaired by former UNSG Kofi Annan.<sup>205</sup> The most recent attempt was carried out in 2018 with the establishment by the Myanmar President's Office of the Independent Commission of Enquiry, whose chair even declared that under the report there would be "no blaming of anybody, no finger pointing of anybody" while remarking that it was "a very bad approach [...] to say 'you are accountable!'"<sup>206</sup>

In view of the visible failure in the investigation of the violations that took and were taking place in the Rakhine State, the international inaction, and the urgent need to address the situation, the HRC took the lead of the whole UN and established the Independent International Fact-Finding Mission on Myanmar in March 2017.<sup>207</sup> The FFM is composed by a team of three experts which follow the mandate of establishing "the facts and circumstances of alleged human rights violations by military and security forces, and abuses, in Myanmar."<sup>208</sup> The FFM

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<sup>205</sup> For more information on the failures of the different national investigations carried out by Myanmar, the reader is referred to: Human Rights Watch, "Myanmar: Domestic Commissions on Rohingya All Failures," 18 September 2018 (available at <https://www.hrw.org/news/2018/09/18/myanmar-domestic-commissions-rohingya-all-failures>). See also: Human Rights Watch, "Myanmar's Investigative Commissions: A History of Shielding Abusers," September 2018 (available at [https://www.hrw.org/sites/default/files/supporting\\_resources/201809myanmar\\_commissions.pdf](https://www.hrw.org/sites/default/files/supporting_resources/201809myanmar_commissions.pdf)).

<sup>206</sup> International Commission of Jurists, "Myanmar: Government's Commission of Inquiry cannot deliver justice or accountability," 7 September 2018 (available at <https://www.icj.org/myanmar-governments-commission-of-inquiry-cannot-deliver-justice-or-accountability/>).

<sup>207</sup> UN Human Rights Council resolution 34/22, *Situation of human rights in Myanmar*, UN Doc. A/HRC/RES/34/22, 3 April 2017.

<sup>208</sup> UN Human Rights Council resolution 34/22, *Situation of Human Rights in Myanmar*, *supra* note 207, para. 11.

was restricted to the situation in Kachin, Rakhine and Shan States, and in the events happening after 2011.

Despite of the government's clear opposition and its rejection to cooperate with the body while refusing the entry of the mandate-holders, a full report was presented in September 2018.<sup>209</sup> And indeed, the conclusions to which the report arrived not only differed exponentially to the outcomes of the failed commissions established by the government, but it focused on the military's evident crimes and the governments involvement. At the time it became explicit that the state authorities had not only failed in upholding their responsibility to protect the civilian population from mass atrocity crimes, but it had also enabled and been involved in the commission of these.

The fact that the government had refused to grant visas to the FFM's mandate-holders, while posing a challenge, it did not halt the FFMs activities. Rather, it pushed it to base its work on more than 800 first-hand interviews, with victims, eyewitnesses, even perpetrators.<sup>210</sup> This is yet another example of how such a procedure can undertake its work without the state's cooperation and while its preferable to have full access to the territory and to sources, an FFM sometimes represents the only and most proper option to fully account of the situation on the ground.

Legally, it is important to note that while FFMs are not endowed with judicial powers, they are not prosecutorial bodies or courts, they do represent an essential pillar for future judicial processes, as they identify perpetrators, account for their facts and they deeply investigate on the situations' record; elements which are crucial for enabling and facilitating the work of future prosecution and prospective legal cases. Missions are not expected to establish guilt or apply the criteria of "reasonable doubt," rather they use terms such as "reasonable suspicion" or "reasonable grounds to believe" while investigating facts depending on the access and analysis of the available information.<sup>211</sup> In this specific case, the FFM concluded that "a

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<sup>209</sup> UN Human Rights Council, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, UN Doc. A/HRC/39/CRP.2, 17 September 2018.

<sup>210</sup> UN Human Rights Council, *Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar*, *supra* note 209, para. 19.

<sup>211</sup> <sup>211</sup> United Nations Office of the High Commissioner for Human Rights, *Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice*, *supra* note 43, pp. 62-63.

competent prosecutorial body would have sufficient elements to proceed with a criminal investigation and prepare a case for adjudication on such charge.”<sup>212</sup>

The FFM has found patterns of the “gravest crimes” under IL, which are to be investigated and prosecuted. These involve crimes against humanity and war crimes. The former has happened in the forms of “murder; imprisonment; enforced disappearance; torture; rape, sexual slavery and other forms of sexual violence; and persecution and enslavement, as well as elements of the crimes against humanity of extermination and deportation.”<sup>213</sup> The fact that the mission has identified the situation as a non-international armed conflict, allows for the categorization of the former mentioned elements as war crimes, as well.<sup>214</sup>

Moreover, it has been noted that “factors allowing the inference of genocidal intent” are to be found in the premediated acts to destroy Rohingya communities as a whole.<sup>215</sup> It is not explicitly revealing that genocide per se has occurred but rather it implies that there is enough proof to demonstrate that the intent of doing so can be found in the perpetrators’ policies.<sup>216</sup> It is argued that the crime of genocide has “high-standards of proof” meaning that it is in extremely difficult in most cases to establish the *dolus specialis* of genocide (genocidal intent), and the evidence is often required to be fully conclusive.<sup>217</sup>

On the responsibility of such actions, the FFM concludes that the operations led by the Tatmadaw and other security forces incur State responsibility.<sup>218</sup> It can be argued that the cause of such assertion lies in the principles of state responsibility, “the State will be held responsible...for the acts of its organs and its officials.” This derives mainly the fact that these are under the responsibility of the state, which is the only that can control them.<sup>219</sup> Moreover,

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<sup>212</sup> UN Human Rights Council, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, *supra* note 209, para. 1386.

<sup>213</sup> UN Human Rights Council, *Report of the Independent International Fact-Finding Mission on Myanmar*, UN Doc. A/HRC/39/64, 12 September 2018, para. 88.

<sup>214</sup> UN Human Rights Council, *Report of the Independent International Fact-Finding Mission on Myanmar*, *supra* note 213, para. 89.

<sup>215</sup> UN Human Rights Council, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, *supra* note 209, para. 85.

<sup>216</sup> Priya Pillay “Renewed Impetus for Accountability: Implications of the Myanmar Fact-Finding Mission report,” *Opinio Juris*, 15 September 2018 (available at <http://opiniojuris.org/2018/09/25/renewed-impetus-for-accountability-implications-of-the-myanmar-fact-finding-mission-report/>).

<sup>217</sup> For more information consult: Peter Tzeng, “Proving Genocide: The High Standards of the International Court of Justice,” *Yale Journal of International Law*, vol.40, no.2 (2015), pp. 419-428.

<sup>218</sup> UN Human Rights Council, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, *supra* note 209, paras. 1518-1520.

<sup>219</sup> Jan Klabbbers, *The Law of Responsibility*, in: Jan Klabbbers (ed.), *International Law*, 2013, pp.126-127.

in this situation the FFM takes a step further and declares that the civilian authorities, including the State Counsellor, have not used their powers to prevent or deal with the events thus, contributing to the commission of mass atrocities.<sup>220</sup>

It is undeniable that the work of the FFM in uncovering the facts on the ground, collecting evidence and presenting a detail account of crimes and violations that have taken place or are even undergoing in Myanmar, is a big step forward. Nevertheless, this still remains somehow an interim process that has to be, in the first place, further advanced and also, it must be supplemented by other means which ensure the applicability of the mechanisms' recommendations. That is how in the concluding remarks of the outcome report the FFM calls for the further involvement of the HRC as the main body within the UN framework dealing with human rights but also, the UNSC as the actor which has under its umbrella a number of far-reaching binding measures which are to be further discussed in this thesis.

The FFM under its conclusions urged for action: the actors identified and the paths that these are to take can be framed under the R2P pillars. First of all, the FFM points towards Myanmar and its primary responsibility to find remedy to its situation. The state has failed in protecting its populations from mass atrocities but that does not mean that it does not have the essential task of addressing root causes and preventing further mass atrocities. Secondly, the international community, with special focus to the UN, has to use all the peaceful means, such as diplomatic and humanitarian to support the first pillar. Finally, collective action in accordance with the UN Charter shall be undertaken, if required.<sup>221</sup>

It is under this third pillar that the FFM in view of ensuring accountability for the mass atrocity crimes that have been mentioned, calls for the UNSC to refer the situation to the ICC or to create and ad hoc international criminal tribunal.<sup>222</sup> In the same line it recommends that the UNSC imposes an arms embargo and that it issues sanctions against the individuals that the FFM has identified under a list of perpetrators.<sup>223</sup> Moreover, it calls for the UNGA or the HRC to create an IM with the purpose of collecting evidence and preparing files that could be used

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<sup>220</sup> UN Human Rights Council, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, *supra* note 209, para. 1548.

<sup>221</sup> UN Human Rights Council, *Report of the Independent International Fact-Finding Mission on Myanmar*, *supra* note 213, paras. 101-104.

<sup>222</sup> UN Human Rights Council, *Report of the Independent International Fact-Finding Mission on Myanmar*, *supra* note 213, para. 105.

<sup>223</sup> *Ibid.*

in potential criminal proceedings.<sup>224</sup> The FFM also reminds that there is a principle of universality of jurisdiction for the crimes of genocide, crimes against humanity and war crimes as jus cogens, (peremptory norms of IL from which no derogation is allowed).<sup>225</sup> While these measures have been briefly presented here, a more detailed analysis will be presented under the final sub-chapter of this case-study on Myanmar.

Finally, it can be concluded that the FFM represented the first firm step that not only the UN, but the international community as a whole, took to address the situation and divert efforts towards accountability. While the FFM was able to fulfil its mandate, a step further became visibly necessary. That is how, the HRC, leading by example and based on the recommendations of the Mission, decided to establish the International Mechanism for Myanmar. On September 2018, the HRC adopted a resolution creating an “*independent mechanism to collect, consolidate, preserve and analyse evidence of the most serious international crimes and violations of international law committed in Myanmar since 2011.*”<sup>226</sup> The same resolution also extended the mandate of the FFM for the mission to be in function until this new mechanism would become operational.<sup>227</sup>

#### 4.3.3 Independent Investigative Mechanism for Myanmar (IIM)

While the resolution establishing the independent mechanism did not provide an official name to denominate it, various UN official web sources refer to it as Independent Investigative Mechanism for Myanmar (IIM).<sup>228</sup> The resolution which was put forward by the Organization of Islamic Cooperation and the European Union was remarkably co-sponsored by more than 100 states.<sup>229</sup> The IIM is a mechanism endowed with a preparatory task in view of potential prosecutions, before national, regional or international courts, for the crimes occurring in Myanmar since 2011. This is a result of the FFM urging for the creation of such a body while

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<sup>224</sup> UN Human Rights Council, *Report of the Independent International Fact-Finding Mission on Myanmar*, *supra* note 213, para. 106.

<sup>225</sup> UN Human Rights Council, *Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar*, *supra* note 209, para. 64.

<sup>226</sup> UN Human Rights Council, *Situation of human rights of Rohingya Muslims and other minorities in Myanmar*, UN Doc. A/HRC/39/L.22, 25 September 2018, para. 22.

<sup>227</sup> UN Human Rights Council, *Situation of human rights of Rohingya Muslims and other minorities in Myanmar*, *supra* note 226, para. 30.

<sup>228</sup> For example: UN Website, “Head of the UN Independent Investigative Mechanism for Myanmar, at the level of Assistant Secretary-General,” (available at <https://www.un.int/pm/head-un-independent-investigative-mechanism-myanmar-level-assistant-secretary-general-0>).

<sup>229</sup> Adams, *supra* note 103, p. 16.

emphasizing that the international community must be the main driver for accountability, as considering the government of Myanmar unable and unwilling to investigate to prosecute crimes under international law.<sup>230</sup>

The precedent of establishing such a mechanism can be found on the International, Impartial and Independent Mechanism on the Syrian Arab Republic established by the UNGA in December 2016 having an almost equal mandate.<sup>231</sup> These mechanisms are to share the outcome files to competent courts or tribunals that respect established standards, such as the right of fair trial, in order to assist in the potential prosecution endeavours.<sup>232</sup> Both represent the most serious attempts of the international community for the time being, in fighting impunity and supporting accountability for these two cases.

The mandate of the IIM, while at a certain level overlaps with that of the FFM, differs from it in substance. The FFM is mandated with establishing facts and circumstances involving the alleged human rights violations while the IIM's objective relies on storing and analysing information having as a purpose future criminal prosecution. It is true that the IIM can make use of relevant information collected by the FFM, and that the latter recommended the establishment of such a mechanism for furthering its work. It is important to re-iterate that the FFM's mandate has been renewed until the IIM becomes operational.

The impact of such a mechanism is potentially far-reaching. First of all, it can have a positive impact for victims' rights, such as the right to truth and satisfaction.<sup>233</sup> The former has been defined as the "right of family members and other close relatives and society to know the truth about serious human rights violations."<sup>234</sup> This right has been recognized by a wide range of actors, amongst them the HRC.<sup>235</sup> The latter, deals with a non-material form of reparation for

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<sup>230</sup> UN Human Rights Council, *Report of the Independent International Fact-Finding Mission on Myanmar*, *supra* note 213, paras. 98, 106.

<sup>231</sup> UN Website, "International, Impartial and Independent Mechanism to assist in the investigation and prosecution of persons responsible for the most serious crimes under International Law committed in the Syrian Arab Republic since March 2011," (available at <https://iiim.un.org/mandate/>).

<sup>232</sup> *Ibid.*

<sup>233</sup> Kingsley Abbott, "Myanmar's Ongoing Independent Mechanism: Careful Planning Needed," *Opinio Juris*, 6 December 2018 (available at <http://opiniojuris.org/2018/12/06/myanmars-ongoing-independent-mechanism-careful-planning-needed/>).

<sup>234</sup> International Commission of Jurists, "The Right to a Remedy and Reparation for Gross Human Rights Violations," October 2018, p.117 (available at <https://www.icj.org/wp-content/uploads/2018/11/Universal-Right-to-a-Remedy-Publications-Reports-Practitioners-Guides-2018-ENG.pdf>).

<sup>235</sup> UN Human Rights Council resolution 9/11, *Right to the truth*, UN Doc. A/HRC/RES/9/11, 24 September 2008.

the damage that has been inflicted to the dignity or reputation of an individual.<sup>236</sup> These rights must be recognized for the numerous victims of Myanmar and the IIM can demonstrate that a much needed effort has been taken for this purpose.

It has been mentioned before that the IIM could support future national efforts of investigation and prosecution. It does not seem probable at the time that Myanmar would undergo such a venture, and this can be demonstrated by the failed attempts of its different commissions, unwillingness to cooperate with the HRC mechanisms that have been established with a similar purpose and the culture of impunity than seems to be entrenched into the state's policies. Despite of this, the work of the IIM could trigger another state's willingness for exercising universal jurisdiction.<sup>237</sup>

The universality principle is based on the acceptance that international law can allow "*states to exercise universal jurisdiction over certain acts which threaten the international community as a whole and which are criminal in all countries.*"<sup>238</sup> While raising a controversial debate, the concept of universal jurisdiction for international crimes, has been codified through binding treaties such as the 1949 Geneva Conventions or the 1984 Convention against torture. This concept is limited to a number of crimes that include war crimes, crimes against humanity and genocide amongst them,<sup>239</sup> and that is why this debate could be useful in the case of the mass atrocities committed in Myanmar. The IIM supports such potential efforts as it can provide national authorities with already gathered documentation and evidence while lessening the challenges that a state might encounter in terms of resources or reach.

Finally, it is relevant to mention the potential influence and support which the work of the IIM could provide to the International Criminal Court (ICC). The ICC is a judicial body with a permanent and independent nature which is competent to prosecute and condemn a limited number of serious crimes, these being the crime of genocide, crimes against humanity, war crimes and the crime of aggression.<sup>240</sup> Nevertheless, because of the fact that Myanmar is not a

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<sup>236</sup> International Commission of Jurists, "The Right to a Remedy and Reparation for Gross Human Rights Violations," *supra* note 234, p. 153.

<sup>237</sup> Abbott, *supra* note 233.

<sup>238</sup> Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7<sup>th</sup> edition, 1997, p. 112.

<sup>239</sup> Human Rights Watch, "Basic Facts on Universal Jurisdiction," 19 October 2009 (available at <https://www.hrw.org/news/2009/10/19/basic-facts-universal-jurisdiction>).

<sup>240</sup> International Criminal Court Website, "How the Court Works," (available at <https://www.icc-cpi.int/about/how-the-court-works>).

state party to the Rome Statute, the treaty which established the ICC, the jurisdiction of the Court also remains limited.

Notwithstanding this situation, the Pre-Trial Chamber of the ICC concluded in September 2018 that the Court has jurisdiction over the crime against humanity of deportation, as victims had coercively travelled from Myanmar (a non-Party) into Bangladesh (a State Party).<sup>241</sup> The Court also found that any other crime set out in art.5 of the Statute could fall under its jurisdiction if occurring under the same context<sup>242</sup> meaning that an element or part of the crime occurred in the State Party's territory. This deliberation came after the request initiated by Chief Prosecutor Fatou Bensouda, who since that month was authorized to begin a preliminary examination to determine whether there is enough evidence for potential prosecution.<sup>243</sup>

In this manner, the IIM could support the Prosecutor's efforts, in sharing relevant information and identifying credible sources, especially targeted to the aforementioned crime. While both the ICC's involvement and the IIM represent a positive development in the fight for accountability which must be supported, the mass atrocity crimes that have occurred in Myanmar are still not addressed. Fortunately, there are still avenues for further action, but ultimately, they rely on the political will and the responsibility of the international community to demonstrate that, while having failed once more to the "never again" promise, it will at least fight for justice.

### **3.4 Interim Conclusions and Further Avenues of Action**

From the analysis that has been developed throughout this case-study it can be concluded that the HRC has been at the forefront of efforts in the case of Myanmar. While by means of the UPR and the Special Rapporteurs it has situated the crisis at the centre of its agenda and of the UN's one while it has also been the first warning about that the risk of mass atrocities. Furthermore, it has continuously urged for action. Nevertheless, it seems that these early-warnings and the attempted constructive engagement with the State have not been enough for avoiding the occurrence of mass atrocities.

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<sup>241</sup> *Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute"*, International Criminal Court, 6 September 2018, para. 73.

<sup>242</sup> International Criminal Court Website, "ICC Pre-Trial Chamber I rules that the Court may exercise jurisdiction over the alleged deportation of the Rohingya people from Myanmar to Bangladesh," 6 September 2018 (available at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1403>).

<sup>243</sup> Paul R. Williams and Jessica Levy, "Atrocities Documented, Accountability Needed: Finding Justice for the Rohingya through the ICC and Independent Mechanism," *Harvard Human Rights Journal*, vol. 31 (2018).

Furthermore, the HRC has also led the UN actions in responding to mass atrocities occurring in Myanmar. It first gave an alert that there was need of urgent action by means of the special sessions, but also when the international community focused rather on the development that Myanmar had apparently undergone, it impulsed and established the FFM for the world to see what had really happened in the country and what were the paths that should be followed. The HRC responded, again, in view of the culture of impunity reigning in Myanmar and the inaction especially of the UNSC in fighting for accountability. With the establishment of the IIM which will soon become active, the people of Myanmar will obtain at least, a partial but not complete justice.

The necessity for pushing even further has become a fact. While the HRC is not mandated to refer issues to the UNSC, member states that are part of both of the bodies could strengthen the item in the UNSC's agenda. Moreover, the UNSC by means of the powers conferred to it in Chapter VII of the UN Charter, can refer the situation of Myanmar to the ICC under article 13(b) thus breaking the limits that are constraining the Court in regarding the mass atrocities that have occurred in the country. Alternatively, under the same provisions, the UNSC could create an ad hoc tribunal as it did with the ICTY and ICTR.<sup>244</sup> A hybrid justice mechanism, involving the national judicial system accompanied by the assistance of the UN or other entities could also be put at the table,<sup>245</sup> however, because of the apparent unwillingness of Myanmar to even refuse to acknowledge the occurrence of mass atrocities in its territory makes for this option to be rather implausible.

The UNSC, which could act under pillar III of R2P, can also mandate the creation of COIs under article 34 of the UN Charter in order to investigate "any situation which might lead to international friction." However, in this case it would probably overlap with the work of the FFM and the IIM thus, resources should be better invested. The security and peace body can undertake visit missions entailing preventative diplomacy and mediation. On the other side of the spectrum, the UNSC has the prerogative under chapter VII of the UN Charter to place arms embargos, commodity and economic sanctions, travel bans, and assets freezes that can act as deterrence elements. Finally, and as a last resort, under art. 42 of the UN Charter, could call for

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<sup>244</sup> For more information consult: Lilian A. Barria and Steven D. Roper, "How effective are international criminal tribunals? An analysis of the ICTY and the ICTR," *The International Journal of Human Rights*, vol. 9, no. 3 (2005).

<sup>245</sup> See for example, UN Office of the United Nations High Commissioner for Human Rights, "Rule of Law Tools for Post-Conflict States: Maximizing the Legacy of Hybrid Courts," 2008 (available at <https://www.ohchr.org/Documents/Publications/HybridCourts.pdf>).

coercive military action “that might include demonstrations, blockade, and other operations by air, sea or land forces.” It is not in the purpose neither on the limits of this thesis to debate further on the effectiveness of such action, however, it is to be mentioned that these actions need a P5 unanimity that it’s not so common to achieve and it can be even more difficult in view of China and Russia’s position on the matter throughout the years.

This are some of the actions that could be taken by the UNSC and which could take further the process for justice and accountability. UNSG António Guterres has acknowledged this fact, and in an attempt that has been not taken by any UNSG since 1989, it has written an official letter to the UNSG urging to address the situation, especially for those that have been obliged to flee and for the purposes of safe return and reconciliation.<sup>246</sup> While not explicitly invoking art.99 of the UN Charter which says that “*the Secretary General may bring to the attention of the Security Council any matter which, in his opinion, may threaten the maintenance of international peace and security*”, the UNSG argued that it implicitly followed that provision.

By bearing in mind Myanmar’s refusal to accept the outcomes of the FFM, another possible path, which raises scepticism, but it can be worth considering, is the legal action involving adjudication that could fall to the International Court of Justice (ICJ). The ICJ does not prosecute individuals as in the case of the ICC, rather it deals with disputes between states. Under its limited jurisdiction, the ICJ does have a treaty-based jurisdiction on the parties to the 1948 *Genocide Convention* to which Myanmar is a State Party and from which is has not made a reservation on potential jurisdiction by the ICJ. In this case, one or more parties to that same Convention could raise a case against Myanmar’s alleged breach under the conventions’ obligations to prevent and punish genocide.<sup>247</sup> On a recent event, the Foreign Minister of the Gambia announced that his state was willing to take the case of Myanmar to the ICJ.<sup>248</sup>

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<sup>246</sup> UNSG Secretary-General António Guterres, “Press Conference,” UN Website, 15 September 2017 (available at <https://www.un.org/press/en/2017/sgsm18676.doc.htm>).

<sup>247</sup> International Federation for Human Rights, “No Stone Unturned: Q&A on Accountability for Crimes in Myanmar,” September 2018, p.14 (available at [https://www.fidh.org/IMG/pdf/fidh\\_-\\_no\\_stone\\_untuned\\_-\\_q\\_a\\_on\\_accountability\\_for\\_crimes\\_in\\_myanmar\\_.pdf](https://www.fidh.org/IMG/pdf/fidh_-_no_stone_untuned_-_q_a_on_accountability_for_crimes_in_myanmar_.pdf)). More information about this possibility to be found under: Michael A. Becker, “The Situation of the Rohingya: Is there a Role for the International Court of Justice?” *EJIL:Talk!*, 14 November 2018 (available at <https://www.ejiltalk.org/the-situation-of-the-rohingya-is-there-a-role-for-the-international-court-of-justice/>).

<sup>248</sup> Global Centre for the Responsibility to Protect, “Atrocity Alert: Myanmar Faces Possible Genocide Case at International Court of Justice,” 29 May 2019 (available at <http://createsend.com/t/j-5DA5AFB7859C41A42540EF23F30FEDED>).

The response of the UN as a whole and the HRC in specific appears to not have been sufficient, and this statement can be demonstrated by the current on-going situation which still in the first months of 2019 has turned the international community in being a witness again of various situations of human rights violations and recurrent violence taking place in Myanmar.<sup>249</sup> Moreover, as recent as February 2019, an inquiry into the UN's conduct in Myanmar and more precisely its failure in responding to years of warning, has been initiated by the UNSG who has not provided further details. It is not clear whether which are the limits and scope of such measures and either if the results are going to be publicly published.<sup>250</sup>

To conclude with, the situation in Myanmar has not only exerted extreme damage to the Rohingya community and other ethnic groups in the state, but has also proven that prevention failed once, and it is failing again, while the international response has focused its action not even on halting but apparently just mitigating the crisis' effects. There's need for further, stronger action and while the HRC's initiatives have signified a major step, its options for undertaking additional measures seem limited; that is why other UN bodies or even States acting on their own initiative must step in and finally find a conclusion to the conflict, while prioritizing the lives of those suffering. However, for many, even those solutions come too late. Again.

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<sup>249</sup> Global Centre for the Responsibility to Protect, "Atrocity Alert: Myanmar Military Units Responsible for Genocide Redeployed to Rakhine State," 27 March 2019 (available at <http://createsend.com/tj-ED3F12C35D5465932540EF23F30FEDED>).

<sup>250</sup> Emanuel Stoakes and Hannah Ellis-Petersen, "Rohingya crisis: UN Investigates its 'Dysfunctional' Conduct in Myanmar," *The Guardian*, 27 February 2019 (available at <https://www.theguardian.com/world/2019/feb/27/un-investigates-conduct-myanmar-rohingya>).

## 5. Case-Study on Cameroon: A Missed Opportunity for Prevention and Response?

### 5.1 Introduction and Factual Background

Presidential elections in Cameroon were held the past October 2018, having as a result the re-election of President Paul Biya, who has occupied this position for the last 36 years.<sup>251</sup> The democratic exercise, has taken place under a situation of turmoil and violence which the country has been living in since 2016. While the causes of instability emerging from a secessionist movement occurring in the Anglophone region of the country and the severe reaction of the government, can be traced back to the post-colonial period, it is from aforementioned year that violence has been rising in a more noticeable manner.<sup>252</sup>

With the purpose of better understanding the current tensions governing the state of affairs in Cameroon it is important to briefly discuss the country's historical background starting by "Kamerun" officially becoming a German protectorate in 1884.<sup>253</sup> Following the German defeat at the Great War, the League of Nations, the UN's predecessor, established a trusteeship under its mandate, by which both the United Kingdom and France would govern over this territory.<sup>254</sup> Each of the powers used their own language, justice and education systems in the administration of their corresponding areas of influence, which led to a heterogenization of the two regions. While maintaining their essential differences they unified in 1961 creating the current Republic of Cameroon. The process of re-unification was one based on assimilation and centralisation led by the Francophone majority which relegated to a secondary role the remaining 20% of the Anglophone population.<sup>255</sup>

An unequal federalist system was established and several attempts into further unifying the territories were carried out both by Ahmadou Ahidjo, President of Cameroon from 1960 to

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<sup>251</sup> Josiane Kouagheu, "Biya wins Cameroon election to extend 36-year rule," *Reuters*, 22 October 2018 (available at <https://www.reuters.com/article/us-cameroon-election/biya-wins-cameroon-election-to-extend-36-year-rule-idUSKCNIMWIXZ>).

<sup>252</sup> For more on the crisis, the reader is referred to: Global Centre for the Responsibility to Protect, "Populations at Risk: Cameroon," (available at <http://www.globalr2p.org/regions/cameroon>).

<sup>253</sup> For more information on Cameroon's colonial past and the origins of the Anglophone Crisis see: International Crisis Group, "Cameroon's Anglophone Crisis at the Crossroads," 2 August 2017 (available at [https://d2071andvip0wj.cloudfront.net/250-camerouns-anglophone-crisis-at-the-crossroads\\_0.pdf](https://d2071andvip0wj.cloudfront.net/250-camerouns-anglophone-crisis-at-the-crossroads_0.pdf)).

<sup>254</sup> *Ibid.*

<sup>255</sup> Amnesty International, "A Turn for the Worse: Violence and Human Rights Violations in Anglophone Cameroon," 2017 (available at <https://www.amnesty.org/download/Documents/AFR1784812018ENGLISH.PDF>).

1982, and President Paul Biya, who began its mandate in 1982. These actions spurred the formation of different movements initiated by anglophone militants whose purpose became not solely to raise awareness of their cause on the diaspora, but also to diplomatically appeal to the UN and other international entities in order to spread their cause.<sup>256</sup>

The movements, which showcased a feeling of alienation rooted in the quest for ameliorating the economic, cultural and administrative status of the anglophone region led even to the limits of declaring the independence, in several occasions, of the so-called state of Ambazonia which would constitute an independent Cameroonian anglophone state.<sup>257</sup> Tensions have been increasing over the last years, and as almost expected, violence was triggered in 2016 when protests that conducted to strikes and school boycotts, were initiated by primarily students, teachers and lawyers denouncing the predominant use of French in schools and the attempts of harmonization of the two different systems. Moreover, the appointment of French speaking judges accused of not possessing the required knowledge on Anglo-Saxon “common law” and the lack of accessibility and availability of English legal texts represented further grounds.<sup>258</sup>

The response of government to these demonstrations which continued on 2017, arose as violent repressions, which involved arbitrary detentions, restrictions on communication systems such as phone lines and the internet and even reported killings of protesters.<sup>259</sup> There is mounting evidence showcasing the devastating results of the government security forces carrying out operations that involve the burning of entire Anglophone villages. The state’s security forces are accused of committing widespread attacks against civilians, while responding to further attacks led by armed separatist groups.<sup>260</sup>

The conflict has also provoked the internal displacement of more than 400,000 people<sup>261</sup> and the fleeing to the neighbour state of Nigeria of over 30,000 Anglophone Cameroonians in seek

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<sup>256</sup> International Crisis Group, “Cameroon’s Anglophone Crisis at the Crossroads,” *supra* note 253.

<sup>257</sup> *Ibid.*

<sup>258</sup> *Ibid.*

<sup>259</sup> Amnesty International, “A Turn for the Worse: Violence and Human Rights Violations in Anglophone Cameroon,” *supra* note 255.

<sup>260</sup> BBC News, “Burning Cameroon: Images you’re not meant to see,” 25 June 2018 (available at <https://www.bbc.com/news/world-africa-44561929>).

<sup>261</sup> For more information consult: UN Refugee Agency Website, “Refugee Situations: Cameroon,” (available at <https://data2.unhcr.org/en/country/cmr>).

of asylum in a year timespan<sup>262</sup> fearing the threat of increased violence between the government and the armed groups. In view of these facts, both the International Crisis Group (ICG) and the Global Centre for the Responsibility to Protect (GCR2P) are labelling Cameroon's situation as a potential or imminent risk of becoming a civil war which could involve the occurrence of gross human rights violations amounting to mass atrocity crimes.<sup>263</sup>

Reports mention also the fact that the Cameroonian government is committing abuses under the context of the confrontations occurring for the last four years against an external threat, the Nigeria-born insurgent group Boko Haram.<sup>264</sup> The radical militant group was created in 2002 with the objective of establishing an Islamic state based ruled by Sharia law.<sup>265</sup> While its activity has been focused on Nigeria, it has been also present in Cameroon's poorest region, the Far North, since 2011. By taking advantage, particularly of the youth's precarious situation on the area, it has established a logistic and recruitment base in the adjacent border territories with Nigeria where numerous attacks have been carried out.<sup>266</sup>

This evident growing violence in the State characterized by repression, hate speech, displacement and an increasing number of deaths and disappearances seem to reflect similarities on image of the human rights situation of Myanmar in the same period of time. While by 2017 it became clear that mass atrocity crimes had taken place in the South-East Asian state, the risk of the African state to move towards the same direction becomes a potential disastrous outcome for its population.

However, and in spite of the government of Cameroon's failure of not only protecting its population but being a principal perpetrator of abuses, on 12 October 2018, the state was elected as a member of the HRC for the 2019-2021 term.<sup>267</sup> Instead of portraying an image of

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<sup>262</sup> UN Refugee Agency Website, "Fleeing violence, Cameroonian refugee arrivals in Nigeria pass 30,000," 9 November 2018 (available at <https://www.unhcr.org/news/briefing/2018/11/5be551224/fleeing-violence-cameroonian-refugee-arrivals-nigeria-pass-30000.html>).

<sup>263</sup> International Crisis Group, "Cameroon," (available at <https://www.crisisgroup.org/africa/central-africa/cameroon>) and Global Centre for the Responsibility to Protect, "R2P Monitor Issue 43," 15 January 2019 (available at [http://www.globalr2p.org/media/files/r2p\\_monitor\\_jan2019\\_final.pdf](http://www.globalr2p.org/media/files/r2p_monitor_jan2019_final.pdf)).

<sup>264</sup> See: Amnesty International, "Cameroon's Secret Torture Chambers: Human Rights Violations and War Crimes in the Fight against Boko Haram," 2017 (available at <https://www.amnesty.org/download/Documents/AFR1765362017ENGLISH.PDF>).

<sup>265</sup> Claire Felter, "Nigeria's Battle With Boko Haram," *Council on Foreign Relations*, 8 August 2018 (available at <https://www.cfr.org/backgrounder/nigerias-battle-boko-haram>).

<sup>266</sup> *Ibid.*

<sup>267</sup> Global Centre for the Responsibility to Protect, "2019-2021 UN Human Rights Council Elections and the Responsibility to Protect," 12 October 2018 (available at <http://www.globalr2p.org/media/files/r2p-and-hrc-elections-2018.pdf>).

hope, as it is expected for the elected members to abide by the highest standards in terms of human rights, it provides yet another substantiated item of debate for those doubting on the body's core while raising the same critiques which undermined the HRC's predecessor.

Under the former chapter it was discussed that despite of the numerous warnings issued by a range of actors from SRs, the OHCHR or states and NGOs under the URP process that can be traced back even to the UNCHR, the HRC was not able to avert the occurrence of mass atrocities. In the case of Cameroon, the human rights body does still have a window of opportunity to address the issue before it is too late. Therefore, the aim of this case-study is to analyse whether the HRC has taken relevant steps into preventing mass atrocities but also, to determine whether responsive approaches can be preventively enforced for avoiding further escalations and protecting the population.

## **5.2 The HRC: Preventing Mass Atrocity Crimes in Cameroon?**

### **5.2.1 Thematic Special Procedures**

This chapter will follow a similar pattern of discussion as the case-study on Myanmar, in this manner, the Special Procedures and the UPR, two essential mechanisms within the framework of the HRC, will be the focus of analysis on the preventative measures taken so far. Nevertheless, and to begin with, an important distinction which differentiates this case from the antecedent discussion lies in the circumstance that the neither the UNCHR nor the HRC have established a country-specific SR for Cameroon. Therefore, the following sub-chapter will be including different thematic SPs which have addressed the situation of Cameroon in their work or had undertaken country-visits to its territory as part of their mandates.

One of the first accounts of a SP mentioning a pertinent issue regarding the human rights situation in Cameroon can be found on the report submitted to the UNCHR by the SR on extrajudicial, summary or arbitrary executions, Mr. Bacre Waly Ndiaye. In this document he makes a brief account of a number of deaths caused by torture undertaken by the security forces in the midst of increased violence that broke out in 1997 after legislative elections were held.<sup>268</sup> Similar incidents were reported by Mr. Nigel S. Rodley, SR on torture and other cruel, inhuman

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<sup>268</sup> UN Commission on Human Rights, *Report of the Special Rapporteur, Mr. Bacre Waly Ndiaye, submitted pursuant to Commission on Human Rights resolution 1997/61*, UN Doc. E/CN.4/1998/68/Add.1, 19 December 1997, para. 66.

or degrading treatment or punishment, who by means of an urgent communication,<sup>269</sup> raised awareness on the situation of more than 200 persons who had been arrested under the same context.<sup>270</sup>

Comparable actions were continued also after the SPs absorption into the newly established HRC. By monitoring different reports and other documents presented by Special Rapporteurs it is possible to identify human rights conditions that would have deserved further attention by the Council. The UNHCHR at the time, Ms. Navi Pillay undertook a mission to the country and as a result of this, she expressed her concerns in areas such as violence against women, journalists harassment, or the criminalization of homosexuality<sup>271</sup> but no references were made in relation to the Anglophone region as the situation at that time did not raised any major alerts. However, the IE on minority issues already in 2013 noted that discriminatory policies against the English-speaking populations were present, however they were not further addressed.<sup>272</sup> The majority of accounts presented by SPs dealt primarily with individual or relatively small collective cases as by that time there were not accounts for widespread human rights violations. As mentioned very recently by the UNHCHR “*until just a few years ago, (Cameroon) has been one of the most settled and peaceful (states) in the region.*”<sup>273</sup>

The diverse reports presented by such a wide spectrum of thematic procedures present visible elements that could be considered primary risks for the potential perpetrations of mass atrocities, such as patterns of discriminations. These are one of the main elements of analysis of the SP on minority issues and have been identified by the UNSG under its R2P report as a

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<sup>269</sup> For more information about the different types of communications issued by Special Procedures, the reader is referred to: UN Human Rights Council, “Manual of Operations of the Special Procedures of the Human Rights Council,” 2008 (available at [https://www.ohchr.org/Documents/HRBodies/SP/Manual\\_Operations2008.pdf](https://www.ohchr.org/Documents/HRBodies/SP/Manual_Operations2008.pdf)).

<sup>270</sup> UN Commission on Human Rights, Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights resolution 1997/38, UN Doc. E/CN.4/1998/38/Add.1, 24 December 1997, paras. 44-48.

<sup>271</sup> Navi Pillay, “Opening remarks by UN High Commissioner for Human Rights Navi Pillay at a news conference at end of her mission to Cameroon Yaoundé,” UN OHCHR, 2 July 2013 (available at <https://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13497&LangID=E>).

<sup>272</sup> UN OHCHR Website, “UN Expert on minority issues welcomes Cameroon’s efforts and urges important next steps to protect minorities,” 11 September 2013 (available at <https://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13711&LangID=E>).

<sup>273</sup> UN OHCHR Website, “Bachelet welcomes Cameroon’s willingness to cooperate to tackle human rights crises,” 6 May 2019 (available at <https://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=24565&LangID=E>).

paramount warning factor which should be dealt with under structural prevention efforts.<sup>274</sup> In the case of Cameroon, the English-speaking minority has vindicated its uprising as a response to the political discrimination, its underrepresentation and the fear for further restriction on its language, education and judicial system, paired with a sense of socioeconomic disparities derived from discriminatory policies driven by the state.

It is not until late 2016 when turmoil and violence arose as a result of the protests and strikes which were severely repressed by the security forces, that the SPs and other UN actors seemed to react. Mr. David Kaye, SR on the promotion and protection of the right to freedom of opinion and expression raised concerns on the restrictive space for free speech and denounced the network shutdown that the government had carried on as a violation of international law.<sup>275</sup> In view of the government justifying these measures for national security purposes, another identified risk factor is plainly visible in this case; “the introduction of legislation derogating rights and freedoms or the imposition of emergency or extraordinary security laws.”<sup>276</sup> In December of that year, the SRs on minority issues and the SR on rights to freedom of peaceful assembly and of association, urged the government to restrain from using force against its civilians and to begin dialogue in order to address the concerns of the English-speaking protestors.<sup>277</sup>

It is in 2017 and 2018 where accounts of continuous voices of concern on the increasing human rights abuses perpetrated not only by security forces, but also by armed groups of insurgents, are to be present in different spheres of discussion, particularly inside of the UN. The UNSG António Guterres urged all the parties to refrain from further violence and called for investigating of the facts.<sup>278</sup> This view was supported by the UNHCHR who called for the government to “establish prompt, effective, impartial and independent investigations to ensure

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<sup>274</sup> UN General Assembly and UN Security Council, *Responsibility to protect: State responsibility and prevention. Report of the Secretary-General*, UN Doc. A/67/929 and S/2013/399, 9 July 2013, para.19.

<sup>275</sup> UN OHCHR Website, “UN expert urges Cameroon to restore internet services cut off in rights violation,” 10 February 2017 (available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21165&LangID=E>).

<sup>276</sup> UN General Assembly and UN Security Council, *Responsibility to protect: State responsibility and prevention. Report of the Secretary-General*, *supra* note 274, para. 23.

<sup>277</sup> UN OHCHR Website, “Cameroon: UN experts urge Government to halt violence against English-speaking minority protests,” 21 December 2016 (available at <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=21054&LangID=E>).

<sup>278</sup> UN Website, “Cameroon: UN Secretary-General urges dialogue to resolve grievances,” 3 October 2017 (available at <https://www.refworld.org/docid/59d390ae4.html>).

accountability”<sup>279</sup> and from a rather large number of SPs calling for the halt of violence in the State “where the country’s English-speaking minority are reportedly suffering worsening human rights violations.”<sup>280</sup>

By having outlined the Special Procedures’ involvement with the human rights situation of Cameroon through the years some elements can be differentiated from the previous case-study that allow to better understand the potential impact of the mechanism in both cases. The different SRs on Myanmar pinpointed towards risk factors of the potential commission of mass atrocity crimes from a rather earlier time. The discrimination policies accompanied by inhuman treatment and arbitrary executions carried out against the Rakhine ethnic minorities were part of warnings issued already in the 1990s. Throughout the years the evolution of the crisis which had peaks of violence and periods where the government was rather praised for its development, could be monitored by the reports and statements of the country-specific procedure.

Whereas in the case of Cameroon, the task of monitoring the human rights situations during the last decade has been more challenging, as the different SPs have dealt with a wide array of areas of work ranging from food to minority rights. For these SPs country-visits had a much wider scope and range. As an example, from 1999 and until the UPR of Cameroon in 2009 no country-visit or missions were undertaken to the state of Cameroon.<sup>281</sup> While these thematics are also essential for determining embedded practices that could developed into risk factors, a more systematic and focused scrutiny of Cameroon’s state of affairs appears to be necessary. For that reason, the HRC has the opportunity to establish a country-specific SR, IE or WG focused solely on the human rights situation of this state. It is true that the thresholds of violence and the overall situation before 2016 was not comparable to the grave human rights violations taking place in Myanmar in the same periods of time, however, in view of the violence escalation and the current human rights and humanitarian situation of the last three years, this option appears to be more relevant than ever.

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<sup>279</sup> UN OHCHR Website, “Press briefing notes on Cameroon and Central African Republic,” 20 November 2018 (available at <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23902&LangID=E>).

<sup>280</sup> UN OHCHR Website, “Cameroon: human rights must be respected to end cycle of violence - UN experts,” 17 November 2017 (available at <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22409&LangID=E>).

<sup>281</sup> UN Human Rights Council, Compilation Prepared by the Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15(B) of the Annex to the Human Rights Council Resolution 5/1, UN Doc. A/HRC/WG.6/4/CMR/2, 9 December 2008, p. 4.

This argument is sustained by the former discussion on the preventative mandate of the SPs: in the case of Cameroon, they could be suitable for opening channels of discussion with all relevant stakeholders, for maintaining a constant reporting on the situation to the HRC and the UNGA, and for acting as a potential deterrence factor if pressuring the state to comply with its primary responsibility of protecting the population. In this case, where other threats such as the terrorist campaign of Boko Haram looms over the civilians' security, instead of the wide coverage of thematic procedures, a more targeted assessment and a centralization of efforts should be prioritized.

It would be simplistic to conclude just from the mentioned information that the impact of the SPs on the prevention of mass atrocities in Cameroon is weak. Nevertheless, if compared to the numerous occasions that the SRs on Myanmar had been the primary voice of alert for potential risks and indicators, it could be argued that there's need for a stronger focus of this mechanism on the situation of Cameroon. This vacuum allows for briefly presenting some recommended ameliorations for the future work of the SPs.

First of all, the essence of the work of the SPs relies heavily on their cooperation with the countries, therefore the channels of communication with the missions in Geneva and New York as well as with other mandate-holders and especially with other actors such as the OHCHR must be strengthened.<sup>282</sup> If a country-specific SR is mandated for Cameroon it should, from the beginning of its work, engage not only with the government but in this case, it is essential that other un-represented parties, in this case the English-speaking minority but not exclusively, to be heard through the voice of the SP. Impartiality should be at the core of their efforts. Country-visits, which as mentioned earlier, constitute one of the main tools at their disposal, and the resulting outcome reports should be published in a rapid manner; if these include warning signs which have to be addressed urgently an informal briefing or an early collective communication should be called for. Moreover, it is very relevant that the SPs are able to present under interactive dialogues their findings to both the HRC and the UNGA. In the same manner, there is a possible open window to engage with the UNSC, thus putting into practice the so-needed cooperation amongst the human rights and security and peace pillars. Mass

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<sup>282</sup> Marc Limon and Ted Piccone, "Human Rights Special Procedures: Determinants of Influence," *Universal Rights Group*, March 2014, p.37 (available at <https://www.brookings.edu/wp-content/uploads/2016/06/un-human-rights-experts-evaluation-piccone.pdf>).

atrocities are the worst forms of human rights violations, but they also represent one of the biggest threats for international security and stability.

### 5.2.2 The Universal Periodic Review of Cameroon

As a next step in the discussion of the preventative part of this chapter, the three UPR cycles which Cameroon has undergone will be analysed in view of determining whether the process is contributing towards the prevention of mass atrocities in the country. By regarding the similarities in terms of indicators that the first two present, they are to be jointly analysed. Moreover, in this case the UPR will be used as a tool for filling gaps of relevant information of the situation on the ground and the observation of increased risks factors and indicators.

#### **First Cycle (2009) and Second Cycle (2013)**

The review in the WG of Cameroon's first UPR cycle took place in February 2009 and the report was subsequently adopted in the June plenary. In this cycle, human rights abuses are identified just in one case by an NGO, while the focus of the recommendations and discussions deal with issues such as child rights, minorities and especially the ratification of human rights core treaties.<sup>283</sup> Just in one occasion the situation of the English-speaking minority is mentioned under the "other stakeholders" inputs by the Unrepresented Nations and Peoples Organization indicating that "English speaking people in the south of Cameroon has been subject to reportedly widespread cultural assimilation."<sup>284</sup>

An event that has to be distinguished and which does raise alert was brought up by the contribution of the International Federation for Human Rights, which reported that serious human rights violations were perpetrated when state agents used disproportionate force against

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<sup>283</sup> The three documents can be found under: UN Human Rights Council, *National Report Submitted in Accordance with Paragraph 15(A) of the Annex to Human Rights Council Resolution 5/1*, UN Doc. A/HRC/WG.6/4/CMR/1, 11 December 2008.

UN Human Rights Council, *Compilation Prepared by the Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15(B) of the Annex to Human Rights Council Resolution 5/1*, UN Doc. A/HRC/WG.6/4/CMR/2, 9 December 2008.

UN Human Rights Council, *Summary Prepared by the Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15(C) of the Annex to the Human Rights Council Resolution 5/1*, UN Doc. A/HRC/WG.6/4/CMR/3, 24 November 2008.

<sup>284</sup> UN Human Rights Council, *Summary Prepared by the Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15(C) of the Annex to the Human Rights Council Resolution 5/1*, *supra* note 283, para. 8.

civilians as a response to numerous demonstrations taking place in February 2008.<sup>285</sup> Neither the SuR nor other states making recommendations mentioned this fact again. However, this is yet another example of the importance of civil society and NGOs to participate in this process and to raise awareness of issues that states avoid sometimes for the sake of “reciprocal praising.”

Whereas on the interactive dialogue of the WG Cameroon was highly congratulated by the delegations for the quality of its national report and its commitment and engagement with human rights field,<sup>286</sup> on the mid-term assessment conducted by UPRinfo, an organization whose mission is to utilise the UPR to ensure cooperation amongst a wide range of stakeholders, it is demonstrated that rather the government has barely engaged in implementing the recommendations of this cycle.<sup>287</sup> Recommendations that have a directly link to atrocity crimes prevention such as the ratification of the Genocide Convention or the Rome Statue were not implemented by the SuR.<sup>288</sup> Others that could signify a step forward in the protection of human rights, such as the strengthening of efforts in the eradication of widespread corruption, suffered from the same fate.

The second cycle of Cameroon’s UPR process, falls also on a period of time in which triggering indicators neither appear to be present nor to forecast an imminent crisis. Nevertheless, further risks factors that contribute towards the consolidation of a culture of human rights abuses that could be sooner or later triggered and pushed towards the potential commission of mass atrocity crimes, can be plainly identified.

Under its national report, as well as, during the deliberations of the WG, the fact that Cameroon had ratified eight international human rights and humanitarian conventions is congratulated. From these, 2 had been repeatedly recommended during the first cycle, a fact that could strengthen the argument on the UPR’s potential as a driver for state’s ratifications.<sup>289</sup>

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<sup>285</sup>UN Human Rights Council, *Summary Prepared by the Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15(C) of the Annex to the Human Rights Council Resolution 5/1*, supra note 283, para. 10, 21.

<sup>286</sup> UN Human Rights Council, *Draft Report of the Working Group on the Universal Periodic Review*, UN Doc. A/HRC/WG.6/4/L.7, 9 February 2009, para. 13.

<sup>287</sup> UPR Info, “Responses to Recommendations: Cameroon.” February 2009 (available at [https://www.upr-info.org/sites/default/files/document/cameroon/session\\_4\\_-\\_february\\_2009/recommendationstocameroon2009.pdf](https://www.upr-info.org/sites/default/files/document/cameroon/session_4_-_february_2009/recommendationstocameroon2009.pdf)).

<sup>288</sup> *Ibid.*

<sup>289</sup> UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Cameroon*, UN Doc. A/HRC/24/15, 5 July 2013, para. 8.

Nevertheless, the aforementioned Genocide Convention or the Rome Statute of the ICC were not amongst those.

The UNSGs reports on R2P repeatedly mention the importance of States becoming parties to relevant international instruments.<sup>290</sup> The dissemination of norms is to be placed under structural prevention efforts but in the same manner, it is made clear that the sole exercise of ratification to pertaining instruments related to mass atrocities is not sufficient for avoiding such crimes. What it needs to be highlighted in these cases is the implementation of such norms not only in the legal domestic and criminal spheres, but also in an educative scheme where national authorities and citizens are made aware of the dynamics of these crimes<sup>291</sup> and the roles that each stakeholder has in preventing them. The UN Framework identifies the lack of “ratification and domestication of relevant international human rights and humanitarian law treaties” as a negative factor that impacts the overall competence of the State in preventing mass atrocities.<sup>292</sup>

### **Third Cycle: 2018**

It is under the third UPR cycle of Cameroon where indicators of potential mass atrocities seem to appear more present than the previous periods. By taking into consideration that the report was considered on May 2018, contextually the violence in the country had severely increased and numerous accounts of human rights violations were already remarked. Nevertheless, the perpetration of mass atrocities has not been officially acknowledged, thus allowing for still treating the case under preventative efforts.

To begin with, a much-debated topic under the UPR discussions by all stakeholders has been the freedom of expression. On one hand and already under its national review, Cameroon clearly states that “freedom of expression, may be restricted if this is necessary to maintain law and order.”<sup>293</sup> The state reiterates this idea while mentioning that it has a responsibility to “strike

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<sup>290</sup> UN General Assembly and UN Security Council, *Implementing the Responsibility to Protect: Report of the Secretary General*, *supra* note 88, para. 17.

UN General Assembly and UN Security Council, *A Vital and Enduring Commitment: Implementing the Responsibility to Protect: Report of the Secretary General*, *supra* note 8, para. 19.

<sup>291</sup> UN General Assembly and UN Security Council, *Fulfilling our Collective Responsibility: International Assistance and the Responsibility to Protect. Report of the Secretary-General*, UN Doc. A/68/947 and S/2014/449, 11 July 2014, para. 30.

<sup>292</sup> United Nations Office on Genocide and the Responsibility to Protect, *Framework of Analysis for Atrocity Crimes - A tool for prevention*, *supra* note 18, p.12.

<sup>293</sup> UN Human Rights Council, *National report submitted in Accordance with Paragraph 5 of the Annex to Resolution 16/21 of the Human Rights Council*, UN Doc. A/HRC/WG.6/30/CMR/1, 5 March 2018, para. 30.

a balance between security and freedom.”<sup>294</sup> This debate can also include the challenges and restrictions that human rights defenders have encountered while carrying out their duties.

On the other, under the UN compilation, as well as, the other stakeholders reports these actions are denounced when providing numerous cases that contravene the freedom of expression and assembly, especially of the most affected by these restrictions, the English-speaking community.<sup>295</sup> Cameroon is repeatedly urged to ensure these essential rights, and indeed their relevance is far-reaching when discussing them under the prevention umbrella as the severe restriction on the use of channels of communication or the imposition of extraordinary security policies are identified as enabling risks which are defined under the Framework as “events or measures.. which provide an environment conducive to the commission of atrocity crimes...”<sup>296</sup>

The anti-terrorism Law that Cameroon enacted in 2014 could also be measured under the category of extraordinary policy measures as an element of risk identified under the UPR process. The law, which involves even the death penalty as a maximum punishment, has raised concern as it is considered a pretext for restricting rights and stifle political opposition and human rights defenders, while not respecting international human rights law.<sup>297</sup> UPR recommendations on the amendment of this law are numerous.<sup>298</sup> Arguably, it is of paramount importance that this law has been raised as an issue of debate as Cameroon should address it in the same manner that Myanmar’s 1982 Citizenship Law, which has had such negative implications, if addressed from early stages could have represented an essential element for structural prevention.

While accountability has been analysed under the previous case-study as a mechanism for response and will also be used in this chapter for an equal purpose, this situation also allows to

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<sup>294</sup> UN Human Rights Council, *National report submitted in Accordance with Paragraph 5 of the Annex to Resolution 16/21 of the Human Rights Council*, *supra* note 293, para. 114.

<sup>295</sup> UN Human Rights Council, *Compilation on Cameroon: Report of the Office of the United Nations High Commissioner for Human Rights*, UN Doc. A/HRC/WG.6/30/CMR/2, 12 March 2018, paras. 42, 76.

UN Human Rights Council, *Summary of Stakeholders’ submissions on Cameroon: Report of the Office of the United Nations High Commissioner for Human Rights*, UN Doc. A/HRC/WG.6/30/CMR/3, 28 February 2018, paras. 32, 67.

<sup>296</sup>United Nations Office on Genocide and the Responsibility to Protect, *Framework of Analysis for Atrocity Crimes - A tool for prevention*, *supra* note 18, p.16.

<sup>297</sup> The Library of the Congress, “Cameroon: New Law on Repression of Terrorism Passed,” 18 December 2014 (available at <https://www.loc.gov/law/foreign-news/article/cameroon-new-law-on-repression-of-terrorism-passed/>).

<sup>298</sup> For example: UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Cameroon*, UN Doc. A/HRC/39/15, 10 July 2018, paras. 121.93, 121.94, 121.96.

analyse it through the lens of prevention. Impunity has been identified by the UNSG as an inciter of further violence<sup>299</sup> and a risk indicator under the Framework. Extrajudicial killings, arbitrary executions, mass arrests, enforced disappearances, excessive use of force and torture carried out by state forces have been denounced under this cycle and these represent “signs of patterns of violence against civilian population,”<sup>300</sup> and incur the “involvement of State institutions or high-level political or military authorities in violent acts.”<sup>301</sup> It can be reasoned that accountability is especially needed in this case as part of prevention. These grave violations if committed in a widespread and systematic manner could amount to atrocity crimes and therefore, accountability appears a necessary step for avoiding such escalation. This has been requested by various actors during both the reporting and WG procedures of the UPR.<sup>302</sup> The sense of impunity could provoke a vicious cycle in which further discontent and uprisings could take place and the government’s response could involve human rights violations, once again.

### **Further Ideas on Prevention Measures**

After having analysed the main mechanisms of prevention under the HRC’s framework, and by taking into account that this chapter deals with an on-going process, it can be concluded that while it is not clear whether mass atrocities have taken place already, numerous risks indicators especially identified under the UPR process, should be observed as warning signs that must be responded with direct prevention or early-response measures. In general terms, while arguably the failure of prevention can be perceptible by the occurrence of mass atrocities, as in the case of Myanmar; its possible success is even more difficult to identify. In the same manner, it is challenging to measure the impact of long-terms measures taken under the banner of structural prevention; on the best-case scenario where mass atrocities are prevented, the question on the degree of the HRC’s impact will still be questioned.

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<sup>299</sup> UN General Assembly and UN Security Council, *Responsibility to protect: State responsibility and prevention. Report of the Secretary-General*, supra note 274, para. 24.

<sup>300</sup> United Nations Office on Genocide and the Responsibility to Protect, *Framework of Analysis for Atrocity Crimes - A tool for prevention*, supra note 18, p. 20.

<sup>301</sup> United Nations Office on Genocide and the Responsibility to Protect, *Framework of Analysis for Atrocity Crimes - A tool for prevention*, supra note 18, p. 21.

<sup>302</sup> UN Human Rights Council, *Compilation on Cameroon: Report of the Office of the United Nations High Commissioner for Human Rights*, supra note 295, para. 25.

UN Human Rights Council, *Summary of Stakeholders’ submissions on Cameroon: Report of the Office of the United Nations High Commissioner for Human Rights*, supra note 295, para. 30.

UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Cameroon*, supra note 298, para. 114.

It is interesting to observe, on one hand, how in the case of Myanmar the different SRs acted in many times as the primary actors in identifying immediate risk factors and warning for the potential commission of mass atrocities years before their occurrence. On the other, it appears that the UPR cycles of Cameroon, while not fulfilling this last role, they did function as identificatory processes. This thought opens the debate on whether a country-specific SP for Cameroon could have had a greater impact and whether its establishment at this point of time could support the dialogue efforts and the prevention of further human rights violations.

With a similar approach, the discussion on an enhanced use of the UPR for mass atrocity prevention appears to be relevant when placed under this framework. The UNSG identifies four steps in this regard under his R2P's implementation report of 2017.<sup>303</sup> First of all, he recognises the importance of including "atrocity crimes risk assessment and preventive measures in the preparatory materials for the UPR." SuRs need to include the views of all relevant national stakeholders in the process and conduct consultations that especially target atrocity prevention. Moreover, he recommends for the state-to-state deliberations to address preventative approaches under questions and recommendations. Thirdly, an important point is the inclusion of "actionable recommendations" in the outcome documents, and undoubtedly the will of states in not only accepting but implementing them. Finally, he highlights the responsibility of the international community in assisting states for carrying out their preventative duties under pillar two of R2P.<sup>304</sup>

The URG identified during the April 2019 HRC intersessional meeting on "the contribution of the HRC to the prevention of human rights violations" a further set of recommendations for operationalizing the body's mandate including the consolidation of the role of the OHCHR in gathering relevant and timely information from different agents within the UN and other national stakeholders, and to better analyse early-warning signs of human rights violation patterns.<sup>305</sup> The UNHCHR should, by means of confidential briefings, share this information with states as to find efficient paths for further action. For this purpose, it is relevant to involve actors that are closer to the population's situation. Moreover, object criteria could be used in

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<sup>303</sup>UN General Assembly and UN Security Council, *Implementing the responsibility to protect: accountability for prevention: Report of the Secretary-General*, *supra* note 40, para. 36.

<sup>304</sup> *Ibid.*

<sup>305</sup> Marc Limon, "How to Operationalize the Council's Prevention Mandate, and where does it fit within the Secretary-General's UN 'prevention agenda'?, *Universal Rights Group*, 10 April 2019 (available at <https://www.universal-rights.org/blog/how-to-operationalize-the-councils-prevention-mandate-and-where-does-it-fit-within-the-secretary-generals-un-prevention-agenda/>).

order to ascertain the potential role of the HRC in that particular crisis.<sup>306</sup> It is argued that further steps could involve the establishment of a closed meeting that involves not only the concerned state, but also regional stakeholders designed as to engage in dialogue, better understand the situation and provide guidance on how to address the situation. Finally, the establishment of “Good Offices” by the HRC could signify a strong preventative diplomacy tool by which national dialogue is promoted.<sup>307</sup>

### **5.3 Direct prevention or Early-Response?**

The present case-study on Cameroon presents itself as a suitable example where the lines separating prevention and response become blurry. As defined before, while direct prevention targets impending cases of atrocities, early-response measures are envisaged towards avoiding further escalations. Cameroon is a case in which it is not clear whether mass atrocities have already occurred or rather that this is a case of grave violations that do not amount to atrocity crimes. In the same manner that prevention and response become unclear, the fine line between grave violations of human rights and violence on one hand, and mass atrocities on the other, renders this analysis even more challenging.

Until 2019 there’s no account for the UN to officially recognise the perpetration of any of the atrocity crimes in Cameroon; however, in February, the Committee on Economic, Social and Cultural Rights, which is an independent treaty body, highlighted that atrocities have been committed both the security forces while responding to protests but also by secessionists.<sup>308</sup> As a response, the Minister of External Affairs of Cameroon stated that just the latter were committing atrocities while “the army was just doing its job in order to secure the population.”<sup>309</sup> The use of the term atrocities in this case also falls under uncertainty as it cannot be properly determined whether the actors have used it as referring to mass atrocity crimes or what appears most probable, they would simply refer to the characterization of the cruelty of the acts.

Other actors have also pinpointed towards the possible commission of mass atrocities in this context. The United States of America determined that while it would keep supporting

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<sup>306</sup> *Ibid.*

<sup>307</sup> *Ibid.*

<sup>308</sup> UN OHCHR Website, “Committee on Economic, Social and Cultural Rights Reviews Cameroon’s Report,” 21 February 2019 (available at <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24189&LangID=E>).

<sup>309</sup> *Ibid.*

Cameroon on its war against Boko Haram, it will reduce its military involvement in the country that has been the main ally on the region, as a response to the “alleged atrocities” and the gross human rights violations.<sup>310</sup> The GCR2P under its *Atrocity Alert* warned about the “increased risk of mass atrocity crimes perpetrated by state security forces and armed separatist groups.”<sup>311</sup> The ICG by May 2019 mentions that after 20 months the situation in Cameroon has left more than 1,800 deaths and 500,000 internally displaced<sup>312</sup> and has warned that the conflict could escalate towards a civil war.<sup>313</sup>

### 5.3.1 Response Measures Already Taken

In view of the accounts that have just been mentioned, it is relevant in a first place to determine whether the HRC has taken any response measures in order to address the situation and subsequently introduce potential further measures. First of all, it appears pertinent to address the 23<sup>rd</sup> special session of the HRC summoned in 2005 “in light of the terrorist attacks and human rights abuses and violations committed by the terrorist group Boko Haram.”<sup>314</sup> The special session was not specifically directed towards the human rights situation in Cameroon, rather it took place in a time where the growing violence had not even already begun, nevertheless, it can be argued that it did implicate the situation of the population in view of the growing threat of terrorism.

During its opening statements the former UNHCHR, Zeid Ra’ad al Hussein, reminded member states, including Cameroon, that whereas human rights violations that could even constitute war crimes and crimes against humanity, had been committed by the terrorist group, it is their responsibility to respond in a targeted and proportionate manner, while maintaining full

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<sup>310</sup> Dionne Searcey, Eric Schmitt and Thomas Gibbons-Neff, “U.S. Reduces Military Aid to Cameroon Over Human Rights Abuses,” *The New York Times*, 7 February 2019 (available at [https://www.nytimes.com/2019/02/07/world/africa/cameroon-military-abuses-united-states-aid.html?ref=collection%2Ftimestopic%2FCameroon&action=click&contentCollection=world&region=stream&module=stream\\_unit&version=latest&contentPlacement=1&pgtype=collection](https://www.nytimes.com/2019/02/07/world/africa/cameroon-military-abuses-united-states-aid.html?ref=collection%2Ftimestopic%2FCameroon&action=click&contentCollection=world&region=stream&module=stream_unit&version=latest&contentPlacement=1&pgtype=collection)).

<sup>311</sup> Global Centre for the Responsibility to Protect, “Atrocity Alert: Growing threat of atrocities in Cameroon following disputed election,” 24 October 2018 (available at <http://createsend.com/t/j-9DC53A3DE44F1CE82540EF23F30FEDED>).

<sup>312</sup> International Crisis Group, “Cameroon’s Anglophone Crisis: How to Get to Talks?” 2 May 2019 (available at [https://d2071andvip0wj.cloudfront.net/272-cameroon-anglophone-crisis\\_0.pdf](https://d2071andvip0wj.cloudfront.net/272-cameroon-anglophone-crisis_0.pdf)).

<sup>313</sup> International Crisis Group, “Cameroon,” (available at <https://www.crisisgroup.org/africa/central-africa/cameroon>).

<sup>314</sup> UN OHCHR Website, “23rd special session of the Human Rights Council in light of the terrorist attacks and human rights abuses and violations committed by the terrorist group Boko Haram - 1 April 2015,” (available at <https://www.ohchr.org/EN/HRBodies/HRC/SpecialSessions/Session23/Pages/23rdSpecialSession.aspx>).

accountability.<sup>315</sup> Moreover, he laid emphasis on the root causes of radical movements, including marginalization, inequality and corruption. While special sessions are often placed under the response umbrella, this is a case where it could have been used as a preventative mechanism. Nevertheless, by being aware of the events that would follow up in Cameroon and taking into account the reports of atrocities committed both by the terrorist group and security forces in countering them, it appears that the special session did not had the impact it intended in this case.

A following rather recent initiative taken under the HRC's work can be found in its 40<sup>th</sup> regular session, taking place in March 2019, under the general debate on technical assistance and capacity building. During the discussion different states stressed that "*cooperation and mutual assistance, rather than naming and shaming*" had to be at the core of the Council's initiatives and for that purpose, *technical cooperation and capacity building are to be delivered when requested by states and exclusively, with their consent.*<sup>316</sup> The United Kingdom making a statement on behalf of 38 countries, urged Cameroon to receive this kind of support in order to address the continuous violence and humanitarian situation and called for the OHCHR to urgently set up an assessment mission. The statement also mentioned "concerning reports of security forces burning villages, shooting unarmed civilians and committing acts of sexual violence" while also referring to the separatist's abuses.<sup>317</sup> Additionally it addressed the need for dialogue involving all the stakeholders and for reconciliation. For that purpose, it called the state to "ensure prompt and thorough investigation of all violations and abuses."<sup>318</sup> Cameroon responded that part of the UK statement dealt with sovereign matters and while it reiterated its commitment to uphold human rights, it argued that assistance had been tendered for other interests and motivations, rather than human rights and that it would not request it, as considering itself a "stable country."<sup>319</sup>

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<sup>315</sup> Zeid Ra'ad Al Hussein, "Opening Statement by Zeid Ra'ad Al Hussein, United Nations High Commissioner for Human Rights, at the 23rd Special Session of the Human Rights Council," 1 April 2015 (available at <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=15782&LangID=E>).

<sup>316</sup> UN OHCHR Website, "Human Rights Council holds general debate on technical assistance and capacity building," 21 March 2019 (available at <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24387&LangID=E>).

<sup>317</sup> United Kingdom Mission to the United Nations Geneva, "Human Rights Council 40: Cameroon," 21 March 2019 (available at <https://www.gov.uk/government/news/human-rights-council-40-cameroon>).

<sup>318</sup> *Ibid.*

<sup>319</sup> UN OHCHR Website, "Human Rights Council holds general debate on technical assistance and capacity building," *supra* note 316.

One step ahead appeared to have materialized with the visit of the UNHCHR to Cameroon in May 2019 where she had the opportunity of meeting with the President, the Prime Minister and other ministries as well as with civil society, media and religious leaders with the aim of discussing on current and further initiatives that have been taken to deal with the grave crisis in humanitarian and human rights spheres. Albeit the numerous challenges portrayed by the attacks perpetrated by Boko Haram and other terrorist groups such as the Islamic State in West Africa, as well as the grave violations carried out while targeting schools, medical facilities and especially civilians, the UNHCHR expressed that “there is a clear-if possibly short-window of opportunity to arrest the crises.. as well as the killings and brutal human rights violations and abuses...”<sup>320</sup> She welcomed the establishment by the President of two new bodies but stressed on the need of strengthening accountability for further deterrence and expressed the willingness of her office and the UN to “contribute to the restoration of peace and security.”<sup>321</sup>

While that has been the most recent evolution on the HRC’s involvement in the situation, meanwhile it has also been addressed for the first time at the UNSC. Whereas the state is not on the UNSC’s agenda, since now it has only been addressed by means of considering the UNSG’s reports on the United Nations Regional Office for Central Africa. However, on the 13<sup>th</sup> of May 2019, an Arria-Formula meeting,<sup>322</sup> especially focused on the humanitarian situation provoked by insecurity in Cameroon, was held at the initiative of some states. On a concept note circulated before the meeting, it is mentioned that the state has “the 6<sup>th</sup> largest displaced population in the world, three million people are food insecure and more than 1.5 million people need emergency health assistance.”<sup>323</sup> Under the statement of the Secretary General of the Norwegian Refugee Council different recommendations on follow-up action was identified. He acknowledges that “the lack of information and international political

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<sup>321</sup> UN OHCHR Website, “Bachelet welcomes Cameroon’s willingness to cooperate to tackle human rights crises,” 6 May 2019 (available at <https://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=24565&LangID=E>).

<sup>322</sup> Arria-Formula Meetings are informal consultations between Members and other stakeholders which are placed outside of the UNSC meetings thus not governed by either the Charter nor the Rules of Procedure. For more information on these meetings, consult: Loraine Sievers and Sam Daws, *Place and Format of Council Proceedings*, in: Loraine Sievers and Sam Daws (eds.), *The Procedure of the UN Security Council*, 2014.

<sup>323</sup> What’s in Blue, “Arria-Formula Meeting on the Humanitarian Situation in Cameroon,” 10 May 2019 (available at <https://www.whatsinblue.org/2019/05/arrria-formula-meeting-on-the-humanitarian-situation-in-cameroon.php>).

attention has allowed the situation to deteriorate from peaceful demonstrations to the atrocities committed by both sides.”<sup>324</sup> Moreover, he calls for facilitation of peace talks, and a clear position of the UN in expressing that “crimes under IL cannot be allowed to continue.”<sup>325</sup>

In brief, these appear to be the most prominent initiatives taken by the HRC, and the UNSC in the last case, to currently address the situation which is still un-going and whose impact is far-reaching. While the UNHCHR’s recent statements are embedded in the spirit of cooperation and seem to present that Cameroon is taking the lead in addressing its own state of affairs, it is to be argued that the UN, especially the HRC should not just wait for that and could further use its tools and mechanisms to act while it is not too late again. If establishing a parallelism with the case of Myanmar, it shall be remembered the numerous warnings issued on the period before the violence increased at the levels that involved mass atrocities, and how the reactions were shaped in view of maintaining the cooperation with the state which appeared to have been making improvements to address wrongdoings.

### 5.3.2 Potential for Further Action

#### **Special Session**

For the beforementioned reasons it is important to further present what next steps could the HRC take in current times to potentially deter further violations and to avoid not falling under an inactive approach. In the same manner that a Special Session was convened twice on the human rights situation on Myanmar, especially the second occasion, which took place after the burst of violence in 2017, a meeting of such urgency could have been summoned at any point during the increased tensions of the last two years in Cameroon. The humanitarian situation, and the numerous challenges posed by the fight of terrorism and the instability caused also by the violence perpetrated by armed groups and the human rights violations of state forces in response, could be usefully addressed by means of such a debate. A question that is raised in this matter is the fact that there is no established threshold, indicator or code of conduct for when a situation should be dealt with in a special session. The advancement of such an initiative could counteract issues of politicisation and selectivity of cases. When requiring a third of the HRC’s member’s endorsement for such a session, the groups that are more dominant in the council could obtain such support more easily.<sup>326</sup> In order to balance that, states could follow

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<sup>324</sup> Jan Egeland, “NRC statement to the UN Security Council on Cameroon” Norwegian Refugee Council, 13 May 2019 (available at <https://www.nrc.no/news/2019/may/cameroon-unscc-statement/>).

<sup>325</sup> *Ibid.*

<sup>326</sup> Freedman, *supra* note 37, p.313.

objective criteria on determining which cases both thematic and country-specific should be urgently addressed.

As stated in HRC resolution 5/1, “a special session should allow participatory debate, be results-oriented and geared to achieving practical outcomes...”<sup>327</sup> That is why calling for such a meeting on Cameroon could allow to engage with different stakeholders including the State in question, civil society and UN actors which could become providers of relevant information from the situation on the ground and it could impulse the adoption of a resolution with follow-up implications that could identify prospective actions to be pursued. The Council has already used this mechanism to respond to crises besides Myanmar such as Haiti, Libya or Syria, nevertheless these “reached an absolute crisis point before being addressed by the Council”<sup>328</sup> and that should not be the case of Cameroon which finds itself too close to that point.

### **Early Fact-Finding Mission or Commission of Inquiry**

It has been argued in the anterior chapter that the HRC took the leading role of the UN in view of the other bodies inaction, especially referring to the UNSC, when establishing the FFM on Myanmar and later on, the independent mechanism. During the UPR process as well as in other statements and reports that have been cited, there have been numerous calls on the government of Cameroon to launch impartial and independent investigations followed by eventual prosecutions on the human rights violations that have been committed in its territory by the different parties.<sup>329</sup> First of all, this idea could be strengthened by the HRC issuing a resolution urging the government to take such actions and for the international community to provide assistance in this regard. The HRC could offer technical assistance to such investigations especially with the collection of evidence. This is an example where the such actions calling for accountability while finding themselves under the umbrella of response, could also fall under pillars I and II of R2P.

Quoting the UNSG “investigation, of course is not a substitute for timely and decisive protective action but rather should be seen as an initial step towards it.”<sup>330</sup> In the same manner

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<sup>327</sup> UN Human Rights Council resolution 5/1, *Institution-building of the United Nations Human Rights Council*, *supra* note 34.

<sup>328</sup> Freedman, *supra* note 37, p.320.

<sup>329</sup> UN Human Rights Council, “UN Human Rights Chief Deeply Alarmed by Reports of Serious Rights Breaches in Cameroon,” 25 July 2018 (available at <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23404&LangID=E>).

<sup>330</sup> UN General Assembly and UN Security Council, *Implementing the Responsibility to Protect: Report of the Secretary General*, *supra* note 88, para. 53.

as the case in Myanmar, the HRC is reminding Cameroon that it has also a primary responsibility in undertaking its own investigations, especially when involving its security forces; Myanmar was allowed and encouraged to establish the different initiatives in the shape of its Advisory Committee and other investigative bodies. It is when it became evident that these were failing in their main objectives, that the HRC decided to establish a fact-finding mission. At the present time, the UNHCHR has declared that Cameroon is willing to fight impunity and to hold accountable those that have committed crimes; however, if the HRC afterwards considers that the state has been unwilling to do so, it should consider establishing an FFM or CoI mandated to investigate violations and to advance means to effectively address them.

### **Questionable Membership**

On 12<sup>th</sup> October 2018 the UNGA held elections for 18 seats on a three-year term at the HRC which would start on the 1<sup>st</sup> of January 2019. Cameroon was elected for the third time, as it had already been a member for the 2009-2012 and 2006-2009 terms. The elections functioned under the “clean slate” that has characterized the procedure in several occasions since the establishment of the subsidiary body. This means that the number of candidates is equivalent to the number of available seats at all the 5 regional groups. At the moment that this process, which instead of an election has become rather a simple designation, involves countries which are under scrutiny for their negative human rights records, it brings into question the credibility and the spirit of the human rights body.<sup>331</sup>

In conformity with the UNGA resolution 60/251 when electing members of the HRC, states should bear in mind “(1) the contribution of candidates to the promotion and protection of human rights and (2) their voluntary pledges and commitments made thereto.”<sup>332</sup> Nevertheless, in this occasion Cameroon has refused to advance any voluntary pledges, which further undermines the whole process and somehow reflects a lack of engagement with the body. Moreover, it is expected from elected members to “(1) uphold the highest standards in the promotion and protection of human rights and (2) fully cooperate with the Council.”<sup>333</sup>

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<sup>331</sup> Peter Splinter, “Human Rights Council Elections: Clean Slates Continue to Undermine the Council,” *Universal Rights Group*, 25 September 2018 (available at <https://www.universal-rights.org/blog/human-rights-council-elections-clean-slates-continue-to-undermine-the-council/>).

<sup>332</sup> UN General Assembly resolution 60/251, *Human Rights Council*, *supra* note 1, para. 8.

<sup>333</sup> UN General Assembly resolution 60/251, *Human Rights Council*, *supra* note 1, para. 9.

Cameroon's election came after repeatedly ignoring calls from the UNHCHR, the SPs reports of grave human rights violations and the numerous concerns raised in its third UPR cycle.

The previous UNHCHR, Zeid Ra'ad Al Hussein proposed that "consideration be given to the need to exclude from the (the Council) States involved in the most egregious violations of human rights."<sup>334</sup> Other recommendations include for a systematic assessment of pledges<sup>335</sup> and human rights records to be carried out before and after the elections and which should have an impact on the voting procedure.<sup>336</sup> The UNGA could require for the competing states to mention how are they going to operationalize their pledges and the OHCHR, NGO's and other actors that could monitor their implementation, could concomitantly provide visibility on the situation.<sup>337</sup> Nevertheless, this seems rather unhelpful if the practice of "clean slates" continues to depict the voting system of the HRC membership. There's a strong need to encourage more candidates than seats with the purpose of driving them into pursuing better pledges and records in order to be elected.

In the same manner that the UNGA has the fundamental role of electing the HRC member states by secret ballot voting, it can also "suspend the rights of membership in the Council of a member of the Council that commits gross and systematic violations of human rights" by a two-thirds majority.<sup>338</sup> On the contrary, there are no guidelines under the establishing resolutions on conditions for restoring the membership. This has occurred just in one occasion in the history of both the HRC and the previous Commission, when Libya was suspended from the Council in March 2011 and whose membership was then restored in November of the same

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<sup>334</sup> Zeid Ra'ad Al Hussein, "UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein highlights human rights concerns around the world in an address to the 36th session of the Human Rights Council in Geneva," UN OHCHR Website, 11 September 2017 (available at <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22044&LangID=E>).

<sup>335</sup> The OHCHR has published a set of guidelines that could be followed by potential Member States when drafting and issuing their voluntary pledges. See: UN OHCHR Website, "Suggested Elements for Voluntary Pledges and Commitments by Candidates for Election to the Human Rights Council," (available at <https://www.ohchr.org/Documents/HRBodies/HRCouncil/Pledges.pdf>).

<sup>336</sup> Splinter, *supra* note 221.

<sup>337</sup> Lorna McGregor, "Should Commitments to Implementation Factor into Elections to the Human Rights Council?" *EJIL:Talk!*, 8 November 2016 (available at <https://www.ejiltalk.org/should-commitments-to-implementation-factor-into-elections-to-the-human-rights-council/>).

<sup>338</sup> UN General Assembly resolution 60/251, *Human Rights Council*, *supra* note 1, para. 8.

year.<sup>339</sup> This occurred as a response to the mass killings of protestors and human rights abuses committed by Muammar Qaddafi's regime.<sup>340</sup>

In the case of Cameroon while the last statements of the UNHCHR and the promised engagement of the state rather focus on the cooperative approach of the Council, this option should not be discarded but rather, further discussions about it could warn Cameroon of the possibility of its membership being suspended. Moreover, in the case of a suspension of a MS the HRC could push for reforms and demand concrete commitments or even tangible results before considering its restoration. In the case of Libya this was ignored and just a few months after the suspension, the HRC decided unanimously to receive again the state while violations were continuously grave and numerous.<sup>341</sup>

### **The Unleashed Potential of the HRC and the UNSC Cooperation**

The institutional relations between the HRC and the UNSC are not mandated, nevertheless they maintain a rather moderate degree of cooperation that if strengthened could have a wide impact on prevention and responses to mass atrocities and human rights violations. This is a relevant discussion under this case as the engagement of both bodies could be fruitful in situations such as Cameroon where they do have a window of opportunity for addressing the crisis while it does not escalate and inflicts more damage on the population. The UNSC while reluctant in its early stages to engage directly with human rights, it has progressively included it in some of its discussions and missions as being a core element on many of the situations that has endeavoured to address.<sup>342</sup>

It is through SPs and investigative mechanisms where this relation has been mostly advanced, nevertheless it is in isolated cases where these independent experts have formally interacted with the UNSC.<sup>343</sup> The SPs have been occasionally involved in providing information by means of the Arria-formula meetings. One may assert that there is space for further interaction,

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<sup>339</sup> UN General Assembly resolution 65/265, *Suspension of the rights of membership of the Libyan Arab Jamahiriya in the Human Rights Council*, UN Doc. A/RES/65/265, 3 March 2011.

<sup>340</sup> Deborah Brown, "The Human Rights Council and Libya: an Historic Precedent and Missed Opportunity," *RightsViews Columbia University*, 19 January 2012 (available at <http://blogs.cuit.columbia.edu/rightsviews/2012/01/19/the-human-rights-council-and-libya-an-historic-precedent-and-missed-opportunity/>).

<sup>341</sup> *Ibid.*

<sup>342</sup> Security Council Report, "Human Rights and the Security Council—An Evolving Role," 25 January 2016, p. 2 (available at [https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/research\\_report\\_human\\_rights\\_january\\_2016.pdf](https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/research_report_human_rights_january_2016.pdf)).

<sup>343</sup> Security Council Report, "Human Rights and the Security Council—An Evolving Role," *supra* note 342, p. 6.

and accordingly, the HRC could ask for its reports and resolutions to be transmitted to the UNSC, perhaps even in a regular fashion. The SPs which are sometimes the first to raise alerts on events that need a swift response and are directly engaged with the situation on the ground, could find in the UNSC a forum where to address such warnings. While Arria-formula meetings represent sometimes the only option for debate, as it is the example in the case of Cameroon, where it appears to be the main initiative inside the UNSC framework to deal with it, they are not attended by all of the UNSC members and generally an outcome document is not released at the end.<sup>344</sup>

A rather unusual link between the two bodies was established under the area of counter-terrorism; the SR on the promotion and protection of human rights and fundamental freedoms while countering terrorism was established in 2005, the HRC included under its authority to “develop a regular dialogue and discuss possible areas of cooperation with Governments and all relevant actors, including relevant United Nations bodies, specialized agencies and programmes, with, inter alia, the Counter-Terrorism Committee of the Security Council...”<sup>345</sup> As in 2016 this mandate was extended for three years, which can be further prolonged, this could present itself as a is a good opportunity for deliberating on the case of Cameroon, its fight against terrorism and especially the prevention of mass atrocities.

The Human Rights Up Front initiative presented by the UNSG Ban Ki-moon in 2013 and which applied to the UN system holistically in view of better enforcing its protective and preventative mandate, could also be further implemented through the UNSC-HRC collaboration. This idea involves, not exclusively, engaging with national authorities and providing MS with essential information with regard to peoples at risk or subject to violations of human rights; better ensuring that the UN system and the actions on the ground are concerted, endorsing a “One-UN approach” for harmonized action and instituting an improved system of information for early warning and response.<sup>346</sup> And by having reviewed the mechanisms and functioning of the

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<sup>344</sup> Joanna Weschler, “The Human Rights Council and the Security Council: Time to think about better synergies?,” *International Service for Human Rights*,” 5 June 2016 (available at <https://www.ishr.ch/news/human-rights-council-and-security-council-time-think-about-better-synergies>).

<sup>345</sup> UN Human Rights Council resolution 15/15, *Protection of human rights and fundamental freedoms while countering terrorism: mandate of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, UN Doc. A/HRC/RES/15/15, 7 October 2010, para. 2(f).

<sup>346</sup> UN Website, “Human Rights up Front: A summary for staff,” 2016 (available at <https://www.un.org/News/dh/pdf/english/2016/Human-Rights-up-Front.pdf>). Security Council Report, “Human Rights and the Security Council—An Evolving Role,” *supra* note 341, p.16.

Council it can be argued that they have a suitable position and role in implementing such recommendations.

A strong response by the UNSC in Cameroon once again appears to be threatened by the opposition of some P5 members which have a veto power on such binding decisions. In this particular case, both China and Russia have expressed their opposition to deal with the human rights and humanitarian situation of Cameroon as they consider it a sovereign responsibility which Cameroon can handle by itself.<sup>347</sup> Russia has maintained that “it is important not to cross the line between prevention and intervention in State’s internal affairs.”<sup>348</sup> Both states have been reluctant to deal with human rights issues under the UNSC: they have previously vetoed resolutions that included a strong human rights component, as in the case of draft resolution 2007/14 involving the situation of human rights in Myanmar.<sup>349</sup>

In conclusion, while initiatives in this regard are numerous, and their potential can have a wide impact, the political will of states both in the UNSC and the HRC is still the guiding element that in numerous occasions has driven the path of action of these two bodies. When there is no such interest, the negative consequences translated to the situation on the ground can be devastating. Burden-sharing, long-term engagement and maximization of resources should be put at the core of the UN when dealing with human rights issues and especially considering the threat of mass atrocity crimes. In this connection “human rights improvements are never just one actor’s success and the different actors can reinforce each other’s value added.”<sup>350</sup>

## 5.4 Interim Conclusions

In order to conclude this chapter and move forward to concluding the whole thesis’ analysis, it is important to briefly interpret this case-study focused on the human rights situation in Cameroon and the role of the HRC in the prevention and response to potential mass atrocity crimes. First of all, it is not wrong to contend that the government of Cameroon is failing on its responsibility to protect its population, while avoiding to address the root causes of a

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<sup>347</sup> All Africa, “Cameroon: Informal Session of UN Security Council - China, Russia Reaffirm Support for Cameroon,” 16 May 2019 (available at <https://allafrica.com/stories/201905170263.html>).

<sup>348</sup> What’s in Blue, “Arria-formula Meeting on the Humanitarian Situation in Cameroon,” 10 May 2019 (available at <https://www.whatsinblue.org/2019/05/arria-formula-meeting-on-the-humanitarian-situation-in-cameroon.php>).

<sup>349</sup> UN Security Council, *United Kingdom of Great Britain and Northern Ireland and United States of America: draft resolution*, UN Doc. S/2007/14, 12 January 2007.

<sup>350</sup> Security Council Report, “Human Rights and the Security Council—An Evolving Role,” *supra* note 342, p. 31.

conflictual situation where tensions have been escalating especially on the last three years. Despite of the widespread violence and the numerous accounts of gross human rights violations, which in some cases have even been identified as international crimes; the international community's attention to the situation has been, at the most, modestly limited.

The engagement of the HRC with this case has followed an equivalent route. Whereas the lines between prevention and response are not easily identifiable particularly in this case, the efforts undertaken under the banner of any of these processes are narrow in scope and in impact. It has been anteriorly argued that the thematic perspective of the Special Procedures that have dealt with some issues such as discrimination, freedom of expression or torture in the state do seem to strengthen structural prevention efforts. However, a country-specific mandate appears not only welcomed but essential. The need to engage with the different stakeholders of the conflict, to have direct access to the ground and to advance clear and operationalizable further actions strengthens the argument for the establishment of such mechanism.

Risk factors that pinpoint towards the possible commission of mass atrocities in the state are numerous, different in character and source: while the government has been identified in many cases as the primary perpetrator of violations, the complex situation involving armed group violence and terrorism puts the security of the whole state, and the human rights of the civilians in jeopardy. In spite of that, the potential of the HRC to deal with possible impending cases of atrocities remains limited. On a side to the preventative efforts led by the SPs and the debates of the UPR, whose impact materialization is challengingly identifiable, responsive approaches to avoid escalation, and to use accountability as a deterrent, are yet no present. This chapter has presented both further proceedings for prevention and response, as well as, for the overall strengthening of the Council's role in these types of situations. Finally, it is to be reminded that even if the HRC's engagement with this case emerges as being limited, the involvement of the UNSC, the main body of the UN framework that does not only have the prerogative but also the tools for direct prevention and early action, is inappreciable. To sum up, the prospects for such actions do not appear to be in favour of those who need it the most, once more.

## 6. Conclusions

The main objective of this thesis has lied on exploring *to what extent the UN Human Rights Council and its mechanism have a role in preventing and responding to mass atrocity crimes*. A further departing point was that whereas the HRC's actions in cases involving mass atrocities have followed a reactive approach, prevention should stand at the forefront of the body's objectives. Moreover, a further hypothesis has been based on the acknowledgment of the body's mechanisms as being fitter for preventative endeavours, if bearing in mind the cooperative nature embedded in the Council's efforts.

After presenting the HRC's mandate, its mechanisms, the theoretical framework of atrocity prevention and response, and its pertinent application and analysis of the two different case-studies, it can be concluded that the *Human Rights Council has a limited role in preventing and responding to mass atrocity crimes*. Moreover, while its mechanisms do appear to be suitable on one hand, for strengthening structural prevention efforts, early-warning and accountability processes, their capacity of engaging with direct prevention of impending mass atrocities is severely constrained.

The mandate envisioned for the Council, which despite of being categorized as a subsidiary body has developed into the principal UN actor in dealing with human rights, included from its inception a responsibility in addressing gross and systematic violations. Whereas an explicit mention to the concept of mass atrocities is apparently absent, the categorization of atrocity crimes as some of the worst forms of human rights violations, allows for not only including them in such a mandate, but to prioritize the need to addressing them.

The assertion on the need of placing preventative, rather than reactive efforts at the core of the body's agenda, has been supported especially by the interpretation of the case-study on Myanmar. While it is commendable that the HRC has taken the leading role in the whole UN's framework, by establishing first of all, the International Fact-Finding Mission on Myanmar followed by the Independent Investigative Mechanism; these have been created once the situation on the ground for millions of people was already devastating. It is true that accountability and the fight against impunity is essential for justice and truth-seeking in such a case; however, the figures of those killed, injured, forcibly displaced, raped and who have been deprived of their most essential rights, visibly demonstrates the gravity in failing to prevent mass atrocities.

It is also by means of this case-study that it becomes apparent how the potential role of the HRC in prevention and response falls in two opposite sides of a spectrum. First of all, in the case of Myanmar, the engagement of the numerous country-specific Special Rapporteurs, whose figure was first created under the auspices of the Commission on Human Rights, is constant and noticeable. While more than often their work was restricted by the unwillingness of the government to allow them access to its territories and to engage in consultations, they were still able to inform and raise numerous warnings on the potential and factual commission of mass atrocities in the state. Such notices are to be accounted even from the 1990s and with time, they grew in severity and gravity. The SRs became the main actors requesting the need of action to the international community, especially through the forum of the HRC. However, their calls were not answered.

The Universal Periodic Review accompanies the SPs on the prevention side of the “HRC action spectrum.” This unique process, which scrutinizes the human rights situation of all the UN member states and engages them in dialogue with other stakeholders, has an underdeveloped potential which, if strengthened, could represent an advancement of structural prevention efforts. This system allows to identify areas where long-term resiliencies need to be developed, to systematically identify and monitor potential risks, and to engage in cooperation for capacity-building purposes. However, the reliance on the willingness of the State under Review in implementing recommendations and engaging in a fruitful debate, constrains the effectiveness of the whole process. Moreover, the main challenge not only for the UPR but also for SPs and other preventative efforts lies in the difficult visualization of their effects. In the case of Myanmar, it has been argued that, *prima facie*, prevention measures have failed just by observing the outcomes of the crisis. But what if prevention would have succeeded? It would have been equally challenging to trace back such accomplishment to the endeavours of the HRC for these purposes.

Subsequent to these preventative efforts on Myanmar, the most noticeable measures undertaken by the HRC moved to the establishment of the FFM and ultimately the Investigative Mechanism. The former is requested to establish facts around the human rights violations committed in Myanmar since 2011, whereas the latter is endowed with preparatory tasks such as evidence gathering in view of ensuring accountability through potential prosecutions in national or international courts.

It is in the void between the aforementioned preventative efforts and the accountability ones, on direct prevention efforts or early responses, where the Council does not have the necessary means to act. Special sessions emerge as the main tool that the HRC can use to rapidly answer to the urgent need to deal with a crisis situation. Nonetheless, by having evaluated their outcomes and the actionability of their resolutions, it can be argued that while they are useful for debate and to raise the profile of a case, they are still far from being the needed response to such cases.

In endeavouring to answer the last hypothesis and by taking into account the same sources of analysis, it can be argued that the mechanisms of the HRC are not necessarily fitter for prevention. Prevention should be at the forefront of the body's strategies as concluded earlier, and mechanisms such as the Special Procedures and the UPR do emerge as preventative in their core; however, this view should not diminish the essential roles of Fact-Finding Missions, Commissions of Inquiry and Investigative Mechanisms which fall under the response field and are equally relevant for the Council's role in addressing mass atrocity crimes.

Different conclusions can also be drawn from the case-study on Cameroon. First of all, it is important to discuss the question of membership: it is expected from members of the Council to uphold to the highest human rights standards. At the time that Cameroon was elected for its third term as an HRC Member State, the international community was aware of the human rights violations perpetrated by the government. In spite of that, and because the state did not have to compete with other African states under the "clean slate" practice, there was nothing stopping it from becoming a member again. This fact might appear outside the debate of the body's role in addressing mass atrocities, but that is not the case. The credibility of the body in these situations is at stake. A question validly posed for further thought is: how can be expected from the UN body to effectively deal with gross human rights violations when its own member states are committing them?

To continue with, the potential further cooperation of the Human Rights Council with the Security Council has to be briefly addressed. Mass atrocity crimes cannot be only covered by the human rights umbrella; peace and security are also threatened when these occur. And it is in this space where it becomes rather clear that the two bodies can and should complement each other. On one hand, the UNSC can fill the gaps or extend the work of the HRC. The UNSC has the tools for carrying out direct prevention and early response, especially under its chapter VII prerogatives. The UNSC can also establish efficient follow-up to the warnings of the HRC and

its Special Procedures or its Special Sessions. Moreover, the Security Council can enter into the picture of accountability processes where the HRC remains limited: FFMs/COIs and even Investigative Mechanisms as established by the human rights body remain interim processes and are not endowed with judicial powers. However, and as recognized in their reports, the UNSC does have the authority to advance such endeavours by means of making referrals to the ICC, establishing ad hoc tribunals or hybrid justice mechanisms. On the other side, by creating such mechanisms, the HRC is easing the burden of the UNSC and, as in the case of Myanmar, it is acting in the name of the UN where the Security Council is unwilling or unable to do so. Thus, the role of the HRC in the prevention and response to mass atrocity crimes has to be understood within the larger framework of the UN: it cannot act alone. Holistic and coordinated efforts are extremely needed when dealing with crimes involving such wide impacts.

This thesis has already identified several paths of action for strengthening the body's procedures, and it does not appear necessary to mention them again, however a particular element which goes hand in hand, especially in preventative efforts, must be reminded. That is the Responsibility to Protect doctrine. In the introduction of this work it has been stated that the HRC lacks from a strategic framework in implementing its preventative methods. The overall analysis has confirmed this fact. Nevertheless, discussions on the connection between R2P and the HRC have been for some time at the table, and the human rights body could find in the doctrine the much-needed framework for action. Through the thesis it has been argued that the HRC's mechanisms are somehow implicitly supporting the pillars of the R2P: under pillars I and II, states are being backed in their responsibility to protect through capacity-building, technical assistance, the UPR, SPs, cooperative dialogue etc. Moreover, FFMs, CoIs and IMs can also, but not exclusively be placed under pillar III endeavours. Yet, it all remains implicit, and while it does appear that members of the Council and participants are increasingly referring to the concept, this potential fruitful relation remains underdeveloped, for the time being.

To conclude with, a basic assertion deriving from both case-studies is that in cases of mass atrocities the problem is, in most of the times, not early-warning. They are built up over years and grievances are and become embedded in societies. However, in both situations the international community has preferred to focus on apparent ameliorations in human rights and on the promise of democratization while turning a blind eye to the real situation on the ground. Regardless on the numerous mechanisms, institutions, guidelines and other elements at place

to protect populations from mass atrocity crimes, until the HRC, member states and the whole framework do not put in motion a real willingness to act, the extensive and numerous debates, the recommendations and all additional efforts, will be in vain. The international community pledged not long ago to not repeat its past failures and yet, it has been demonstrated so far that there is a fine line between the “never again” ideals and the “again and again” reals.

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