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Introduction

The 8th session of the Human Rights Council was dominated by the adoption of the outcomes of the first 32 reviews of countries under the universal periodic review (UPR). Most notable were the attempts by some States to limit NGO statements on the adoption of outcome documents of the UPR and further restrict the already limited role that the institution-building package has guaranteed for NGOs.

The Council also continued the review of a number of special procedures mandates, most of which went smoothly. However the reviews of the mandates on extrajudicial, summary, or arbitrary executions and on torture and other cruel, inhuman or degrading treatment or punishment were contentious. The controversy allegedly related to the conduct of the mandate holders rather than to the mandates themselves. It is regrettable that these issues are sometimes conflated and that some States use the opportunities to engage with the special procedures to strongly criticise the mandate holders. This conflation was also seen in a President's statement adopted at this session on the terms in office of special procedures mandate holders, which was a successful attempt by some States to re-interpret in a restrictive way the institution-building package. The Council should make greater efforts to strengthen its system of special procedures and protect the integrity and independence of mandate holders from undue pressure.

While the Council has almost completed its institution building, it seems that it is encountering significant obstacles in turning its attention to pressing human rights issues and situations. This is not least the result of

the many efforts by some States to re-open discussion on, and re-write the terms of, the institution-building package and weaken the Council and its mechanisms. It is high time that member and observer States focus on strengthening the Council and ensure that it fulfils its mandate to promote and protect all human rights everywhere.

Update from the High Commissioner for Human Rights

The High Commissioner for Human Rights, Ms Louise Arbour, gave her final update to the Council before leaving office at the end of June. She spoke of the Council's institution-building process, noting that it would take two cycles of the UPR to be able to fully measure its added value in distinguishing the Council from the former Commission on Human Rights (the Commission). Ms Arbour also suggested that the UPR could be further strengthened by the contributions of independent experts and the creation of follow-up mechanisms. In relation to the system of special procedures, she called for the creation of new mandates where protection gaps were identified. Ms Arbour recalled the long process that led to the establishment of the Council and characterised the reform of the human rights machinery as one of the major achievements of the UN reform process. However, in unusually sharp comments she warned that 'scepticism has not been fully dispelled' and that the 'pursuit of consensus' or use of regional or 'communal' positions often 'eroded the clarity' with which members and the Council as a whole 'could and should speak on critical human rights protection issues'.

Ms Arbour reiterated her call for a mechanism to monitor the implementation of the *Convention on the Prevention of Genocide* and spoke in favour of alternatively creating an early-warning optional protocol to the *International Convention on the Elimination of All Forms of Racial Discrimination*, which may be considered by the forthcoming Durban Review Conference in 2009.

The High Commissioner commented on 'lower intensity discrimination' against women, the rights of minorities, caste-based discrimination, and prejudice on the basis of sexual orientation as examples of areas where human rights law 'cannot be pigeon-holed to deny protection' to persons facing discriminatory exclusion. She demanded that all forms of intolerance be condemned. In what appeared to be a response to the High Commissioner's mentioning of the issue of sexual orientation, Egypt took strong exception to the discussion of 'behaviour outside international human rights law' and the 'imposition of the cultural values of others'.¹

Many States welcomed the High Commissioner's announcement that OHCHR will convene an expert consultation to develop a better understanding of the permissible limitations to freedom of expression while taking into account the prohibition of advocacy of national, racial, or religious hatred, and to ensure the fullest respect for freedom of expression.² This and the related issue of 'defamation of religions' have repeatedly been discussed in the Council but seem only to have led to increasingly entrenched opposing views between European and member States of the Organisation of the Islamic Conference (OIC) on how to address them. The expert consultation is a welcome initiative that hopefully will begin to build a common understanding of relevant human rights standards and perhaps overcome the divisions on this issue.

In addressing country situations, the High Commissioner commented on South Africa and the attacks on foreigners, in particular Zimbabwean migrants, which 'shocked and continue to alarm the international community'; Italy and the proposed criminalisation of illegal immigration; and the ongoing threat of a human

¹ This was consistent with its reaction to references to sexual orientation during the first sessions of the UPR. See, for example, the adoption of the report of Ecuador, at http://www.ishr.ch/hrm/council/upr/upr_1st_session_2008/upr_001_ecuador_final.pdf.

² Algeria, Egypt (on behalf of the African Group), Indonesia, Malaysia, Maldives, Nigeria, Pakistan (on behalf of the OIC), Slovenia (on behalf of the EU), United Kingdom (UK).

rights and humanitarian disaster in Somalia. Ms Arbour reserved particularly strong words for the obstruction to relief efforts in Myanmar following cyclone Nargis, which ‘illustrates the invidious effects of long-standing international tolerance for human rights violations’. Italy responded rather aggressively to the High Commissioner’s comments and accused her of being misinformed. Sri Lanka declared its ‘support for the rebuttal by the Ambassador of Italy’.

States³ and NGOs⁴ used the occasion to highlight the achievements of the High Commissioner, including the expansion of regional offices, the inclusion of human rights experts in UN country teams, and her open dialogue with the Council. While many States⁵ saw the increase in regional OHCHR offices as her most notable achievement, others were highly critical of these developments and claimed that the establishment of such offices needed the full consent of States in the region and not just the host country.⁶ Uzbekistan particularly complained about the recent opening of an OHCHR office for Central Asia in Bishkek, Kyrgyzstan, claiming that the region had not been consulted. Algeria went much further, arguing that the Council should be consulted before the opening of a country office. This would, however, be an unprecedented and inappropriate level of control by the Council over the operations of the OHCHR.

Commenting on the recurring issue of ‘strengthening’ the relationship of the OHCHR with the Council, several States called for a formal discussion of the strategic framework of the OHCHR for 2009-2010 by the Council.⁷ The Netherlands and Ireland affirmed the need for an independent OHCHR, rejecting the view that it ‘should be accountable to the Council or follow its instructions’. The Netherlands argued that question of oversight by the Council could not be discussed in Geneva, but must be settled in New York. The question of the Council’s competencies vis-à-vis the High Commissioner has yet to be resolved at the appropriate level. In this context, it is worth noting that several weeks after the session the new Council President, Ambassador Uhomoibhi, appointed Ambassador Mohammed Loulichki (Morocco) to ‘facilitate discussions’ on the relationship between the OHCHR and the Council.⁸ As of the end of July, it was unclear what the format, timeframe, and outcome of these consultations will be.

Interaction with thematic special procedures

The enhanced interactive dialogues with the special procedures, one of the main improvements of the Council over the Commission, are by now well established as one of the centrepieces of the Council’s substantive work. During this session, the Council held interactive dialogues with six mandate holders. While the modalities for the interactive dialogues still leave some room for improvement, the level of interaction between special procedures, members and observers of the Council, including NGOs and national human rights institutions (NHRIs), is much higher than at the time of the Commission. The opportunity for both States and civil society to comment on the work of special procedures and provide their views on the future orientations of the mandates is very valuable. At the same time, the open exchange with mandate holders is used by some States to publicly criticise individual mandate holders for aspects of their work. For instance, this was the case in the interactive dialogue with the Special Rapporteur on torture and other cruel, inhuman, and degrading treatment or punishment.

³ Canada, Russian Federation, Slovenia (on behalf of the EU), Tunisia.

⁴ The joint statement was signed by 32 organisations, of which 24 enjoy consultative status with ECOSOC. See http://www.ishr.ch/lca/statements_council/ishr/joint_statement_item_2_session_8.pdf.

⁵ Brazil, Canada, France, Nepal, Norway, Republic of Korea, Slovenia, Senegal, UK.

⁶ Pakistan, Uzbekistan.

⁷ Algeria, Malaysia, Philippines, Uzbekistan. A similar discussion was already held during the 7th session. Please see ISHR’s *Daily Update* of 2 June 2008.

⁸ Letter by the President dated 10 July 2008 on the appointment of facilitators, available on the OHCHR extranet.

A further aspect of the interaction with special procedures was the continued ‘review, rationalisation and improvement’ of special procedures mandates in the course of the implementation of the institution-building package. A number of important mandates were reviewed during this session. Most of these were renewed relatively smoothly. However, the renewal of the mandate of the Special Representative of the Secretary-General on transnational corporations and human rights was quite controversial. While there was no opposition from States on the way the mandate had been carried out, there was significant disagreement about how, and at which pace, the work should be carried forward.

More controversial, however, were the reviews of the mandates of the Special Rapporteur on extrajudicial, summary or arbitrary executions and of the Special Rapporteur on torture. The renewal of these two mandates, while never directly put into question, was used to again bring to the table the issue of regulating the work of special procedures and the question of term limits for mandate holders.

Based on objections to the work and views of those two current mandate holders, some States forced the President of the Council, and ultimately the Council as a whole, to ‘fix a problem that did not exist’.⁹ After arduous negotiations behind closed doors, the Council adopted a Presidential statement on the ‘terms in office of special procedure mandate-holders’.¹⁰ The Presidential statement links the terms in office of mandate holders with the implementation of the Code of Conduct for special procedures mandate holders.¹¹ Both of these issues were comprehensively discussed during the Council’s first year and were settled in the institution-building package. The two questions are not substantively connected and have never been discussed as interrelated during the institution-building process.¹²

The issue of term limits was one of the first questions to be settled during the institution building, when the Working Group on the review of mandates agreed on a maximum of two three-year terms for thematic mandates. The question of ‘re-appointment’ after the first term was not discussed and it seemed that States were at the time mainly concerned with the method of selection of mandate holders and the elaboration of the Code of Conduct. Presumably, if the intention had been to extend the newly elaborated selection process to mandate holders having served one of their two three-year terms, this issue would have been addressed. For example, in the case of the Human Rights Council Advisory Committee, it was made explicit that ‘[t]he members of the Advisory Committee shall serve for a period of three years. They shall be eligible for re-election once.’¹³

This analysis of the negotiation and the actual text of *Resolution 5/1* is supported by the long-standing practice of the Commission, to be automatically renew the terms of mandate holders for a further three years. This remained the practice even after the introduction of term limits in 1999.¹⁴ The Presidential statement provides that ‘the terms in office of the mandate holder shall be extended for a second three year term by the Council’, only if no information on ‘persistent non-compliance by a mandate holder with the provisions of the [Code of Conduct]’ is brought to the attention of the Council. In this sense, the Presidential statement clearly changes the plain meaning of the institution-building text and the practice of the Commission.

⁹ Amnesty International.

¹⁰ The Presidential Statement is available on the OHCHR extranet, or at http://ap.ohchr.org/Documents/E/HRC/p_s/A_HRC_PRST_8_2.pdf.

¹¹ The Code of Conduct is contained in Council *Resolution 5/2*.

¹² See ISHR’s comprehensive reports on the institution-building Working Groups of the Council, available at www.ishr.ch.

¹³ See paragraph 74 of *Resolution 5/1*.

¹⁴ In 1999, through a statement by the chairperson the Commission decided to establish a six-year term limit for the special procedures mandate holders. This was further clarified in ECOSOC *Decision 2000/284* which imposes ‘a time-limit of two terms of three years for membership of special procedures working groups, as well as for special rapporteurs, whose position in relation to time limits is covered by the statement made by the Chairperson of the Commission on 29 April 1999’.

During the negotiation of *Resolution 5/2*, several proposals were made on how to implement the Code of Conduct. None of those were retained, and for the Council to now exhume this question again is, unfortunately, in line with the erosion of the institution-building package described above. Moreover, the Coordination Committee of special procedures has displayed pragmatism and good faith by establishing a procedure to give effect to the provisions of the Code of Conduct.¹⁵ Many of the debates during this session were reminiscent of the efforts by many States during the institution-building process to reign in the independent working methods of the special procedures.

Despite these fundamental concerns about the Presidential statement, it remains to be seen how it will be implemented. For instance, it seems crucial that all actors, but in particular the President of the Council, handle any ‘information’ on persistent non-compliance with the Code of Conduct with full transparency and with the active involvement of the Coordination Committee.

In the remainder of this section of the overview, we discuss the interactions with special procedures mandate holders, both in the interactive dialogues on the presentation of their annual or mission reports, and on the review, rationalisation and improvement of mandates. In its three weeks, the Council held the interactive dialogues with and reviewed the following special procedures mandates:

- Special Rapporteur on the human rights of migrants.
- Special Rapporteur on extrajudicial, summary or arbitrary executions.
- Special Rapporteur on the right to education.
- Special Rapporteur on the independence of judges and lawyers.
- Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises.
- Independent Expert on the question of human rights and extreme poverty.

The following mandates were reviewed only and no interactive dialogue took place:

- Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.
- Special Rapporteur on trafficking in persons, especially in women and children.

All mandates under review were renewed for a further three years. The Council also held an interactive dialogue with the Representative of the Secretary-General on the human rights of internally displaced persons, whose mandate had been reviewed at the 6th session in December 2007.

Special Rapporteur on migrants

The Special Rapporteur on the human rights of migrants, Mr Jorge Bustamante, commenting on the review of the mandate, stressed that he had focused on the criminalisation of irregular immigration, detention of migrants, the rights of domestic workers, and the rights of minors and women migrants. Mr Bustamante underlined that the low level of ratification of the *International Convention on the Protection of the Rights of all Migrant Workers*¹⁶ and continuing xenophobia against migrants demonstrates the vital importance of the existence and renewal of this mandate.

¹⁵ See the ‘Internal Advisory Procedure’ elaborated in September 2007 and adopted at the 15th annual meeting of special procedures in June 2008. It is essentially a procedure to deal with communications from States or other stakeholders if they feel that a working method applied by special procedures is not in consonance with the Code of Conduct. Available at http://www2.ohchr.org/english/bodies/chr/special/annual_meetings/docs/InternalAdvisoryProcedure.doc.

¹⁶ Only 37 States have ratified.

Only few States spoke during the review,¹⁷ praising the work of Mr Bustamante and supporting the renewal of the mandate. Slovenia and Senegal both commended the focus on the rights of female migrants and expressed their support for further investigation of this issue. NGOs¹⁸ proposed that the mandate could be strengthened in the future by examining the health of migrants and analysing the displacement of migrants due to poor living conditions in their home countries.

The most contentious issue during the negotiations of the resolution to renew the mandate was a paragraph to ‘recall all international norms and standards relevant to the human rights of migrants’.¹⁹ Previous Commission resolutions referred directly to the *International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families* (ICRMW) and other relevant instruments. Originally, the draft resolution ‘reaffirmed’ all international norms and standards; however, Spain (on behalf of the EU) and the United States expressed their concern at ‘reaffirming’ international norms and standards without clearly defining which instruments were referred to. In particular, Spain (on behalf of the EU) requested the reference be deleted as the EU would be unable to support any blanket reaffirmation of international norms and standards since no EU country has ratified the ICRMW. In contrast, Albania, Egypt, and the Philippines supported the contested text, asserting that the phrase made no explicit reference to a particular convention and simply recognised the universality of human rights, which warranted its inclusion in the resolution. In an effort to reach a consensus, Mexico modified the preambular paragraph to ‘recall’ as opposed to ‘reaffirm’ international norms and standards. The resolution was adopted without a vote.

The resolution sets out in detail the terms of reference for the mandate holder.²⁰ The resolution is procedural in nature and therefore leaves out many of the important issues that have been addressed in past resolutions on this topic adopted by the Commission. Only two paragraphs are allocated to ‘encourage’ States to assist the Special Rapporteur in protecting the rights of migrants. It is expected that Mexico, as the main sponsor of the resolution, will propose a more substantive text on protecting and promoting the human rights of migrants at a future Council session.

Special Rapporteur on extrajudicial executions

In presenting his annual report,²¹ the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr Philip Alston, highlighted three issues of particular concern: the questionable role of commissions of inquiry in combating impunity for extrajudicial executions, governments allowing prisoners to run prisons, and the right to seek pardon for or commutation of a death penalty. He also expressed concern about the conditions of detention in many places and recommended that the Council mandate a new special rapporteur on the rights of detainees to analyse the issue further.

Mr Alston voiced open and direct criticism of the countries he had recently visited (the Philippines, Brazil, Sri Lanka, Central African Republic, Nigeria, and Afghanistan).²² During the interactive dialogue, Algeria, Singapore, Sri Lanka, Pakistan (on behalf of the OIC), the Philippines, and India strongly disapproved of the methods used by the Special Rapporteur. Sri Lanka complained that he had failed to understand the mandate’s terms of reference and the Philippines questioned the legitimacy of his sources of information. Algeria even took objection to his style of presentation. The Special Rapporteur’s unusually frank and critical presentation clearly made several States uncomfortable and defensive.

¹⁷ Brazil, Chile (on behalf of the Group of Latin American and Caribbean Countries), Philippines, Slovenia (on behalf of the EU), Senegal, Turkey.

¹⁸ Comisión Jurídica para el Autodesarrollo de los Pueblos Originarios Andinos, Association of World Citizens.

¹⁹ Preambular paragraph 2 of A/HRC/8/L.14.

²⁰ *Resolution 8/10*.

²¹ A/HRC/8/3.

²² A/HRC/8/3, Add.2 (Philippines), Add.3 (Sri Lanka and Nigeria follow-up country recommendations), Add.4, (preliminary note on Brazil), Add.5 (preliminary note on Central African Republic), Add.6 (preliminary note on Afghanistan).

A mentioned above, the review of the mandate and the informal consultations regrettably appeared to be a review of the mandate holder, as opposed to a review of the mandate. It seemed undisputed during the review that the mandate continues to be relevant. The Special Rapporteur's compliance with the Code of Conduct²³ and his reporting methodology overshadowed the discussions on the annual report and the renewal of the mandate.

During the review of the mandate, Mr Alston argued that special procedures must be independent and be able to work 'without fear or favour'. He stated that he had provided impartial assessments 'free from extraneous influence'. This included, importantly, commenting on States that had not cooperated with his requests, as he had observed an imbalance in criticising those who engage with special procedures while ignoring those who do not.

Discussions surrounding the Special Rapporteur's methods of work strongly influenced the negotiations to renew the mandate. While some States that had expressed concerns about Mr Alston's working methods went to great lengths to assure that the review was focused on the mandate and not the mandate holder, they put forward proposals that could only be understood to relate to the mandate holder. A particular case in point was India's proposal for a new paragraph, which was supported by Algeria, China, the Philippines, Singapore, and Sri Lanka, requesting the President to commence the process for the appointment of 'another mandate holder'. It explained that in the absence of a comprehensive solution to the question of reappointment it was 'compelled' to present this proposal. Numerous States²⁴ were strongly opposed to the proposal, arguing that such a provision would be unwarranted because the proposed resolution deals only with the renewal of the mandate and not with any issues related to the mandate holder. It is worth noting that India was one of the countries mentioned in the report for failing to cooperate with the mandate. However, the above proposal appeared somewhat disproportionate as a reaction to the Special Rapporteur's report. It is unclear whether India's acceptance of the Presidential statement on the terms in office for special procedures as a compromise resolves any grievances it may have with Mr Alston.

The draft resolution included the standard reference to the Code of Conduct and the duty of mandate holders to discharge their functions in accordance with it. However, the Russian Federation, supported by Algeria, India, Singapore, China, and South Africa, sought to add new and more specific references to the Code of Conduct. This was opposed by Mexico, Austria, and Slovenia and was in the end not included in the final resolution. In light of the rather personal nature of comments made by States during the interactive dialogue and informal consultations it seemed clear that the persistent efforts of some States to reference the Code of Conduct in the resolution to renew the mandate was a result of their dissatisfaction with the Special Rapporteur's methodology and findings.

The resolution renewing the mandate is mostly procedural in nature and therefore does not address the many substantive issues related to the mandate. Sweden, as the main sponsor of the resolution, in the last days of negotiations proposed to insert a new substantive paragraph highlighting some of the main issues of concern to the mandate. The proposed paragraph was included in past resolutions and is contentious for a number of reasons, but in particular for its reference to killings of persons because of their sexual orientation. It was unclear why Sweden attempted to insert this paragraph at a late stage in the negotiations. It could be perceived as a lever in relation to some of the more difficult and contentious proposals made during the negotiations, including Egypt's proposal that the mandate should focus on extrajudicial killings in times of armed conflict. The proposed substantive paragraph met with opposition from many sides and was quickly dropped and not included in the adopted resolution. During the review, Egypt also proposed that the mandate

²³ 'Code of Conduct for Special Procedures Mandate-holders of the Human Rights Council', *Human Rights Council Resolution 5/2*, 18 June 2007, available at www2.ohchr.org/english/bodies/chr/special/docs/CodeofConduct_EN.pdf

²⁴ Argentina, Australia, Austria, Canada, Denmark, Finland, Germany, Mexico, Netherlands, Slovenia, Switzerland, UK, United States (US).

could be substantively improved by including abortion as a category of execution. This proposal was also brought up during the informal consultations, but it was not pursued by the delegation.

One of the more contentious issues was the Special Rapporteur's work related to the death penalty. The Special Rapporteur has clearly stated that his mandate is not to advocate for the abolition of the death penalty and that he only addresses a limited number of issues related to the death penalty that fall squarely within his mandate. Nevertheless, many States, including Egypt (on behalf of the African Group), Pakistan (on behalf of the OIC), and Singapore continue to oppose any attention to the abolition of the death penalty by the Special Rapporteur claiming that this issue is not commonly agreed among States. However, it should be emphasised that previous Commission resolutions on extrajudicial executions, including *Resolution 2004/37* have called on States to abolish the death penalty.²⁵ Throughout the review process Egypt, as the African Group coordinator, asserted the group's opposition to any mention of the death penalty in the mandate of the Special Rapporteur and rejected any reference to the abolition of the death penalty in the resolution. However, these assertions appeared inconsistent with past voting records of some African States on this issue. For example, the 2007 General Assembly Resolution *Moratorium on the use of the death penalty*,²⁶ which explicitly urges States to abolish the death penalty, was co-sponsored by five African States²⁷ and 15 African States voted in favour.²⁸ Egypt was one of 11 African States²⁹ to vote against the resolution, while 21 African countries abstained.³⁰

Finally, a new paragraph in the resolution requests the Special Rapporteur to incorporate a gender perspective in his/her work. This new addition demonstrates States' willingness to mainstream gender issues and is in line with implementation of Council *Resolution 30/6* on the integration of a gender perspective in all aspects of the Council's work.

In the context of the negotiations on this resolution, it is worth noting that on 6 June 2008 the US Department of State, during its daily address, announced that the United States would disengage from the Council and participate 'only when [it] believe[s] that there are matters of deep national interest before the Council'. The Department of State representative stated that this decision was made due to the United States' inability to 'really influence' the Council. The representative asserted that the Council has a 'rather pathetic record' in fulfilling its mandate and 'instead of focusing on some of the real and deep human rights issues around the world' it seemed to focus almost solely on Israel.³¹ Despite these harsh criticisms of the Council, the United States delegation was actively involved in the negotiations of the draft resolution. One particular issue that the United States found to be 'of deep national interest' was the resolution's reference to extrajudicial killings in armed conflict. The delegation stressed that the mandate on extrajudicial, summary or arbitrary executions is not applicable to international conflicts because only international humanitarian law applies in these situations. This assertion was supported by India. In addition, the United States, with the support of India, expressed its disapproval with a reference to the *Geneva Conventions* in the draft resolution, stating that the resolution 'mixes up' human rights law and international humanitarian law. However, despite the US's disapproval of this reference, it remained in the resolution.

²⁵ These resolutions have traditionally been adopted by a vote.

²⁶ General Assembly *Resolution 62/149*.

²⁷ Angola, Benin, Cape Verde, Gabon, Guinea-Bissau.

²⁸ Algeria, Angola, Benin, Burkina Faso, Burundi, Cape Verde, Cote d'Ivoire, Gabon, Mali, Mauritius, Mozambique, Namibia, Rwanda, Sao Tome and Principe, and South Africa.

²⁹ Botswana, Comoros, Egypt, Ethiopia, Libya, Malawi, Mauritania, Nigeria, Sudan, Uganda, and Zimbabwe.

³⁰ Cameroon, Central African Republic, Chad, Congo, Djibouti, Equatorial Guinea, Eritrea, Gambia, Ghana, Guinea, Kenya, Lesotho, Liberia, Madagascar, Morocco, Niger, Sierra Leone, Swaziland, Togo, Tanzania, and Zambia.

³¹ Full US State Department address is available at <http://www.state.gov/r/pa/prs/dpb/2008/jun/105716.htm>.

Special Rapporteur on torture

The review of the mandate of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment proved quite controversial, although all the States and NGOs that spoke during the plenary discussion supported the mandate in general.³²

The Russian Federation accused Mr Nowak of violating the Code of Conduct for special procedures, but the English simultaneous translation of the statement made it impossible to make out the specifics of the criticism. Indonesia criticised Mr Nowak's unannounced visits to places of detention during his visit to that country in 2007. In response, the Special Rapporteur explained that unannounced visits and private interviews are necessary methods of fact-finding and noted with surprise that Indonesia had not objected to these methods at the time of the visit. Both statements appeared to be a continuation of efforts by many States during the institution-building process to reign in the independent working methods of special procedures.

The resolution renewing the mandate sets out clear and broad terms of reference for the mandate holder but also contains several substantive elements. For instance, it calls on States to prevent, investigate, and ensure accountability, redress, and compensation to victims for acts of torture and cruel, inhuman and degrading treatment or punishment. It also urges States to criminalise all acts of torture. In this regard it is worth noting that the Committee against Torture has called repeatedly on Denmark, the main sponsor of the mandate, to incorporate a specific offence of torture in its criminal code.³³ The resolution also explicitly asks the Special Rapporteur to integrate a gender perspective throughout his work.

Despite NGO efforts the resolution did not include stronger language on combating the risks of *refoulement* to countries where a person may face torture or other cruel treatment, on ensuring the credibility of diplomatic assurances, and on urging States to ensure proportional punishment for perpetrators of torture or cruel treatment.

The resolution to renew the mandate of the Special Rapporteur on torture was adopted without a vote, but only after significant delay. This appeared to be linked to the efforts during the session to regulate the terms in office of special procedures, and threats to Mr Nowak's tenure in particular. The Russian Federation argued that since Mr Nowak had completed a first term of three years, the Council should consider appointing a new mandate holder. Interestingly, Jordan did not speak during the review of the mandate, but instead made very critical comments during the informal consultations on the draft resolution. Jordan's criticism of Mr Nowak seemed to be linked to his visit to that country in 2006 (well before the adoption of the Code of Conduct for special procedures). Jordan's responses during the interactive dialogue at the Council's 4th session, when Mr Nowak presented his report on that visit, were defensive in refuting allegations that torture was routinely committed by the General Intelligence Directorate and the Criminal Investigation Department.

Special Rapporteur on education

The Special Rapporteur on the right to education, Mr Vernor Muñoz, presented his annual report to the Council that focused on the difficulty of accessing education in emergency situations of natural disasters and

³² Canada, Chile, Cuba, Indonesia, Norway, Russian Federation, Slovenia (on behalf of the EU), Switzerland, Turkey, Commission on Human Rights of the Philippines (in a joint statement with the National Consultative Commission on Human Rights of France, National Commission for Human Rights of Togo, Ugandan Human Rights Commission, and the Advisory Council on Human Rights of Morocco), International Commission of Jurists (ICJ), Association for the Prevention of Torture (APT) in a joint statement with World Organization Against Torture, International Federation of ACAT (Action by Christians for the Abolition of Torture – FIACAT), *Comisión Jurídica para el Autodesarrollo de los Pueblos Originarios Andinos*.

³³ Most recently in its concluding observations of July 2007, CAT/C/DNK/CO/5, para. 10.

armed conflict.³⁴ State reactions to Mr Muñoz's presentation were generally positive and constructive. The interactive dialogue centred on appreciation for greater attention paid to this right and requests for suggestions of more practical methods to realise it universally. Certain States, including Luxembourg, Pakistan, China, Qatar, and Venezuela, pointed out the importance of eradicating poverty due to its interrelation with access to education. Cuba and Chile discussed recent events in their own countries to point out the challenges caused by emergency situations.

The 'review, rationalisation and improvement' dialogue on the mandate focused on the elimination of discrimination against vulnerable groups in accessing education. Having already focused on persons with disabilities in his 2007 report, Mr Muñoz intends to address the situation of persons deprived of their liberty, in particular migrants, minorities, and exploited children, regarding the right to education in his 2009 report. Mr Muñoz enjoyed the support of each country that spoke³⁵ and the mandate was extended without a vote.³⁶

Special Rapporteur on judges and lawyers

The Special Rapporteur on the independence of judges and lawyers, Mr Leandro Despouy, focused on access to justice in his annual report and reported on his mission to the Democratic Republic of the Congo (DRC).³⁷ He also touched on impunity, the use of military tribunals, states of emergency, and the use of the death penalty in Iraq, echoing his last presentation to the Council during its 5th Session in June 2007.³⁸

His presentation received a generally favourable reaction from States. Notably, the Maldives reiterated its gratitude for Mr Despouy's recommendations following his February 2007 visit to the country³⁹ and discussed its progress in implementing them. Argentina and Chile expressed support for Mr Despouy's suggestion that the UN should compile a catalogue of good practices and make it available to all stakeholders. NGOs requested that the Special Rapporteur pay more attention in the future to the justice systems of specific countries, including Sri Lanka,⁴⁰ Iraq,⁴¹ China,⁴² and Egypt.⁴³

The scant response to Mr Despouy's report was perhaps in part a result of the attention concentrated on the presentation of the Special Rapporteur on extrajudicial, summary, or arbitrary executions, which was discussed at the same meeting. The expressions of support contrasted with some of the reactions after Mr Despouy's presentation in 2007, when the Republic of Korea and the US criticised the scope of the Special Rapporteur's report, arguing that it exceeded the boundaries of the mandate.

Hungary, as the mandate's main sponsor, took the lead in the review process. Mr Despouy explained that the mandate had initially focused on direct protection of judges and lawyers, but had evolved to also encompass a preventive aspect. He suggested that the Council consider broadening the scope of the mandate, but did not detail what such an expanded scope would constitute. The Council adopted without a vote a resolution extending Mr Despouy's mandate for another three years.⁴⁴ The resolution 'commends' the Special

³⁴ A/HRC/8/10.

³⁵ Chile (on behalf of GRULAC), Cuba, Slovenia (on behalf of EU), Pakistan (on behalf of OIC).

³⁶ *Resolution 8/4*.

³⁷ A/HRC/8/4 (annual report), Add.1 (communications from governments), A/HRC/8 (Democratic Republic of the Congo).

³⁸ For more information, please see ISHR's *Daily Update* of 11 June 2007.

³⁹ For more information, please see ISHR's *Daily Update* of 11 June 2007.

⁴⁰ Asian Legal Resource Centre.

⁴¹ North South XXI.

⁴² Society for Threatened Peoples.

⁴³ Amnesty International.

⁴⁴ *Resolution 8/6*.

Rapporteur's work, reflecting the Council's satisfaction with his performance. The last time the mandate was renewed in 2005,⁴⁵ the Commission merely took note of Mr Despouy's work.⁴⁶

Special Rapporteur on trafficking

The review of the mandate of the Special Rapporteur on trafficking in persons, especially in women and children, did not give rise to any major debate and the mandate was renewed without a vote.⁴⁷ Established in 2004, the mandate of the Special Rapporteur is a cross regional initiative co-sponsored by the Philippines and Germany.⁴⁸ The development of more cross-regional initiatives at the Council is indeed positive and could be critical to the Council's future success.

Slovenia, on behalf of the European Union (EU), Sri Lanka, Turkey, Belarus, and Spain all affirmed the important role of the Special Rapporteur and supported a renewal of the mandate. They spoke on the need to combat this disturbing phenomenon and called for increased cooperation between government agencies and the mandate holder, as well as for the continued use of internet resources and other modern technology to aid in the prevention of trafficking. Sri Lanka, Turkey, and Belarus specifically called for a more long-term, victim-centred approach to combating trafficking by emphasising the rights of victims and creating effective witness protection programmes. The resolution requests the Special Rapporteur to coordinate with other mandate holders in areas such as education, poverty reduction, and prevention of sexual exploitation to address how to eliminate the demands for services that lead to trafficking.

Special Representative of the Secretary-General on business and human rights

The Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Mr John Ruggie, presented his annual report⁴⁹ and emphasised that most abuses by transnational corporations (TNCs) and other businesses occur in States currently experiencing or emerging from conflict, or of low income. Therefore, there is a paramount need for an international regulatory framework on the conduct of businesses. The Special Rapporteur had received allegations of business complicity in acts of murder, disappearances, torture, rape, forced displacement of communities, child labour, and sweatshop conditions.

The report, which is the result of the mandate's 'first phase', identifies a conceptual and policy framework that consists of three principles or pillars. These are: the State duty to protect against human rights abuses by third parties, including businesses; the corporate responsibility to respect human rights; and the need for more effective access to remedies. The report received positive support from States that participated in the interactive dialogue.⁵⁰

The mandate's creation in 2005 was the result of a cross-regional initiative involving Argentina, India, Nigeria, the United Kingdom (UK), and the Russian Federation. While the cross-regional sponsorship has been maintained, Norway has replaced the UK. The change in sponsorship seems to be directly related to the

⁴⁵ Commission on Human Rights *Resolution 2005/33*.

⁴⁶ E/CN.4/2005/60. The report focused on the impact of the fight against terrorism on human rights and the administration of justice in periods of transition

⁴⁷ *Resolution 8/12*.

⁴⁸ It was originally initiated by Germany..

⁴⁹ A/HRC/8/L.8 available at: http://ap.ohchr.org/documents/alldocs.aspx?doc_id=14260.

⁵⁰ Algeria, Argentina, Bangladesh, Chile, China, Cuba, Egypt, France, India, Italy, Luxembourg, Russian Federation, Malaysia, Nigeria, Norway, Pakistan (on behalf of OIC), Peru, Portugal, Qatar, Republic of Korea, Slovenia (on behalf of the EU), Thailand, UK, Venezuela.

UK's very reserved position on the responsibility of businesses in relation to human rights and its lack of support for the development of an enforceable normative framework in this regard.

During the review of the mandate, Norway, as one of the key sponsors, underlined that one of the key challenges is to narrow, and ultimately bridge, existing governance gaps and expand on the first phase of the previous three years of research by entering a second phase, namely providing normative clarity to governments and businesses.

During the plenary discussions the renewal of the mandate received unanimous support from those who spoke.⁵¹ However, there were significant divisions on the future of the mandate. States were divided as to whether the mandate should develop a legal framework. Belgium, Egypt (on behalf of the African Group), Nigeria, Pakistan, and South Africa underlined the need for the development of a more coherent normative framework to adequately address TNC's business practices.⁵² Cuba even suggested that the Special Representative draw on the work of the former Sub-Commission on Human Rights,⁵³ which had spent several years on this issue developing the *Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights*.⁵⁴ Other States, and notably the UK, believed that it is too early in the process for such a proposal and were reluctant to support a rapid development of international law in this area.

Similar fault lines were visible in relation to the scope of the mandate. South Africa argued that the mandate should be strengthened through the establishment of a complaints mechanism. France and Peru seemed more sceptical, asking how such a complaints mechanism could be established. The Netherlands felt that a complaints mechanism would be 'unmanageable'. Egypt proposed the expansion of the mandate to specifically focus on private military companies.

The negotiations of the resolution were plagued by the different views on the right balance between corporate responsibility and State obligations, and on the pace with which the mandate's work should proceed towards the development of a normative framework. The UK (leading the negotiations on behalf of the EU) insisted that the mandate should not be seen to allow a shift of responsibility from governments to businesses. It also sought to weaken the mandate's further work on the conceptual and policy framework. The main sponsors maintained that the aim was to operationalise the framework.

The resolution to renew the mandate was adopted by consensus despite the significant differences of opinion among States expressed during the negotiations. South Africa formally disassociated itself from the resolution and did not join the consensus as it believed that the resolution did not go far enough in giving the mandate strong terms of reference designed to revitalise and carry the Special Representative's work into the next phase.

The substance of the resolution to renew the mandate addresses the three pillars proposed in the Special Representative's report. It recognises the need to operationalise the existing framework and requests the provision of concrete recommendations to businesses and other stakeholders. Finally, it also calls for the renewal of the mandate of the Special Representative for a further three years, although at the outset the main sponsors had proposed a renewal for only two years.

⁵¹ Bangladesh, Belgium, Canada, Cuba, Egypt, Malaysia, Nigeria, Norway, Pakistan (on behalf of the OIC), Slovenia (on behalf of the EU), South Africa, Switzerland.

⁵² Belgium, Egypt, Nigeria, Pakistan, South Africa.

⁵³ Also mentioned by Centre Europe Tiers-Monde.

⁵⁴ E/CN.4/Sub.2/2003/12/Rev.2 available at: <http://www2.ohchr.org/english/issues/globalization/business/index.htm>

Of note was the lack of discussion during the negotiations of the title of the ‘Special Representative (of the Secretary-General)’. During the March 2008 session there had been considerable debate surrounding this issue in regards to the then Special Representative of the Secretary-General on human rights defenders.⁵⁵ The most contentious issue in relation to the title was the process by which the mandate holder would be appointed, since special representatives of the Secretary-General are appointed by the Secretary-General. All other mandate holders are appointed by the President of the Council after a complex selection process. Part of the reason for the absence of debate may be that the Special Representative had only served one term and that no mandate holder needed to be appointed as he can continue to serve for another term.⁵⁶ It is also noteworthy that there were no calls for the ‘re-appointment’ of Mr Ruggie, who has served one term.

Independent Expert on extreme poverty

The new Independent Expert on the question of human rights and extreme poverty, Ms Magdalena Sepulveda, presented the report of her predecessor, Mr Arjun Sengupta, which was due to be presented at the 7th session of the Council.⁵⁷ Mr Sengupta’s report found that an effective assessment of extreme poverty required that it be defined from a human rights perspective and not be seen as a purely economic phenomenon. The majority of States that spoke praised the Independent Expert’s work and supported the call for a human rights approach to the elimination of extreme poverty.

The review of the mandate⁵⁸ was very short as only five States and two NGOs spoke. France, the main sponsor of the mandate, asserted that the mandate should be renewed to better understand the phenomenon of extreme poverty, to define policies and practices to combat extreme poverty, and to ensure that those living in extreme poverty can play a decision-making role in the shaping of policies that affect them. All States that spoke favoured the continuation of the mandate,⁵⁹ with Algeria thanking the Independent Expert for her ‘realistic approach’. Pakistan (on behalf of the OIC) stated that it was essential to address the root causes of poverty and that it was time to move to practical actions.

During the interactive dialogue South Africa called for the strengthening of the mandate. It became clear during the adoption of the resolution⁶⁰ without a vote that South Africa was not satisfied with the scope of the mandate as it disassociated itself from the resolution. It explained that the question of poverty and hunger was a major challenge for developing countries, and that the plight of people in these countries should not be ‘trivialised’ nor addressed as narrowly as was the case in the resolution. Instead, the problem should be addressed with due linkages to development issues.

Representative of the Secretary-General on internally displaced persons

The Representative of the Secretary-General on internally displaced persons (IDPs), Mr Walter Kälin, presented his annual report and his mission reports on visits to the Central African Republic, Azerbaijan, the Democratic Republic of the Congo (DRC), and Sri Lanka.⁶¹ He mentioned that he had recently focused on displacement due to natural disasters, particularly in the wake of cyclone Nargis in Myanmar and the earthquake in China. However, he underlined that while attention to displacement due to natural disasters is

⁵⁵ See ISHR’s *Daily Update* of 7 March 2008, www.ishr.ch.

⁵⁶ A similar situation arose in relation to the mandate of the Representative of the Secretary-General on the human rights of internally displaced persons in September 2007.

⁵⁷ A/HRC/7/15.

⁵⁸ Commission on Human Rights *Resolution 1998/25*.

⁵⁹ Algeria, Pakistan (on behalf of the OIC), Senegal, Slovenia (on behalf of the EU), Turkey.

⁶⁰ *Resolution 8/11*.

⁶¹ A/HRC/8/6 (annual report), Add.1 (Central African Republic), Add.2 (Azerbaijan), Add.3 (Democratic Republic of the Congo), Add.4 (Sri Lanka).

growing, armed conflicts are still the major cause for displacement. He concluded by expressing his hope to receive a positive reply to a request for a visit sent to the Sudan in January and March 2008.

Both the DRC and Azerbaijan, speaking as concerned States, welcomed the report and pledged to take the recommendations seriously. Sri Lanka commended Mr Kälin for his ‘wonderful commitment’. It updated the Council on the progress made since the visit and emphasised that while the Government would not compromise on security, it will continue to work on resettlement ‘with the least inconvenience possible’. Sri Lanka informed the Council that it had already begun preparations for implementing the recommendations. The interactive dialogue with Mr Kälin attracted a lot of State and NGO interest and focused on displacement as a result of natural disasters and armed conflict, and the *Guiding Principles on Internal Displacement*.⁶²

Appointment of new mandate holders

At this session, the Council also had to appoint seven special procedures mandate holders. The President presented his list of candidates for the special procedures and for the Expert Mechanism on the rights of indigenous peoples.⁶³ He attempted to gavel through the decision as per his list. However, Egypt, on a point of order, requested a suspension of the session in order to conduct further consultations, and stated that it did not consider the list adopted. After a lengthy delay, the President stated that all mandate holders shall fulfil their responsibilities in strict accordance with the relevant Council resolutions covering their mandates. On that basis, the list was approved. However, there seems to be little value in the addition that mandate holders must comply with the terms of reference of their mandate.

It was rumoured that the consultations related to Egypt’s objections to the proposed mandate holder on freedom of expression, who is from Guatemala. Notably, following the adoption of the list of candidates, Guatemala complained about the consultations on candidates, which had gone well beyond the technical and objective requirements for the mandate and had questioned the candidate’s faith and political views. It claimed that the Council had become as ‘politicised and non-transparent’ as the Commission.

The Republic of Korea and Portugal criticised the President’s approach to the procedure. These statements were clearly motivated by the fact that their own nationals had not been recommended by the President to fill vacancies, despite having been presented to the President by the Consultative Group as the latter’s top preferences.⁶⁴ It is regrettable that some States continue to perceive the appointment of special procedures mandate holders as related to their national interests.

Promotion and protection of human rights

General debate

⁶² E/CN.4/1998/53/Add.2, 11 February 1998, available at www.unhcr.ch/html/menu2/7/b/principles.htm.

⁶³ The list can be accessed on the OHCHR extranet at <http://portal.ohchr.org> (fill out the form on <http://www2.ohchr.org/english/bodies/hrcouncil/form.htm> to receive user name and password). Then follow the links to ‘follow-up to Human Rights Council *Resolution 5/1* on the institution-building package’, ‘Special Procedures’. The list contained candidates that had been put forward for the Council’s consideration by the President, following consultations with the Consultative Group. These covered mandates on the following issues: freedom of opinion and expression; physical and mental health; contemporary forms of racism, racial discrimination, xenophobia and related intolerance; trafficking in persons; people of African descent, arbitrary detention, the situation of human rights in Haiti. The list also included candidates for the Expert Mechanism on the rights of indigenous peoples, and the forum on minority issues.

⁶⁴ It should be noted that the President retains the prerogative to choose from the Consultative Group’s list whichever candidate/s he/she deems most suitable, and is thus not obliged to concur with the preferences of the Group.

A wide range of issues were discussed during the general debate. These included respect for human rights while countering terrorism;⁶⁵ rule of law;⁶⁶ the right to food, particularly in the context of the recent hunger crisis;⁶⁷ the death penalty;⁶⁸ the right to development;⁶⁹ eliminating the stigma of leprosy;⁷⁰ eradicating extreme poverty; the right to education;⁷¹ the right to self-determination;⁷² the system of special procedures;⁷³ and the adoption of the optional protocol to the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).⁷⁴ Slovenia (speaking on behalf of the EU) expressed concern about the situations in Sri Lanka and Zimbabwe.

Country focus

Human rights situations that require the Council's attention

Follow-up to the special session on Myanmar

The Council held a special session on the situation of human rights Myanmar in October 2007.⁷⁵ In follow-up to this session, the newly appointed Special Rapporteur on the situation of human rights in Myanmar, Mr Tomás Ojea Quintana, presented at this session an initial report on the developments in the aftermath of the peaceful demonstrations that took place in the fall of 2007, which were violently suppressed by the government.

As it had done on previous occasions, Myanmar rejected the Special Rapporteur's report on the basis that it 'lacked impartiality' and failed to respect the State's territorial integrity and sovereignty. Responding to the international criticism of the recent referendum on the new draft constitution, the delegation claimed that it had been 'fair and transparent' and that part of the diplomatic corps present in Myanmar had observed it. Similarly, it justified the detention of Ms Suu Kyi as necessary to 'protect the State against subversion'. The categorical rejection of criticism was best illustrated when the Ambassador claimed that there are 'no political prisoners' in the country.

The discussions on Mr Quintana's report centred on two important events since the special session, namely cyclone Nargis which hit the country in May 2008 and the holding of the referendum on the draft constitution only days after that. States commented on these events to either support or criticise the Government. Some States⁷⁶ seemed to see the natural disaster as a factor for the international community to be less demanding of the Government, while others⁷⁷ identified the authorities' response to it as confirming the lack of political will to improve the human rights situation. All four NGOs⁷⁸ that spoke expressed their concern about the human

⁶⁵ Pakistan (on behalf of the OIC), Slovenia (on behalf of the EU), Switzerland.

⁶⁶ Slovenia (on behalf of the EU).

⁶⁷ Japan, Slovenia (on behalf of the EU).

⁶⁸ Indonesia, Italy.

⁶⁹ Indonesia, Malaysia.

⁷⁰ Japan.

⁷¹ Oman.

⁷² Pakistan (in its national capacity).

⁷³ Russian Federation, Slovenia (on behalf of the EU).

⁷⁴ Morocco, Slovenia (on behalf of the EU).

⁷⁵ Please see ISHR's report on the special session at <http://www.ishr.ch/hrm/council/other/cmreports/specialsessions/>

⁷⁶ India, Philippines, China, Singapore, Sri Lanka, Indonesia.

⁷⁷ Slovenia (on behalf of EU), Germany, Canada, New Zealand, Ireland, Switzerland.

⁷⁸ International Federation of Human Rights Leagues (FIDH), Asian Legal Resource Centre, Human Rights Watch, Amnesty International.

rights situation in Myanmar and particularly criticised the national referendum. Germany, Japan, Canada, Ireland, and Switzerland deplored the decision of the Government to insist on holding the referendum despite the humanitarian crisis.⁷⁹ Philippines, Malaysia, China, Singapore, Sri Lanka, and Indonesia were of the view that holding the referendum despite the adverse circumstances in the aftermath of the cyclone was proof of the Government's willingness to implement its '7-step road map to democracy'.

The position of the great majority of Asian States seemed to indicate the level of political will in the Council to address the situation in Myanmar. While most Asian States called on the Government to continue a dialogue with the international community, Singapore deplored that 'the status-quo has not changed' in Myanmar and that this was 'unacceptable'. It also recalled the strong position the Association of Southeast Asian Nations (ASEAN) had voiced in December 2007. Singapore seemed to take an intermediate position in other respects. While it did acknowledge the referendum as a 'small step forward', it expressed its disappointment at the recent extension of Ms Suu Kyi's detention, and 'shared the frustration' about the Government's lack of cooperation with the international community in response to cyclone Nargis. However, against the background of the discussions taking place in the UN Security Council,⁸⁰ Singapore rejected any invocation of the 'responsibility to protect'⁸¹ in the situation as 'irresponsible', because it 'confirms the mistrust of the Government of Myanmar'.

The resolution that was adopted on Myanmar was co-sponsored almost exclusively by States from the Western European and Others Group (WEOG) and the Eastern European Group (EEG).⁸² The reactions to the draft resolution mirrored the divisions observed during the consideration of the follow-up to the special session. The relatively strong wording and the increased range of issues covered by the resolution is a positive step in the Council's treatment of this situation. However, it seemed from the discussions that the momentum of the special session, where broad support from States from all regions led to a consensus outcome, was wearing off.

General debate

A large number of human rights situations of concern were raised, including those in the Democratic Republic of the Congo (DRC),⁸³ Iran,⁸⁴ Sri Lanka,⁸⁵ the Sudan,⁸⁶ China (Tibet),⁸⁷ Zimbabwe,⁸⁸ and Burma/Myanmar. Belarus,⁸⁹ the Democratic People's Republic of Korea (DPRK),⁹⁰ Kenya,⁹¹ Nepal,⁹² and

⁷⁹ A number of NGOs also regretted the circumstances of holding the referendum.

⁸⁰ For more information, see www.securitycouncilreport.org/site/c.glKWLeMTIsG/b.4130257.

⁸¹ The idea of invoking the responsibility to protect was first invoked by France in May 2008. This was opposed by UN Secretary-General Mr Ban Ki-Moon, who emphasised that the situation in Myanmar was a humanitarian one, and therefore the concept did not apply.

⁸² The only exception was Panama.

⁸³ Canada, France, Netherlands, Slovenia (on behalf of the European Union and Croatia, Macedonia, Albania, Bosnia and Herzegovina, Montenegro, Iceland, Liechtenstein), UK.

⁸⁴ Australia, Canada, France, Iceland, Ireland, Slovenia (on behalf of the EU and other States), UK. The Baha'i International Community also condemned Iran for religious persecution.

⁸⁵ Canada, France, Ireland, Japan, Netherlands, Slovenia (on behalf of the EU and other States), Switzerland.

⁸⁶ Australia, Canada, France, Iceland, Ireland, Netherlands, New Zealand, Slovenia (on behalf of the EU and other States), Switzerland, UK.

⁸⁷ Sweden, UK, Amnesty International, Human Rights Watch.

⁸⁸ Australia, Canada, France, Germany, Japan, Iceland, Ireland, Netherlands, New Zealand, Slovenia (on behalf of the EU and other States), Switzerland, UK. It was notable, however, that Japan expressed itself less harshly than the others. Amnesty International and Human Rights Watch also expressed concern over Zimbabwe.

⁸⁹ Canada, Slovenia, UK.

⁹⁰ Canada, Ireland, Slovenia.

⁹¹ New Zealand, Slovenia (on behalf of the EU and other States), UK.

Somalia⁹³ also received some attention. NGOs drew attention to the US Central Intelligence Agency's secret detention programmes, the situation of detainees held at Guantanamo Bay,⁹⁴ Colombia's reaction to its internal armed conflict,⁹⁵ Pakistan's failure to reinstate its deposed judiciary, and the continuing state of emergency in Bangladesh.⁹⁶ The situation in the Sudan was exclusively commented upon by States. Comments on Zimbabwe, meanwhile, originated equally from both States and NGOs. Bolivia and China were the only States outside of the WEOG that spoke during the general debate. The scope of both their statements was narrower than others. Bolivia drew attention to recent attacks against Bolivian indigenous leaders by non-State actors, imploring international organisations to 'speak out in condemnation of these acts'. China criticised what it called the Council's 'double standards', and insisted that the situation in Tibet was 'not a human rights issue', but rather a matter of Chinese 'sovereignty and internal affairs'.

The list of situations addressed was virtually identical to that of the 7th session in March 2008⁹⁷ and shorter but strikingly similar to that of the 6th session in September 2007.⁹⁸

The Netherlands, France, and the UK asserted that the UPR was no substitute for a general debate on human rights situations that require the Council's attention, namely under Item 4.

It was also of interest that several States that had been commented on during the debate used their rights of reply to make substantive statements criticising other States. For example, Iran criticised the States that had made comments on Iran for their policies or practices in relation to racism, social exclusion of minorities, police brutality, and 'defamation of religions'. It seems odd that these concerns, as far as they are legitimate, were not voiced during a regular Item 4 statement.

The response to criticism was not limited to critical comments on other States. Sri Lanka announced that 'although [it holds] the High Commissioner in high esteem, the same cannot be said for OHCHR'. Bangladesh took offence at a statement by the Asian Legal Resource Centre, and called for a 'code of conduct for NGOs'.

As mentioned above, the short list of situations raised by States during the general debate was similar to those of previous sessions. However, discussions of country situations that merit the Council's attention generally do not result in any Council action. This is not surprising given the strong opposition to country resolutions and mandates by a majority of the Council's members. Overall, the cursory nature of the discussions prevented a more substantive response by the Council to situations that merit its attention and action. A new approach to dealing with country situations is required and it should involve effective use of all of the Council's existing tools, including the reports and recommendations of special procedures, special sessions, and the complaint procedure, as well as new methodologies.

The relatively limited number of situations discussed is in part due to the fact that only some States raised situations of concern to them, while others quite clearly boycotted the general debate. It seems that the intentional effect of such a strategy is to let the item appear lopsidedly political in nature. At the same time it

⁹² Japan.

⁹³ Netherlands, UK, Human Rights Watch.

⁹⁴ Amnesty International.

⁹⁵ Colombian Commission of Jurists.

⁹⁶ Asian Legal Resource Centre.

⁹⁷ Belarus, China, Democratic People's Republic of Korea (DPRK), Democratic Republic of the Congo (DRC), Iran, Kenya, Myanmar, Sri Lanka, Sudan, Somalia, Zimbabwe.

⁹⁸ Belarus, Burundi, China, Colombia, Cuba, DPRK, DRC, Egypt, Fiji, Gabon, Haiti, Iran, Iraq, Sri Lanka, Myanmar, the Sudan, Pakistan, Jammu and Kashmir, Philippines, occupied Palestinian territories (OPT), Russian Federation, US, Uzbekistan, Western Sahara, Zimbabwe.

is clear that many more situations deserve attention and it seems that in raising some situations of concern but not others States may be guided by certain political considerations.

Human rights situation in Palestine

States largely presented well-worn positions regarding the situation in the occupied Palestinian territories (OPT) during the interactive dialogue and general debate on the human rights situation in Palestine and other occupied Arab territories (Item 7). The Council devoted a considerable amount of time to this item, yet failed to advance beyond the familiar impasses. Unlike during the last session, it did not adopt any resolution on this topic. The incoming Special Rapporteur on the situation of human rights in the OPT, Mr Richard Falk, introduced a fresh point of contention by choosing to use his first address to the Council to highlight the need to expand the mandate to include human rights abuses committed by Palestinian armed groups. He recognised that the possible reconfiguration of the mandate was a ‘sensitive issue’, but argued that such a change would ‘insulate the Human Rights Council from those who maintain its work is tainted by partisan politics’.

The outgoing High Commissioner, Ms Louise Arbour, outlined progress made toward implementing goals⁹⁹ such as ensuring the protection of Palestinian civilians against Israeli military attacks and compliance with international humanitarian law by all parties involved in the conflict.¹⁰⁰ Her presentation, though brief, was notable for its focus on not only Israeli but also on Palestinian actions.

Israel, as a concerned State, expressed its doubt about Mr Falk’s stated commitment to impartiality, citing his past publications as examples of an anti-Israeli bias.¹⁰¹ It pointed out that this mandate has not undergone a review in the last 15 years, and called for its expansion to include violations by Palestinians.

The other concerned entity, Palestine, pointed to recent plans to build Israeli settlements in East Jerusalem as evidence of Israel’s ‘determination to undermine the peace process’.

Mr Falk’s suggestion that the mandate be reconfigured received a mixed but predictable reaction from States. Jordan, Egypt, and Cuba insisted that the mandate as in its current form was not, in fact, one-sided, and worried that such an expansion of the mandate would give ‘a false impression of symmetry’ by ‘equat[ing] the oppressor with the oppressed’.¹⁰² Sri Lanka and Brazil indicated that the idea merited further consideration. Only Slovenia (on behalf of the EU) spoke up in support of the idea.

The remainder of the discussion echoed familiar themes and opinions from past sessions. Several States called on both sides to cease violations of international humanitarian law,¹⁰³ but most focused on Israeli violations and suffering of Palestinian civilians.¹⁰⁴ Many concerns expressed in the three resolutions adopted during the last session¹⁰⁵ were repeated here, including the expansion of settlements and the building of the ‘separation wall’. In March 2008, the Council decided to specifically consider the situation in the occupied Syrian Golan

⁹⁹ As requested by *Resolution 7/1*.

¹⁰⁰ She presented two reports: A/HRC/8/17, ‘Report of the High Commissioner for Human Rights on human rights violations emanating from Israeli military attacks and incursions in the occupied Palestinian territory, particularly the recent ones in the occupied Gaza Strip’, and A/HRC/8/18, ‘Report of the High Commissioner for Human Rights on religious and cultural rights in the occupied Palestinian territory, including East Jerusalem’.

¹⁰¹ For example, Mr Falk authored an article in June 2007 entitled “Slouching Toward a Palestinian Holocaust”, which included statements such as: “Is it an irresponsible overstatement to associate the treatment of Palestinians with this criminalized Nazi record of collective atrocity? I think not.” It appeared in a publication for the Transnational Foundation for Peace and Future Research.

¹⁰² Jordan.

¹⁰³ Brazil, China, South Africa, Sri Lanka, Switzerland.

¹⁰⁴ China, Cuba, Egypt (on behalf of the African Group), Jordan, Pakistan (on behalf of the OIC), South Africa, Sri Lanka.

¹⁰⁵ *Resolution 7/1*, *Resolution 7/18*, and *Resolution 7/30*.

during its March 2009 session.¹⁰⁶ Nevertheless, many States¹⁰⁷ already used this session to raise their concerns about this territory and, in particular, the plight of Syrian prisoners held by Israel.

In his response, Mr Falk agreed with comments by Egypt that ‘if the situation of occupation no longer existed’ the mandate could be abolished.

The substantive future of the mandate is difficult to predict. State positions on whether to expand the mandate appear rigidly fixed based on predictable divisions and are not likely to yield. A review was originally scheduled for the Council’s September 2008 session, but recent controversy over its ‘appropriateness’ has thrown this plan into question. States aligned with Palestine¹⁰⁸ contend that because the mandate is intended to last until the end of the occupation, a review would be unnecessary. Israel and other States were of the view that a review is necessary and in accordance with standard Council practice, as all other mandates have been or are scheduled to be reviewed. The draft programme of work for the next session when the remaining mandates are to be reviewed¹⁰⁹ has not scheduled a review of the mandate. During the Bureau meeting on 25 June 2008, the incoming President of the Council, Mr Martin Ihoeghian Uhomobhi, indicated his intention to hold further consultations on this issue.¹¹⁰

Technical assistance and capacity-building

Interactive dialogue – Independent Expert appointed by the Secretary-General on the situation of human rights in Haiti

Mr Louis Joinet addressed the Council for the last time in his capacity as the Independent Expert appointed by the Secretary-General on the situation of human rights in Haiti. A wide range of human rights issues was raised in the presentation by Mr Joinet and in the ensuing interactive dialogue, from tackling arbitrary detention to the continued violence against women to the increasing level of poverty. Moreover, the comments were general, with little reference to technical assistance and capacity-building.

The Council at this session appointed Mr Michel Forst as the new mandate holder.

General debate

The general debate on ‘technical assistance and capacity-building’ (Item 10) drew very few comments from States and NGOs,¹¹¹ and the discussions were largely repetitive of those on Item 4. For instance, Slovenia (on behalf of the EU) reiterated its disappointment with Sri Lanka’s refusal to accept the presence of a human rights monitoring presence. This was rebutted by Sri Lanka, which again emphasised that technical assistance must be ‘demand-driven’ at the request of the recipient State. Slovenia (on behalf of the EU) also regretted the termination of the mandate of the Independent Expert on the situation of human rights in the DRC. The clear parallels between the discussions on Items 4 and 10 suggest that a reconsideration of this division in the Council’s approach to country situations may be warranted.

Optional protocol to the ICESCR

¹⁰⁶ Resolution 7/30.

¹⁰⁷ Bahrain, Cuba, Egypt, Iran, Morocco, Pakistan (on behalf of the OIC), Qatar, Syria, Yemen.

¹⁰⁸ Including Pakistan and Egypt.

¹⁰⁹ Working Group on people of African descent, Independent Expert on toxic waste, and Special Representative of the Secretary-General on the situation of human rights in Cambodia.

¹¹⁰ The minutes of the Bureau meetings are available on the OHCHR extranet.

¹¹¹ Only Slovenia (on behalf of the EU) and Sri Lanka.

One of the most anticipated decisions of the Council was the adoption of the optional protocol to the International Covenant on Economic, Social and Cultural Rights (OPICESCR). The Protocol will provide for an individual communications procedure under the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). The Chair of the Working Group on an optional protocol to the *International Covenant on Economic, Social and Cultural Rights*, Ms Catarina de Albuquerque, presented her final report.¹¹²

Negotiations on the procedural resolution, which would adopt the optional protocol and forward it to the General Assembly for adoption and opening for signature, commenced on a less than promising note. The informal consultations, led by Portugal as the main sponsor of the related resolution, were marked by polarised debates on the status and scope of the draft OPICESCR. The key point of dispute was the non-inclusion of the right to self-determination (Part I of the ICESCR) within the scope of the optional protocol that had been developed in the Working Group.¹¹³ Pakistan, Algeria, Syria, and Palestine, in particular, considered the Working Group's draft optional protocol to be selective and warned that its current form would only serve to legitimise the perceived asymmetry between civil and political rights, on the one hand, and economic, social and cultural rights on the other.¹¹⁴ Pakistan¹¹⁵ proposed a rewording of Article 2 of the optional protocol, which would effectively expand its scope to include 'all' the rights covered by ICESCR. In response, Canada and others recalled that the Working Group's formulation of a more limited Article 2 had represented part of a careful compromise. There was significant concern that the ensuing deadlock would prevent the passage of the resolution through the Council, or trigger a re-opening of the entire text.

Most States, seeking to avoid a reopening of the entire text and a return to the negotiating process that had already lasted five years, argued that the existing draft represented the best possible compromise (albeit a 'delicate' one) and urged its speedy adoption. The UK, Canada, Australia, and Denmark warned that if some delegations wished to 'pick out' a single element of the text for reconsideration, others, who had at the Working Group acquiesced to a consensus document despite their own misgivings about the text, would also have the 'right' to renegotiate other aspects.

In an effort to defuse the situation, Mexico stressed that the nature of the optional protocol was procedural, and could not be interpreted as amending or limiting the obligations of States under the ICESCR. Slovenia questioned whether one could realistically lodge a complaint relating solely to self-determination anyway, when any such complaint should logically be linked to other rights contained in the ICESCR. Thus the exclusion of Part I from the scope of the optional protocol would not, of itself, prevent the lodging of relevant complaints.

Syria conceded that it did not genuinely expect the Committee on Economic, Social and Cultural Rights when dealing with communications to be able to implement what was stipulated in Part I of ICESCR. However, it stressed that it did not wish to institutionalise a precedent through the overt omission of a reference to self-determination, which could risk similar 'cherry picking' of rights in future scenarios.

¹¹² A/HRC/8/7.

¹¹³ The Working Group responsible for drafting the Optional Protocol had, in its final meeting in April 2008, transmitted the draft OPICESCR to the Council for its consideration. That version of the OPICESCR, which omitted Part I of ICESCR from the scope of the OPICESCR, was considered by most States to be the final 'delicate' compromise text. While no delegation had opposed the forwarding of the text from the Working Group to the Council, some considered the text to be still 'open', and had reserved their final positions in the Working Group session.

¹¹⁴ The Optional Protocol to the *International Covenant on Civil and Political Rights* (ICCPR) allows for individual communications based on 'any' of the rights set forth in the ICCPR. Article 1 of the ICCPR, in turn, refers to the right to self-determination.

¹¹⁵ Supported by Algeria, Palestine, Syria.

It is unclear how discussions developed between the informal sessions and the eventual adoption of the OPICESCR resolution.¹¹⁶ Given the discussions that had taken place in informal sessions, it came as something of a surprise that the final version of the text contained the re-wording proposed by Pakistan, which, in effect, expanded the scope of the optional protocol. Apparently the co-sponsors of the text had judged that the risk associated with sidelining those States that warned against any changes, in favour of bringing on board Pakistan and its allies, was one worth taking.¹¹⁷ In any case, some States were clearly disappointed that amendments to the Working Group's version of the text had been accepted.¹¹⁸ Romania considered that this course of events could affect the 'climate of trust' that had prevailed in the Working Group. The UK, Turkey, Canada, Australia, and Switzerland placed on record their interpretation that the right to self-determination alone could not be invoked to trigger a complaint under a future complaints mechanism.

The resolution was, perhaps surprisingly, adopted by consensus, and will be considered by the General Assembly in New York later in the year. It remains to be seen how those States that opposed the latest amendments will approach the issue in New York. While there remains a possibility that they will actively oppose the newly altered OPICESCR, a concerted effort to derail it (or to reopen the text) at this late stage may not be considered politically palatable or likely to succeed. In any case, whatever version of the OPICESCR is adopted, it will remain 'optional' by definition.

Universal periodic review

The second week of this session was dedicated to the consideration and adoption of the reports of the Working Group of the universal periodic review (UPR) from its first and second sessions, and also to a general debate on the UPR process (under Item 6). This comprised of the reports of 32 States under review,¹¹⁹ with each report being allocated one hour for consideration by the Council.

It had not been decided in advance of this session how time would be allocated to States under review, member and observer States to comment on the outcome, and, for the first time in the process, NGOs and NHRIs to provide general comments. It was clear at the organisational meeting of the Council in May, however, that Pakistan (on behalf of the OIC) and Bangladesh sought to limit NGO engagement to the maximum extent possible. Following lengthy consultations, it was finally decided the day before the consideration that the State under review, member and observer States, and other stakeholders would each be allocated 20 minutes. While this appeared to be a fair allocation, the lateness of the decision hindered the participation of national NGOs in the debate on the UPR outcomes. Also, in presenting this proposal to the Council, the President stated that NGOs should not use this time to 're-open discussions of the Working Group', a statement that would later create enormous difficulties for NGOs and the President alike, as explained below.

The report on Bahrain was the first to be considered, with the Government using its speaking time to comment vaguely on plans undertaken to implement the UPR recommendations.¹²⁰ This was followed by eight out of nine States who had time to speak, all members of the OIC, entirely complementing Bahrain on its efforts.¹²¹

¹¹⁶ Resolution 8/2.

¹¹⁷ In light of what eventually transpired at the end of the session, it is interesting to note that Slovenia (on behalf of the EU) had previously argued during the general debate that the Council should adopt the draft optional protocol as received from the Working Group.

¹¹⁸ UK, Switzerland, Canada, Japan, Turkey.

¹¹⁹ The States reviewed during the first session of the UPR were: Bahrain, Ecuador, Tunisia, Morocco, Indonesia, Finland, UK, India, Brazil, Philippines, Algeria, Poland, Netherlands, South Africa, Czech Republic, and Argentina. The second session covered: Gabon, Ghana, Peru, Guatemala, Benin, South Korea, Switzerland, Pakistan, Zambia, Japan, Ukraine, Sri Lanka, France, Tonga, Romania, and Mali. The summaries of the consideration of all reports are available under ISHR's *Daily Updates* at www.ishr.ch.

¹²⁰ Available on the Extranet, at <http://portal.ohchr.org/>.

It should be noted that it was not always easy for States or NGOs to critique the State under review's response to the recommendations made in the Working Group. The final edited UPR reports, containing the State's final position on various outstanding recommendations, were not readily available before each meeting of the Council. It should be expected that this anomaly will be addressed by the new President of the Council prior to the next consideration of UPR reports by the Council in March 2009.

When NGOs then spoke in relation to Bahrain it became apparent that there was a difference in understanding of the guidelines for participation. Frontline International, as the second NGO speaker, declared that human rights defenders were harassed, detained, and subjected to excessive force in the country. Pakistan then recalled the previous words of the President that NGOs 'should not re-open discussions in the Working Group'. The President asked that NGOs 'stick to the provisions of *Resolution 5/1* as well as all relevant documents', which he claimed were 'perfectly clear'. However, as these documents state that NGOs may make 'general comments', the President's directions were anything but clear.¹²²

The failure of the President to clearly rule on the issue meant that the impasse continued throughout the week. Many NGOs that addressed the situation of human rights in a country under review were interrupted,¹²³ even when the statement was clearly linked to the outcome report of the Working Group, with the request (usually from Egypt) that the President uphold his own ruling and that the comments of the NGOs in question be removed from the final report of the session. This was followed by States such as Canada, Mexico and Switzerland challenging this 'excessively narrow' interpretation of Council *Resolution 5/1* and the President's own statement on modalities.¹²⁴

It is worth noting that complaints by States were limited to NGO interventions directed at African or OIC States.¹²⁵ Egypt, Algeria, and Pakistan were notably silent when it came to criticisms of the human rights situation in France or the Republic of Korea, for example, even when they were not clearly linked to the recommendations of the UPR report. It is also worth noting that many States who often claim to be advocates of the work of human rights defenders, including those who continually raised the issue during the UPR itself, were generally silent throughout this procedural controversy.

Concerning the general process of the consideration of reports, there were varying practices by States under review on how they used their allotted speaking time. The vast majority of States explained which outstanding recommendations of the UPR they had finally accepted and rejected, with Switzerland and the UK focusing on recommendations they could not accept and providing detailed reasons why.¹²⁶ The majority of States detailed efforts that were being undertaken to implement recommendations and voluntary commitments. The practice of Ecuador of listing initiatives related to all enumerated UPR recommendations, point-by-point, proved to be particularly interesting to the discussion. A number of States chose to once again respond to particularly sensitive issues that had been raised by member States during the interactive UPR Working Group, including, for example, Indonesia on its Ahmadiyah minority, India on caste-based

¹²¹ Slovenia was the exception, which regretted that Bahrain had not accepted its recommendation on women migrant workers.

¹²² Council *Resolution 5/1*, para. 32 states that NGOs may 'make *general comments* before the adoption of the outcome by the plenary'.

¹²³ NGOs increasingly linked their references to human rights to recommendations in the UPR report, which lessened the opportunity for Egypt and others to interrupt the proceedings with 'points of order'.

¹²⁴ President's statement on modalities and practices for the Universal Periodic Review Process, 8/PRST/1, available on the Extranet at <http://portal.ohchr.org/>

¹²⁵ Interruptions took place during the discussions of Bahrain, Morocco, Algeria, and Pakistan.

¹²⁶ See also Finland, Benin, Republic of Korea, Ukraine, Romania, and Mali. Sri Lanka, on the other hand, summarily dismissed 26 recommendations by simply stating that many were linked to establishing an OHCHR field-office, on which its position was 'very clear'. See http://www.ishr.ch/hrm/council/dailyupdates/session_008/13_june_2008.pdf

discrimination, and France on the wearing of religious symbols.¹²⁷ A less useful practice was simply reiterating elements of statements made during the UPR Working Group and reaffirming the State's commitment to the UPR process.¹²⁸

As mentioned, the contribution of those member and observer States that took the floor was overwhelmingly positive in their comments on the State under review.¹²⁹ Notable exceptions included criticism by Denmark, Sweden, Japan, and Canada of the non-acceptance by Sri Lanka of 26 recommendations, while lamenting the prevailing culture of impunity. Algeria, on the other hand, deplored the 'politicisation of human rights' that occurred when States addressed the situation in Sri Lanka, yet sternly listed several of its recommendations to the UK that that State had not accepted. Canada used the intervention in relation to Pakistan to state that the UPR report did not 'accurately reflect' its suggestion that Pakistan take steps to end discrimination against minorities, as the paragraph omitted a list of specific groups in need of protection. Certain States also used the opportunity to request that States under review report back to the Council on implementation before the next cycle of the UPR¹³⁰, while France volunteered to do so as a State under review.

One general negative practice of the UPR Working Group was also replicated, whereby regional or other groupings would line up to commend their allies. For example, in the case of Morocco, 9 out of 10 speakers were members of the OIC.¹³¹ Often, however, no member or observer State wished to comment, as was the case when the reports on Finland, Poland, the Netherlands, the Czech Republic or Peru were considered.

NGOs that spoke were generally critical of the human rights situations in States under review, and provided specific examples of issues addressed during the UPR. Many NGOs and NHRIs also used the speaking time to propose means by which States could implement specific recommendations¹³² and/or challenged the State's position on particular issues or recommendations that the State had rejected.¹³³ Some of the more critical discussions related to Pakistan, where many NGOs¹³⁴ expressed concern over the State's rejection of a number of recommendations, including the decriminalisation of adultery and non-marital consensual sex, the decriminalisation of defamation, the repeal of the blasphemy laws, a moratorium on the use of the death penalty, and the 'prohibition in all circumstances of the use of the provisions of the *Qisas* and *Diyat* law in cases of honour killings'. Pakistan rejected these recommendations on the grounds that they were not 'universally recognised human rights principles'.¹³⁵ In the case of Algeria, among others, NGO interventions were useful in pointing out that the recommendations that the State had rejected were in fact the most relevant recommendations in the report. In relation to Argentina, NGOs stressed that the recommendations of the UPR had actually not addressed many of the most serious issues in the country. Concerning South Africa, NGOs highlighted the apparent lack of commitment of South Africa to the UPR process.¹³⁶ In rare instances, such as

¹²⁷ Others included Tunisia (torture), Netherlands (health services, human rights education), Ghana (death penalty), Pakistan (religious freedom, women's rights), and Japan (death penalty).

¹²⁸ See for example Indonesia, Brazil, Czech Republic, Gabon, Guatemala, Pakistan, Zambia, and Tonga.

¹²⁹ Council *Resolution 5/1*, para. 31.

¹³⁰ For example, the Netherlands recommended that India inform the Council before the next review in four years on any developments regarding the implementation of the recommendations made, including those not agreed to.

¹³¹ The same patterns were evident in relation to Bahrain and Tunisia and OIC co-member States, and Gabon and Benin and African Group States.

¹³² For example, Action Canada for Population and Development, speaking on behalf of partner organisations in Ecuador, welcomed Ecuador's inclusion of sexual orientation in their voluntary commitments, and called for sexual orientation to be listed as grounds for discrimination in accordance with recommendation 7 of the UPR report.

¹³³ See for example the Centre for Human Rights and Evictions (COHRE) in relation to Switzerland and economic, social and cultural rights, and the National Human Rights Commission of Korea in relation to the *National Security Act*.

¹³⁴ International Federation of Human Rights Leagues, Human Rights Watch, International Commission of Jurists, Amnesty International, Asian Legal Resource Centre, Women's Rights Action Watch.

¹³⁵ A/HRC/8/42, para. 108, referring to recommendations in paras. 23(b) and (f), 27(b), 20(b) and (d), 43 (c), 62(b) and (e).

¹³⁶ Amnesty International.

in the case of Tunisia, many national NGOs chose to commend the State on its efforts in relation to poverty reduction and women and children's rights, while remaining resolutely silent on any critical issues raised in the OHCHR's summary report of information submitted by other stakeholders.

It was more difficult to gauge the nature of interventions by NHRIs as only those from India, Indonesia, Republic of Korea and France spoke. KOMNAS – HAM from Indonesia and the National Commission of the Republic of Korea interestingly drew attention to the limits of their own powers, and they and the National Consultative Commission of France all levelled criticism at their respective States' performances. The National Human Rights Commission of India, on the other hand, provided general comments on the UPR process and the status of NHRIs, including its objection to being 'clubbed together with NGOs'. Aside from the fact that such a statement belonged under the general debate on the UPR and not under the consideration of State reports, the idea of discussing a review of the categorisation of 'other stakeholders' at this stage illustrated the need for further work to be done in clarifying the role of NHRIs in the UPR process. It also strengthened the allegation of Amnesty International that the independence of India's NHRI was questionable, despite loud claims to the contrary by the Government.

On a more positive note, a high percentage of States under review were happy to respond to issues posed by NGOs in their interventions,¹³⁷ thus utilising the opportunity for engagement, despite the best efforts of Egypt to restrict NGO involvement. In particular, Ecuador and Argentina as States under review underlined the importance of NGO participation at this stage of the UPR process.

There were generally relatively few stakeholders that spoke.¹³⁸ This may have been attributable to the short time between the last session of the UPR and the Council, and the lack of clarity surrounding modalities for participation in the plenary. Many NGOs may also have considered that two minutes of speaking time was not the best use of limited resources, and others may have wished to see how practice evolved following the first round.

NGOs also used the opportunity of the general debate on Item 6 (UPR) to relay their views of the first sessions of the UPR and recent developments. Again, NGOs were more constructively critical of the process than States, with a general sense that judgement was still reserved on the UPR. The issues raised included: a lack of inclusive national consultations in the preparation of the State reports, the practice of certain groups of States lining up to praise their allies, a lack of clarity about NGO participation in the adoption of the outcome, a lack of response by the State under review to some of the recommendations made, and attempts by some States to call into question universal human rights law and principles. Once again Egypt attempted to interrupt NGOs under the general debate on the UPR¹³⁹ when reference was made to country situations, even when used as examples of the UPR process, and once again the issue was not resolved satisfactorily by the President.

Finally, concerning the adoption of reports by the Council, the President had drafted a standard procedural decision to be used by the Council for all reports, which simply states that the Council adopts the relevant report and the addendum report summarising the information presented by the State under review, comments made by member and observer States and general comments by NGOs before the adoption of the outcome. There were no objections to this formulation, and in each instance the decision was adopted by consensus.¹⁴⁰

¹³⁷ See for example, Bahrain in relation to women's participation in public life, Brazil in relation to human rights defenders and collaboration, Poland on renditions, Peru on the advancement of women, Switzerland on economic, social and cultural rights.

¹³⁸ For example no NGOs spoke in relation to Gabon and Mali, and only one in relation to Zambia.

¹³⁹ For a review of the general debate under Item 6 on 13 June, see ISHR's *Daily Update* at of 13 June 2008.

¹⁴⁰ All decisions are available on the Extranet under the heading 'Resolutions, decisions and President's statements', at <http://portal.ohchr.org/>

However, the final complication of the UPR process occurred after the close of the session, when the Council had to adopt its draft report of the session, which included a draft addendum summarising the views expressed on the outcome of the UPR review.¹⁴¹ Both were adopted *ad referendum*, with States given two weeks to propose any technical comments to the drafts. In the immediate aftermath, Egypt (on behalf of the African Group) and Pakistan (on behalf of the OIC) objected to the existence of a separate addendum of the UPR outcomes and to its descriptive content. The Ambassadors of Pakistan and Egypt sent a letter to the new President of the Council, Ambassador Uhomoibhi, on 8 July 2008 claiming that the addendum ‘does not conform to the agreement reached in paragraph 4.3 of the President’s statement of 9 April 2008’¹⁴² and ‘accordingly, the report does not stand adopted’. This resulted in a decision from the new President two days later to appoint Ambassador Luis de Alba of Mexico to facilitate negotiations on the status of the report. At the time of writing, the issue was unresolved.

Racism and racial discrimination

With less than a year remaining before the Durban review conference,¹⁴³ the Council held a general debate on ‘racism, racial discrimination, xenophobia and related intolerance, follow up to the Durban Declaration and Programme of Action’ (Item 9). Worryingly, the debate, like the first Preparatory Committee session in April/May, confirmed the clear fault-lines that are emerging in relation to the objectives and desired outcomes of the 2009 review conference. There was significant concern that the review process would deviate from the important human rights issues it ostensibly sets out to address, and would be politically highjacked.

The debate was led by Ms Claudine Mtshali (Vice-President of the Bureau for the Durban Preparatory Committee and Ambassador of South Africa) who presented an oral report on the first substantive session of the Preparatory Committee. The Preparatory Committee had decided on the date and venue for the review, which will take place from 20 to 24 April 2009 in Geneva. Also agreed were modalities for the participation of observers, the structure of the outcome, and the review conference’s slogan — ‘united against racism: dignity and justice for all’.

A discussion ensued on the importance of regional preparatory conferences. Such conferences had already been scheduled for Africa (in Nigeria) and Latin America (in Brazil). Ms Mtshali urged the High Commissioner, who is the Secretary-General of the review conference, to carry out a worldwide information campaign to mobilise support for the objectives of the review.

During the lead-up to the review conference (including the Council debate), discussion on how racism should be addressed by the review had exposed clear fault-lines, which appear likely to continue to characterise the Durban review process. The key point of divergence was whether the review should either:

- i) reach beyond the 2001 Durban Declaration and Programme of Action by expanding its consideration of ‘all contemporary forms’ of racism to include racial profiling (in the context of the fight against terrorism), and incitement to religious discrimination, in particular ‘Islamophobia’, and the ‘defamation of religions’ since 11 September 2001, (this position is defended in particular by Egypt (on behalf of the African Group) and Pakistan (on behalf of the OIC)), or
- ii) adhere to the common consensus understandings of the 2001 Conference, and strengthen the implementation of agreements already reached (as proposed by EU States).

¹⁴¹ A/HRC/8/L.10/Add.1

¹⁴² Paragraph 4.3 of the President’s statement provides that ‘A summary of the views expressed on the outcome of the review by the State under Review, and Member and Observer States of the Council, as well as general comments made by other relevant stakeholders before the adoption of the outcome by the plenary, will be included in the report of the Council’s session.’

¹⁴³ For further information about preparations for the Review, including the unedited report of the first Preparatory Committee meeting, see <http://www2.ohchr.org/english/issues/racism/DurbanReview/sessions.htm>

By-products of this central debate also surfaced during the Council session. Some delegations argued that the review conference should address multiple forms of discrimination, anti-Semitism, and Holocaust remembrance.¹⁴⁴ Others urged the inclusion of the situations of people under foreign occupation,¹⁴⁵ while the UK, in a rebuff to this suggestion, warned that singling out one particular geographical situation (an obvious reference to the Israel-Palestinian conflict) could jeopardise consensus.

On NGO accreditation for the review conference, Pakistan (on behalf of the OIC) argued that NGOs should closely adhere to ECOSOC *Resolution 1996/31*, while Slovenia (on behalf of the EU) asserted that the ‘excellent practices’ followed by the Council should be applied. The substantive implications of these statements have not yet become clear. A number of NGOs commented on the need to make NGO participation more readily achievable in practice, including through funding, granting of visas, allowing NGOs adequate time for submitting contributions, and making information on preparations available on a regular basis.

Prior to the Council session, the first session of the Intersessional Intergovernmental Working Group was scheduled from 26 to 30 May, although it met only for three days. Most notably, the Chair produced a contentious ‘non-paper’ entitled ‘Outcome Document – List of Issues’, the purpose of which was to provide a compilation of contributions made by States and other stakeholders in response to a questionnaire on the implementation of the Durban Declaration and Programme of Action.¹⁴⁶ While the majority of States welcomed the paper as a positive step forward in preparing for the review conference,¹⁴⁷ there were some who felt that the Working Group had overstepped its mandate by producing such a document.¹⁴⁸

The final outcome of the Working Group meeting was the creation of a small group of States to be known as ‘friends of the Chair’, who would engage in brainstorming, consolidation of inputs, and identification of broad areas of consensus. The group’s negotiations would continue over the summer, with the aim of presenting the ‘pre-draft’ of an outcome document to the second meeting of the Intersessional Intergovernmental Working Group (1 to 5 September), which, in turn, would continue negotiations on an outcome document. The second substantive session of the Preparatory Committee is scheduled from 6 to 17 October 2008.

Other issues

Conference facilities and financial support

The Council adopted, without a vote, a procedural resolution entitled ‘conference facilities and financial support for the Human Rights Council’.¹⁴⁹ It intends to ensure the availability of all documentation for the Council in all official UN languages, and the possibility of webcasting all meetings of the Council’s Working Groups and ensure ‘permanent capacity for webcasting’. The resolution asks OHCHR, the Conference Services Division of the UN Office in Geneva, and the Department of Public Information to conduct an assessment of the situation and report back to the next session in September 2008, including proposals on measures to be taken and an estimation of the necessary resources.

¹⁴⁴ For example, the UK.

¹⁴⁵ Azerbaijan, Algeria.

¹⁴⁶ The questionnaire consists of 6 core questions and an annex, and seeks States’ and other stakeholders’ inputs on policies and programmes undertaken in line with the Durban Declaration and Programme of Action. Details are available at:

<http://www2.ohchr.org/english/issues/racism/DurbanReview/session1-repliesfromMemberStates.htm>

¹⁴⁷ *Inter alia* Slovenia (on behalf of the EU), Liechtenstein, Germany, Mexico, Greece, Russian Federation, China, Argentina, Ecuador, Bangladesh.

¹⁴⁸ *Inter alia* Egypt, Algeria, India.

¹⁴⁹ *Resolution 8/1*.

Women and gender

In implementation of Council *Resolution 6/30* a full day was set aside to discuss the human rights of women. The discussion was organised as two panel debates, one on violence against women and another on maternal mortality. The panel on violence against women was in follow-up to a decision by the General Assembly¹⁵⁰ and was aimed at setting priorities for the Council in addressing the issue.

The High Commissioner opened the discussion and underlined that the outcome of the discussion should not be ‘more talk and more venting of frustration’ about the lack of progress in overcoming discrimination against women and girls. Rather it should ‘inspire and embolden’ the Council to accelerate its action for gender equality and equal rights for women and girls. While the panel discussions were interesting and continued a welcome new practice of the Council of more interactive debates, they did not live up to the expectations raised by the High Commissioner as it remained unclear what the concrete outcome of the discussions would be and how the Council would take up at least some of the interesting ideas and suggestions made.

Interesting recommendations were proposed for how the Council and its mechanisms could continue efforts to address violence against women. Notably, France proposed the creation of a new special rapporteur on discrimination against women. Some speakers also endorsed the High Commissioner’s proposal that the UPR should address violence against women more systematically.¹⁵¹

In the discussion on maternal mortality the recurrent question was what the Council could do to address this issue.¹⁵² It appeared that most of the panellists, with the exception of the former Special Rapporteur on the right to health, Mr Hunt, who has addressed the issue in his work, had few concrete and relevant proposals regarding possible action by the Council. The other panellists mainly spoke about existing initiatives in the UN system and about the key actions that States should take to address maternal mortality. Mr Hunt argued that the technical experts in this area were not well-positioned to step back and make independent judgments about what States and others are doing. This was the role of the UN human rights system, and in particular of the Council. He suggested that what was missing was a mechanism of effective international accountability, and the Council could have a ‘comparative advantage’ in setting up such a ‘simple mechanism to work hand in glove with existing mechanisms’. With some realism and perhaps scepticism, Mr Hunt recognised that the Council may not yet feel ready to undertake that role, and encouraged other parts of the international system to act should the Council not do so.

UN Guidelines for the protection and alternative care of children without parental care

Brazil instigated the special event in line with a resolution adopted by the Council at its March 2008 session,¹⁵³ which had encouraged the advancement of the draft Guidelines, and called for their further consideration at the eighth session. The dialogue involved four invited panellists (from the Brazilian Government, the Committee on the Rights of the Child, the UN Children’s Fund, and civil society), NGOs, and three States from each regional group.

¹⁵⁰ General Assembly *Resolution 61/143*.

¹⁵¹ France, Mexico, International Federation of University Women.

¹⁵² Slovenia (on behalf of the EU), Canada, Norway, New Zealand, Switzerland, Chile.

¹⁵³ *Resolution 7/29*.

The expert panellists outlined the drafting history of the Guidelines, which had been conceived through an initiative of the Committee on the Rights of the Child to promote international debate on the issue of children deprived of parental care.¹⁵⁴

Of particular note during the interactive dialogue was the broad support expressed for the elaboration of the Guidelines. China noted that it was still studying the draft, while Azerbaijan stressed that the Guidelines were not supposed to replace the *Convention on the Rights of the Child* (CRC), nor to develop new norms, but merely to improve the implementation of the CRC. Many States suggested that the Guidelines would serve to fill a gap in the protection mechanisms for children, by making the implementation of the CRC clearer. Egypt noted that it had translated the Guidelines into Arabic and transmitted them to the Arab League for consideration. Brazil announced its intention to present a draft resolution on the guidelines to the Council's session in September 2008. In light of the support for the Guidelines by several States they may be adopted at the September session, and perhaps subsequently by the General Assembly. This would present an interesting process for the development of international instruments and guidelines. At its 37th session in 2004 the Committee on the Rights of the Child encouraged the Commission to develop a set of guidelines on the protection and alternative care of children without parental care by 2008. Although the Commission never took up this request it appears that the desired outcome may not be far off.

Conclusions and next steps

This session has demonstrated that the Council continues to face challenges in fulfilling its broad mandate. It is of serious concern that many States, including members of the Council, repeatedly seek to undermine the independence and integrity of the system of special procedures. The Council should instead focus on strengthening the special procedures, which continue to be among its most important mechanisms.

The Council must also do more to address country situations around the world that demand attention and a new approach is required. The Council should make effective use of all of its existing tools, including the reports and recommendations of special procedures, and special sessions, as well as develop new methodologies.

Finally, the development of more cross-regional initiatives at the Council, such as the mandates on business and human rights and on trafficking, is indeed positive and could be critical to the Council's future success.

The next session of the Council will take place from 8 to 26 September 2008. It can be expected that the recurring debate on the relationship between the OHCHR and the Council will continue at that session and that the facilitator on that issue may give a preliminary update to the Council. However, the new High Commissioner, Ms Navanathem Pillay, will not take up office until 1 September, which could delay this discussion to allow her to settle in.

The Council will also have to resolve whether to review the mandate of the Special Rapporteur on the OPT. This is likely to be a very sensitive issue despite the clear guidelines in the resolution establishing the Council that it is to review the system of special procedures, which should be understood to include this mandate. In any case, the review of the mandate would normally be initiated by its main sponsor. The Council will also receive reports from several special procedures. It will have to consider whether to extend the mandate on Burundi, and possibly on the Sudan, which both proved somewhat controversial when they were reviewed last year.

¹⁵⁴ The UN Children's Fund, in conjunction with the International Social Service, relevant experts, and other stakeholders, had formulated an initial draft. Brazil then took a lead role in mobilising other governments, and in August 2006 hosted the first intergovernmental meeting, bringing together 42 countries to analyse the preliminary document. The Committee on the Rights of the Child was closely involved in the drafting process, which had been broad and inclusive, engaging States, civil society, experts, young people, and other interested stakeholders.

It will also be interesting to see if the new Consultative Group will improve its working methods in providing recommendations to the President on the appointment of mandate holders. This could namely be done by establishing specific requirements for each mandate and substantiating its recommendations, as required by *Resolution 5/1*. In September, the Council will have to appoint mandate holders to the following mandates: the Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation, the Working Group on Enforced or Involuntary Disappearances (representative from the Group of Western and other States), the Working Group on people of African descent (representative from Eastern European Group), and the Working Group on people of African descent (representative from Asian Group).

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