



# THE HUMAN RIGHTS COUNCIL IN 2008: CONSENSUS-BUILDING AT THE COST OF HUMAN RIGHTS

## INTRODUCTION

At the end of 2007, we concluded that the Human Rights Council's (the Council) record that year was somewhat mixed.<sup>1</sup> Its time had mostly been spent reviewing its mechanisms and establishing its procedures with little attention paid to substantive human rights issues. We noted that many of the political challenges that had hampered the work of the former Commission on Human Rights (the Commission) were also negatively affecting the Council's ability to respond to the needs and expectations of human rights defenders and victims of human rights violations.

Our assessment of the Council's work in 2008 will examine the conclusion of its institution-building process and the key discussions and outcomes in relation to substantive human rights issues. The Council convened three regular sessions (in March, June and September) for a total of about nine weeks, less than the minimum ten weeks mandated by the General Assembly.<sup>2</sup> It also held three special sessions on the world food crisis, the situation in the eastern part of the Democratic Republic of the Congo (the DRC), and Gaza, as well as a commemorative session to mark the 60th anniversary of the *Universal Declaration of Human Rights*. In addition,

the Council began the universal periodic review (UPR) of States in April and held three sessions of its Working Group on the UPR during the year.<sup>3</sup>

The membership of the Council changed in June after elections in the General Assembly in May.<sup>4</sup> In June also, the new President of the Council, Ambassador Martin Uhomoibhi of Nigeria succeeded Ambassador Doru Romulus Costea of Romania.

In 2008, the difficult political environment within the Council continued to be a significant obstacle to it becoming an effective body for 'enhancing the promotion and protection of all human rights'.<sup>5</sup> It is this environment of often deep divisions between regional or political groupings of States, in particular between members of the European Union (EU), Switzerland, Japan, and the Republic of Korea on the one hand and African and Islamic States on the other hand (with the support of China, Cuba, the Russian Federation, and others), that more than anything else characterised and determined the Council's debates, actions and inactions in 2008. It is probably the single biggest challenge for the Council to overcome in 2009 and beyond.

<sup>1</sup> International Service for Human Rights (ISHR), *Human Rights Monitor 2007*, 'New body, old battles: the Human Rights Council in year two', (Geneva, 2008).

<sup>2</sup> Para. 10, General Assembly *Resolution 60/251*.

<sup>3</sup> The UPR is discussed in detail on pp. 37-50.

<sup>4</sup> The new members are Argentina, Bahrain, Brazil, Burkina Faso, Chile, France, Gabon, Ghana, Japan, Pakistan, Republic of Korea, Slovakia, Ukraine, United Kingdom (UK), and Zambia.

<sup>5</sup> Para. 4, General Assembly *Resolution 60/251*.

## INSTITUTION BUILDING

The institution-building process was formally concluded at the end of the Council's first year in June 2007 with the reaching of a fragile consensus.<sup>6</sup> Nevertheless, the Council continued throughout 2008 to fine-tune its mechanisms and at times revisit its previous institutional decisions. As during the institution-building process, some States used every opportunity to promote their 'negative reform agenda'<sup>7</sup> in an attempt to weaken the Council's systems of human rights protection. This was especially pronounced in relation to the continued 'review, rationalisation and improvement' of the Council's special procedures mandates, and the beginning of the UPR process. As the most significant institutional novelty, the UPR's actual functioning, including its relationship to the Council, was still to be defined. In addition, the Council also had to operationalise its new agenda, as members had diverging views in relation to the scope of some agenda items. Finally, the Human Rights Council Advisory Committee (the Advisory Committee) took up its work in August, but was slowed in its tracks by the reluctance of the Council to take the necessary decisions to let it carry on with its proposed activities.

A common thread running through the Council's discussions were the attempts to re-interpret the institution-building text in a restrictive manner. While the institution-building text is in parts deliberately vague and leaves room for different interpretations, the proposals heard in 2008 often went against the actual spirit of the institution-building text. Often these attempts proved successful, for a variety of reasons. One possible explanation is that many of the negotiations were held in private, with the participation of only a handful of States with widely conflicting opinions, mediated by a Presidency under constant pressure. To some extent, this was in line with the first year of the institution-building process, during which the Presidency had also handled much of the negotiations, particularly towards the end of the process. However, it clearly departed from the practice of holding public discussions combined with more private meetings. In addition, in 2008, States interested in weakening the Council's mechanisms did not hesitate to table their proposals as resolutions, knowing that they could count on at least the tacit support of the majority of

the Council's members. This tactic also served to increase the pressure on the Presidency to find an agreement.

Contrary to this, the institution-building process had throughout been an open process, although more private meetings also took place. In the public meetings, arguments were exchanged in the open, allowing for the effective participation of all States and civil society. In 2008, not only were the options presented far less positive than during the institution-building process, but the private nature of the negotiations made it virtually impossible to hold States accountable for their positions. When details of the proposals became public, it was often a case of fighting for the least damaging outcome, rather than improving human rights protection.

## Universal periodic review

The institution-building text outlines how the UPR will be carried out, but leaves pending the detailed modalities.<sup>8</sup> Disagreement emerged on a number of issues including the role of the troika;<sup>9</sup> the flow of information before, during, and after the review the 'general comments' of other stakeholders at the plenary session; and follow-up to the UPR by the Council. These challenges were not new, and all of the points were essentially old and largely settled issues from the institution-building process. A group of States,<sup>10</sup> often led by Egypt (on behalf of the African Group), sought to frame these issues as 'new' and insufficiently regulated by the institution-building text in order to interpret them in a restrictive manner. Some States have sought to restrict the effectiveness of the UPR wherever possible, and have put the young UPR mechanism under heavy pressure from the beginning.

In relation to the **role of the troika**, some States felt it should receive and structure questions from States, and actually 'facilitate' each of the reviews.<sup>11</sup> Others saw its role as purely formal, without any practical implications on the review process.<sup>12</sup> On a more technical level, there was significant debate about various parts of the '**information management**' in the UPR process. This included the question of what format the report of the Working Group on the UPR

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It is disputed whether the institution-building text, Council *Resolution 5/1*, was indeed adopted by consensus. See the detailed overview of the events and discussions surrounding the adoption of the institution-building text by the Council in ISHR's *Daily Updates* of 18 and 19 June 2007 as well as the report on the conclusion of the 5th session and the organisational meeting of the Council, available at [www.ishr.ch/council\\_monitor](http://www.ishr.ch/council_monitor).

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See ISHR, *Human Rights Monitor 2006*, 'A stock-taking of the Council's institution-building process', (Geneva, 2007) and other publications on the institution-building process, available at [www.ishr.ch/hrm06](http://www.ishr.ch/hrm06).

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For a detailed overview of the UPR in 2008, see the chapter at pp. 37-50. The current section mainly looks at issues in light of the Council's institution-building process and how the UPR relates to the Council's work.

9

The troika is a group of three rapporteurs, selected from among different regional groups, who are tasked to facilitate each review.

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Egypt (on behalf of the African Group), Palestine (on behalf of the Arab Group), Pakistan (on behalf of the Organization of the Islamic Conference (OIC)), Cuba, Russian Federation.

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See ISHR's analytical overviews of the 1st and 2nd session of the UPR, and the chapter on the UPR in this *Human Rights Monitor* for more information on the functioning of the UPR. Available at [www.ishr.ch/publications](http://www.ishr.ch/publications).

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These positions were not very clearly articulated in public. Pakistan (on behalf of the OIC) was most vocal prior to the selection of the first set of troikas, arguing that the role of the troika needed to be 'clarified', while many other States supported this delay in the selection (Egypt (on behalf of the African Group), Algeria, China, South Africa, Morocco, Russian Federation, India, Bangladesh, Ghana, Ethiopia). A presidential statement on the selection of the troikas presented in early 2008 shed a little more light on the discussions around the role of the troikas (contained in document *A/HRC/OM/L.1*, available at ). See also ISHR's *Council Alerts* for the resumed 6th session and the 7th session, and the update on the selection of troikas, available at [www.ishr.ch/council\\_alerts](http://www.ishr.ch/council_alerts).

should take, how recommendations made would be reflected in the report, and how it should be drawn up. It also included a debate on what kind of information should be posted on the Office of the High Commissioner for Human Rights (OHCHR) extranet and the OHCHR website. Both of these issues were partly addressed in a presidential statement delivered on the occasion of the opening of the first session of the Working Group on the UPR in April.<sup>13</sup> It gives the troika some role in receiving written questions in advance, and in clustering those according to the State report, but it does not grant it a facilitating role during the review. The first three sessions have shown that such a role would be a useful improvement of the UPR process. The presidential statement also specifies that only the three documents that form the basis of the review will be published on the OHCHR extranet, namely the State report, the compilation of UN information, and the summary of reports submitted by NGOs. The 'original' NGO submissions are excluded from 'official' publication.<sup>14</sup>

A further point of contention developed around the way the **plenary of the Council** was to deal with the reports of the Working Group on the UPR, and how this debate would be relayed in the Council's reports, including to the General Assembly. According to the institution-building text, 'other relevant stakeholders will have the opportunity to make general comments before the adoption of the outcome by the plenary'.<sup>15</sup> This moment in the UPR process is deemed particularly important by non-governmental organisations (NGOs), since it is their only possibility to address the Council on the outcome of each review.<sup>16</sup> Despite the clear compromise contained in the institution-building text and in the presidential statement, some States challenged many NGO speakers on the content of their statements during the adoption of the first set of UPR reports.<sup>17</sup> Renewed controversy erupted following the closure of the June session of the Council. As usual, the report of the Council's session was adopted *ad-referendum*,<sup>18</sup> but the African Group and the Organization of the Islamic Conference (OIC) objected to its content.<sup>19</sup> Following consultations on this issue, the report was reissued, with insignificant changes. The questions around the report of the Council's session seem to have been settled with a further presidential statement issued during the September session.<sup>20</sup> It specifies a limited number of words

for the report on the UPR, but ensures that comments by 'other stakeholders' are reflected substantively in the final document.

The final complication came up during the September session of the Council, in relation to the **scope of the agenda item dedicated to the UPR (Item 6)**. As no Working Group reports had to be adopted, some States argued that there was no need to schedule this item on the programme of work.<sup>21</sup> Others were of the view that substantive follow-up to the UPR should still be discussed.<sup>22</sup> Again, the institution-building text is very clear on this issue. A close reading of the text supports the interpretation that Item 6 was always intended to be a standing item on the Council's agenda dedicated, among other things, to follow-up.<sup>23</sup> Following private consultations, Item 6 finally appeared on the programme of work. The new President of the Council, Ambassador Uhomoibhi of Nigeria, cautioned that it would be 'proper to recall that implementation of the outcome is explicitly referred to in the institution-building text in relation to the second cycle'. This seems to imply that follow-up will only be discussed four years after the first review. He urged participants not to speak about follow-up in a specific manner and not to refer to specific countries. Egypt (on behalf of the African Group) commented that it would not oppose the general debate on the condition that that it would not 'be used in violation of *Resolution 5/1*' and for follow-up to the review. Judging by these comments, it seems that the opposition to a standing Item 6 on the Council's agenda stems from an unwillingness to seek any substantive follow-up to the universal periodic review.

Nevertheless, a few States reported on their steps to implement the UPR outcome. NGOs skilfully seized the opportunity to underline the need for concrete follow-up, including to specific reviews, although they referred to these in general terms. This was an important precedent for the UPR process, which continues to evolve.

### Special procedures

The review of the special procedures remained a piece of unfinished business from the institution-building process. The review of the last mandates took place during the September

13 See A/HRC/8/L.1, available at [www.ishr.ch/index.php?option=com\\_docman&task=doc\\_download&gid=179&Itemid=](http://www.ishr.ch/index.php?option=com_docman&task=doc_download&gid=179&Itemid=).

14 However, alternative websites were already in place to make up for this 'censure'. See for instance [www.upr-info.org](http://www.upr-info.org).

15 Para. 31, Council *Resolution 5/1*.

16 The presidential statement on the modalities of the UPR issued on the occasion of the first UPR session further strengthened this clear language in the institution-building text. It said 'a summary of the views expressed (...) 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.'

17 Egypt was particularly vocal on this issue. See ISHR's *Analytical Overview of the 8th session of the Human Rights Council*, available at [www.ishr.ch/council\\_session\\_overviews](http://www.ishr.ch/council_session_overviews) for a detailed discussion of this episode.

18 *Ad-referendum* denotes the adoption of reports, which are not yet final but subject to editorial comments by member States within a fixed deadline. All session reports of the Council are adopted in this manner. Therefore, reports become final after a two-week referendum period.

19 See *Letter from the African Group and the Organization of the Islamic Conference on the adoption of the report of the eighth session of the Human Rights Council*, available at <http://portal.ohchr.org/portal/pls/portal/docs/1/1854315.PDF>.

20 A/HRC/PRST/9/2, available at [http://ap.ohchr.org/documents/E/HRC/p\\_s/A\\_HRC\\_PRST\\_9\\_2.pdf](http://ap.ohchr.org/documents/E/HRC/p_s/A_HRC_PRST_9_2.pdf).

21 Egypt (on behalf of the African Group). See also ISHR's *Council Alert on the 9th session*, available at [www.ishr.ch/council\\_alerts](http://www.ishr.ch/council_alerts).

22 Switzerland, France (on behalf of the European Union (EU)).

23 Paras 33-38 of Council *Resolution 5/1* refer to follow-up to the review. Para. 34, to which the President seemed to refer, specifies that 'the subsequent review should focus, inter alia, on the implementation of the preceding outcome' (emphasis added). It therefore neither limits the subsequent review to the follow-up, nor does it limit follow-up to the subsequent review. Para. 35, still under the heading of 'follow-up to the review' specifies that 'the Council should have a standing item on its agenda devoted to the universal periodic review'. This seems to imply that the standing item on the Council's agenda could be used, *inter alia*, for follow-up.

24  
General Assembly *Resolution 60/251*  
and Council *Resolution 5/1*.

25  
See the section on country focus,  
below at p. 26.

26  
Some thematic mandate holders  
have already submitted proposals for  
improving follow-up, and some have  
prepared specific reports on follow-up  
to their recommendations.

27  
Suggested by the Special Rapporteur  
on extrajudicial executions, Mr Philipp  
Alston. See ISHR's *Daily Update* of  
2 June 2008, available at  
[www.ishr.ch/daily\\_updates](http://www.ishr.ch/daily_updates).

28  
Suggested by France on the occasion  
of the thematic panel discussion on  
violence against women. See below  
at p. 25.

29  
See section on interaction with the  
thematic special procedures.

30  
See for instance ISHR's *Human  
Rights Monitor 2007*, p. 19, on the  
background to these negotiations.  
The Code of Conduct was originally  
intended to regulate the behaviour of  
individual mandate holders but has  
more or less remained a paper tiger. It  
has required partial adaptation in the  
workflows of mandate holders, such as  
better management of the information  
flow before, during, and after country  
missions.

31  
The Coordination Committee of  
special procedures established an  
'advisory procedure to review practices  
and working methods' to deal with  
complaints in relation to special  
procedures mandate holders' work.  
Although the procedure is explicitly  
established 'to review practices  
and working methods' of special  
procedures, it is an implicit reaction  
to deal with concerns stemming from  
the Code of Conduct. See [www2.  
ohchr.org/english/bodies/chr/special/  
ccspecialprocedures.htm](http://www2.ohchr.org/english/bodies/chr/special/ccspecialprocedures.htm).

32  
See 'attacks on individual mandate  
holders below' at p. 22.

33  
Mr Manfred Nowak, Special Rapporteur  
on torture and Mr Philipp Alston,  
Special Rapporteur on extrajudicial,  
summary or arbitrary executions.

34  
Egypt (on behalf of the African Group),  
India, Russian Federation, Singapore,  
Sri Lanka.

35  
A/HRC/8/L.15 and A/HRC/8/L.15/  
Rev.1. Draft resolutions are available  
through the OHCHR document search  
at [http://ap.ohchr.org/Documents/  
gmainec.aspx](http://ap.ohchr.org/Documents/gmainec.aspx).

session. At present, the 'review, rationalisation and improvement' has come to a conclusion, although the mandate on the occupied Palestinian territories (OPT) was not reviewed. There is little doubt that the Council is required to review all the special procedures mandates.<sup>24</sup> Several States were opposed to a review of that mandate, arguing that since it was established 'until the end of occupation' it was beyond scrutiny. However, the Council could have undertaken a review of the scope of the mandate without calling into question its duration.<sup>25</sup> In the Council's current political environment there is no willingness to do so.

The General Assembly gave the Council the mandate to 'maintain a system of special procedures' and rationalise and improve it as required. If the Council has not achieved the rather ambitious goal of improving the overall special procedures system, it has at least managed to retain the system's basic parameters. The review process could have been a useful opportunity to study and strengthen the system. While this chance was already missed with the decision to review each mandate individually and not examine the overall system, the Council could still have strengthened it through the review. This could have been done in particular by improving the interplay between special procedures and the Council or by developing more effective mechanisms of follow-up to the wealth of information and recommendations received from them.<sup>26</sup>

The Council has so far also failed to systematically address protection gaps in the current system of special procedures. This year the Council did, however, establish a **new mandate on the right to water**. Suggestions were also made to create a new mandate on the rights of detainees,<sup>27</sup> and one on discrimination against women.<sup>28</sup>

Despite these mixed results, a positive 'side product' of the various attacks on special procedures and their work throughout the institution-building process has emerged in the form of a strengthened Coordination Committee of special procedures. In reaction to the constant pressure from several States, the mandate holders have demonstrated a healthy degree of unity, showing the Council that their collective expertise and experience cannot be discarded lightly. In this sense, the special procedures have consolidated an essential part of the system.

Most of the thematic mandates, with the exception of that on freedom of expression, have gone through the process unharmed. In 2008, however, some of the most important mandates were up for review, and it was therefore not surprising to see new and unprecedented challenges to some of them. The review of individual mandates is closely related to the Council's interaction with special procedures mandate holders. The substance of these challenges will be examined below.<sup>29</sup>

### A new challenge: terms in office of mandate holders

In parallel to the institution-building text, the Council also adopted the *Code of Conduct for Special Procedures Mandate Holders* (the Code of Conduct), contained in *Resolution 5/2* and adopted as part of the 'institution-building package'.<sup>30</sup> During the negotiations, several proposals were made on how to implement the Code of Conduct, but so far the Council has not taken any steps towards enforcing it.<sup>31</sup> This task should remain with the Coordination Committee and the special procedures.

States interested in tighter control over special procedures mandate holders seem to have realised that the intended result of using the Code of Conduct to limit the independence of special procedures was not achieved, and that some mandate holders continue to provide the Council with information that some States do not wish to hear.<sup>32</sup> The opportunity to 'exhume' the question of implementation of the Code of Conduct arose with the review of some mandates currently occupied by outspoken individuals.<sup>33</sup> Several States, among which India and the Russian Federation, were the most vocal, argued that mandate holders would have to be reappointed after serving a first term of three years.<sup>34</sup> Again, this question was then negotiated in private with the President, and the same States tabled a draft resolution during the June session to impose their interpretation of the institution-building text.<sup>35</sup>

The issue of term limits was one of the first questions to be settled in the institution-building process, with an agreement on a maximum of two three-year terms for thematic mandates.

There was no discussion of 're-appointment' after the first term, and most attention was paid to the new selection process. Undoubtedly, if the intention had been to extend the newly elaborated selection process to mandate holders having served the first of their two three-year terms, this issue would have been addressed in the institution-building text.<sup>36</sup>

Caving in under the heavy pressure from many vocal States, and the draft resolutions tabled, the President at the time, Ambassador Costea of Romania, agreed to issue a presidential statement addressing this question. It is entitled 'terms in office of special procedures mandate holders',<sup>37</sup> and links the terms in office of mandate holders with the implementation of the Code of Conduct. The presidential statement provides a formal tool for States to 'veto' the automatic reappointment of mandate holders if they see 'a persistent non-compliance of a mandate holder with the Code of Conduct'.

The presidential statement seriously undermines the institution-building text. However, it remains to be seen how it will be applied in practice. Even though States now have the possibility to 'remove' unwanted mandate holders, they will still have to justify their objection to a particular mandate holder. The threshold of 'persistent non-compliance' indicates that a mandate holder would have to repeatedly and over a certain period of time 'violate' the Code of Conduct without correcting his or her behaviour after being informed of these 'violations'. Hopefully, the damage done to the special procedures system can also be limited by the quality of mandate holders. It will require independent individuals to uphold objective human rights principles, especially if this could mean not being selected for a second term.

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### The Council's agenda

A further area where the Council's institution-building text came under pressure was the operationalisation of the Council's new agenda. Several of the Council's agenda items are quite broad and openly formulated, allowing for discussion of any human rights issue.

On a number of occasions throughout the year,

these broad agenda items were used in a creative way to raise issues related to the universal implementation of human rights and highlight human rights violations in particular countries. For instance, during the March session, some States and many NGOs commented on the situation of human rights in the autonomous region of Tibet under 'Follow-up and implementation of the Vienna Declaration and Programme of Action' (Item 8). Another example was the general debate under 'Racism, racial discrimination, xenophobia and related forms of intolerance, follow up and implementation of the Durban Declaration and Programme of Action' (Item 9), during which some NGOs drew attention to cases of racism in particular countries. Both these discussions of concrete human rights issues were ill-received by some States, in particular the countries directly concerned.<sup>38</sup> The result was a series of points of order, trying to prevent NGO speakers from completing their statements.

While it is not disputed that the item on 'human rights situations that require the Council's attention' (Item 4) is the primary item to deal with country-specific situations, the institution-building text does not limit discussion of human rights violations to this item. Forcing speakers to deal with human rights issues occurring in countries in the abstract, and without naming the country, would render most discussions meaningless, and would hamper the Council in fulfilling its mandate to 'address situations of violations of human rights'.<sup>39</sup> Recalling the discussions during the institution-building process, it is clear that the Council's agenda is intended to represent a compromise between a 'flexible' and a 'predictable' agenda. Interpreting each agenda item in a more restrictive way is yet another example of how some States are not interested in a faithful implementation of the institution-building text.

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### The Advisory Committee

The Human Rights Council Advisory Committee met for the first time in August, and requested the Council to take action on some of its proposals at its September session.<sup>40</sup> The Council postponed its action on these proposals until its March 2009 session and has thus prevented the Advisory Committee from continuing consider-

<sup>36</sup> In the case of the Advisory Committee, it was made explicit that its members 'shall serve for a period of three years. They shall be eligible for re-election once.' Para. 74, Council *Resolution 5/1*. See also ISHR's reports on the institution-building Working Groups of the Council, available at [www.ishr.ch/publications](http://www.ishr.ch/publications).

<sup>37</sup> The presidential statement is available at [http://ap.ohchr.org/Documents/E/HRC/p\\_s/A\\_HRC\\_PRST\\_8\\_2.pdf](http://ap.ohchr.org/Documents/E/HRC/p_s/A_HRC_PRST_8_2.pdf).

<sup>38</sup> China in particular objected to the discussion on Tibet, while Egypt led the attempts at keeping NGOs from referring to specific countries under Item 9.

<sup>39</sup> General Assembly *Resolution 60/261*.

<sup>40</sup> See the chapter on the Advisory Committee at pp. 53-58.

ation of these issues at its January 2009 session. In its institution-building text, the Council had mandated the Advisory Committee to 'convene up to two sessions' a year. If the Advisory Committee meets twice a year, the Council must be ready to consider its proposals in a manner that allows the Advisory Committee to carry out its tasks as effectively as possible. It remains clear that States are not willing to give the Advisory Committee much scope to define its own work, and the Council will keep tight control over its activities.

### INTERACTION WITH THE HIGH COMMISSIONER FOR HUMAN RIGHTS

During the year, Ms Louise Arbour was succeeded by Ms Navanethem Pillay as High Commissioner for Human Rights (High Commissioner). Ms Arbour presented her final annual report as High Commissioner to the Council at its March session and gave an update at the June session before leaving office at the end of June.

In her address to the Council in June, Ms Arbour warned 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'. The pursuit of consensus and the use of regional and other group positions has indeed characterised the work of the Council in 2008 and constitute key challenges for the year(s) ahead.

A recurrent theme in the dialogue between the High Commissioner and members and observer States of the Council was the Council's role in relation to the Office of the High Commissioner for Human Rights. Early in the year, some States had requested that the Council formally discuss the 'institutional relationship' between OHCHR and the Council.<sup>41</sup> Although this topic was not formally on the Council's agenda during the year, it received attention, in particular at the March session. States were deeply divided with many arguing that the Council should have a closer oversight role,<sup>42</sup> while others defended OHCHR's and the High Commissioner's inde-

pendence.<sup>43</sup> States wanting a closer oversight role for the Council also argued that OHCHR's work at the country level should be pre-approved by the Council. During her term, Ms Arbour developed a country engagement strategy. The number of OHCHR national and regional offices as well as field presences as part of UN country teams or peace-keeping missions have steadily grown. It is no surprise that those States that are generally uneasy with independent human rights monitoring want to control this aspect of OHCHR's work.

The differences of opinion clearly reflect diverging principled views on the scope of the High Commissioner's mandate to set priorities for and give strategic direction to the work of her Office. They also translate into different interpretations of the relevant resolutions and other documents that govern the status of OHCHR and its relationships with the Council and the General Assembly. In March, Ms Arbour provided detailed replies to questions about these relationships, but this did not satisfy those States wishing the Council to exercise more oversight over OHCHR. She strongly defended the position of the High Commissioner and her Office, replying to some of the statements that any comments 'which impeach the integrity of the High Commissioner and/or members of her Office through allegations of bias, hypocrisy, insubordination, and dereliction of duty are outside the acceptable scope of interactive dialogue' and that such statements 'demean the Council and betray the good-faith efforts of all those working in the UN on very difficult and divisive issues'.

The new High Commissioner, Ms Pillay, was not directly questioned on this issue at the September session, as States recognised that it was not the appropriate time for the discussion. However, several States made it clear that they expect a full discussion in the near future. It can be expected that this will take place in March 2009. Ms Pillay has pledged an 'open and frank relationship' with the Council. This may ease what seems to have become at times a rather tense relationship with the Council. Considering that many of the challenges to the High Commissioner came from States within the African Group, it is also possible that Ms Pillay's origin in South Africa will help ease those tensions.

It seems that much of this debate has been

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Egypt (on behalf of the African Group),  
Pakistan (on behalf of the OIC).

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Egypt (on behalf of the African Group),  
Pakistan (on behalf of the OIC), China,  
Russian Federation.

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France (on behalf of the EU),  
Switzerland, Canada.

prompted by the Council's higher status within the UN system, as a subsidiary organ of the General Assembly, compared to its predecessor, the Commission on Human Rights (the Commission). This higher status seems to have empowered some members of the Council to demand that it should have a greater say in OHCHR's work. However, the Council's comparatively higher status in the UN system in no way changes the fact that both the High Commissioner and her Office, and the Council draw their mandates from the General Assembly, the highest political body in the UN. It should also be recalled that the High Commissioner is directly responsible to the Secretary-General and any attempt at restricting her mandate should also be seen as an attempt at undermining the Secretary-General.<sup>44</sup>

While the tendency of seeking more control over OHCHR may be new, the Council continued a resolution on the geographic composition of the staff of OHCHR.<sup>45</sup> This resolution was adopted every year since 1994<sup>46</sup> (in relation to the Centre for Human Rights before its replacement by OHCHR) by the Commission. As in the past, this resolution was presented by Cuba and adopted by a vote. During the March session, the High Commissioner presented a report to the Council on efforts made to improve the geographical balance among OHCHR staff.<sup>47</sup> While the High Commissioner reported significant progress in this regard, some States questioned this, relying instead on a report by the Joint Inspections Unit,<sup>48</sup> which has also recommended that the Council should exercise greater general oversight over OHCHR.

In her presentations to the Council, Ms Arbour focused on the following issues: ending impunity and strengthening democratic governance; the need for a monitoring mechanism on the implementation of the *Convention on Prevention and Punishment of the Crime of Genocide*, or alternatively an early warning optional protocol to the *Convention on the Elimination of All Forms of Racial Discrimination*; and various forms of discrimination, including against women, minorities, persons of lower caste, and on the basis of sexual orientation. This was the first time that in an address to the Council she directly spoke of discrimination and prejudice based on sexual orientation. It was an important affirmation of the universality of all human rights.

In her first presentation, Ms Pillay underlined the need to 'engage all States in human rights agendas and processes' and made particular reference to effective engagement in the Durban Review Conference, which some States have already opted out of.<sup>49</sup> She addressed issues related to racism, gender equality, and prevention of genocide. The latter topic featured high on the agenda this year as the world celebrated the 60th anniversary of the *Convention on Prevention and Punishment of the Crime of Genocide* on 9 December.

Both High Commissioners dedicated some space in their presentations to country work. In her annual report, Ms Arbour updated the Council on the implementation of her country engagement strategy, including the renewal of agreements for OHCHR offices in Nepal, Colombia and Mexico, and a regional office in Senegal. The High Commissioner also presented reports on the work of her Office in Colombia,<sup>50</sup> Nepal,<sup>51</sup> Cyprus,<sup>52</sup> Guatemala,<sup>53</sup> Afghanistan,<sup>54</sup> Uganda,<sup>55</sup> Cambodia,<sup>56</sup> Sierra Leone,<sup>57</sup> and the Democratic People's Republic of Korea (DPRK).<sup>58</sup> Ms Arbour also reported on her visits to Sweden, Slovenia, Mexico, and Georgia. She highlighted positive developments in Australia, Nepal, Togo, and Kenya and expressed concern about the situations in West Darfur, Sri Lanka, South Africa, Myanmar, and Italy. The Council did not discuss these reports in any detail. This is regrettable as the reports could present important opportunities for follow-up.

Unsurprisingly, Ms Pillay did not raise any country-specific situations of concern in her first address. However, her affirmation that it is at the country level that OHCHR can more easily cooperate with governments and provide protection to victims was important. It also indicated her strong support to this aspect of OHCHR's work. It will be interesting to see how Ms Pillay positions herself vis-à-vis the Council when she presents her first annual report in March 2009.

44  
General Assembly Resolution 48/141.

45  
Council Resolution 7/2. Adopted by 34 votes in favour, ten votes against, and three abstentions. The negative votes came from Bosnia and Herzegovina, Canada, France, Germany, Italy, Netherlands, Romania, Slovenia, Ukraine, and the UK. Japan, the Republic of Korea, and Switzerland abstained.

46  
Commission on Human Rights Resolution 1994/56.

47  
A/HRC/7/57.

48  
JIU/REP/2007/8. For more information about the Joint Inspections Unit, see [www.unjiu.org/en/about.htm](http://www.unjiu.org/en/about.htm).

49  
Canada, Israel.

50  
A/HRC/7/39.

51  
A/HRC/7/68.

52  
A/HRC/7/46.

53  
A/HRC/7/38/Add. 1.

54  
A/HRC/7/27.

55  
A/HRC/7/38/Add. 2.

56  
A/HRC/7/56.

57  
A/HRC/7/66.

58  
A/HRC/7/47.

## INTERACTION WITH THEMATIC SPECIAL PROCEDURES

In 2008, the Council held a total of 28 interactive dialogues with its 29 thematic special procedures. The new Independent Expert on access to safe drinking water and the Special Rapporteur on trafficking in persons did not report, while the Special Rapporteur on toxic waste reported twice. The following dialogues were held:

### Interactive dialogues

#### March session

- Independent Expert on minority issues
- Independent Expert on the effects of economic reform policies and foreign debt on the full enjoyment of all human rights, particularly economic, social, and cultural rights
- Special Rapporteur on adequate housing as a component of the right to an adequate standard of living
- Special Rapporteur on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights
- Special Rapporteur on the human rights of migrants
- Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health
- Special Rapporteur on the right to food
- Special Rapporteur on torture and other cruel, inhumane or degrading treatment
- Special Rapporteur on violence against women, its causes and consequences
- Special Representative of the Secretary-General on human rights defenders
- Working Group on arbitrary detention
- Working Group on enforced disappearances
- Working Group on the use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination

59

Follow-up report to the special session, see below.

60

See the section on racism at p. 23.

61

This mandate was not established by the Council, but by the General Assembly in its *Resolution 51/77*.

#### June session

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

#### September session

- Independent Expert on human rights and international solidarity
- Special Rapporteur on contemporary forms of slavery
- Special Rapporteur on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights
- Special Rapporteur on the right to food<sup>59</sup>
- Special Rapporteur on the sale of children, child prostitution and child pornography
- Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples
- Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, on combating defamation of religions<sup>60</sup>
- Special Representative of the Secretary-General for children and armed conflict<sup>61</sup>

These interactive dialogues are an indispensable part of the Council's work, and it seems that often, special procedures are among the Council's only connections to real human rights situations. The expertise of 29 thematic (and eight country-specific) experts represents an extremely valuable but largely untapped resource for the

Council. Focusing more on **follow-up** to both thematic and country-specific information provided by special procedures should be one of the Council's main preoccupations in the coming year(s).<sup>62</sup> However, looking at how other initiatives for effective follow-up have fared in the Council, this too is likely to encounter resistance and outright opposition. During the institution-building process, proposals for a specific agenda item on follow-up was discussed but not taken up.<sup>63</sup>

In 2007, we noted the persistent problem of **time management** during sessions of the Council.<sup>64</sup> This is especially relevant in relation to the interactive dialogues with special procedures mandate holders. Many NGO representatives prepare their attendance of and interventions at the Council in view of the presence of a particular mandate holder. This year we once again saw problems with keeping the times for the interactive dialogues. Very often, the delays resulted in the absence of mandate holders for part of the dialogue, including their replies to comments and questions raised. Further efforts are required to make the Council's programme of work in relation to the special procedures more predictable. This could be done by blocking the interactive dialogues in the programme of work, just like panel discussions are held at a fixed time. General debates could be used as 'buffers' to make up for delays in the programme of work.

### Review and creation of mandates

In 2008, the Council created a new mandate: the Independent Expert on the issue of 'human rights obligations related to access to safe drinking water and sanitation'.<sup>65</sup> The mandate was created at the initiative of Germany and Spain, with the support of many civil society organisations. Some States cautioned that this issue should be developed within the existing international legal framework.<sup>66</sup> The resolution was co-sponsored by many States from all regions except Africa. While it is certainly positive to see more joint initiatives in the Council, they would be even more valuable if they enjoyed even broader, cross-regional support.<sup>67</sup>

The Council reviewed and renewed the mandates of 19 special procedures in the course of

the 'review, rationalisation and improvement' of mandates. Most mandate renewals went relatively smoothly, with a few exceptions. ISHR's analytical overviews of Council sessions examine the review of mandates in detail. Below, we merely highlight some of the more contentious cases.

Ever since the creation of the mandate of the Special Representative of the Secretary-General on **human rights defenders**, the mandate has been seen as sensitive by some States. The review of the mandate opened the door for attempts to limit the scope of the mandate and the protection it affords to human rights defenders.<sup>68</sup> Egypt and the Russian Federation were among those most vocal in trying to renegotiate the definition of 'human rights defenders' in the *Declaration on Human Rights Defenders*,<sup>69</sup> with the professed goal of stopping 'self-proclaimed human rights defenders' from 'abusing' the mandate. These States also sought to re-open other parts of the Declaration, including provisions related to access to funding for human rights defenders.

Despite the tense climate during the negotiations, a strong resolution renewing the mandate was adopted by consensus, with broad co-sponsorship.<sup>70</sup> In line with other similar decisions by the Council, it renamed the mandate 'Special Rapporteur on human rights defenders'. The President of the Council also appointed a new mandate holder, Ms Margaret Sekaggya of Uganda, who will present her first report to the March 2009 session.

The review of the mandate on the 'promotion of the right to **freedom of expression**' proved particularly difficult as some States took concerted action to weaken it although its renewal was never seriously put in question. Adding to the difficulties, Canada, as the main sponsor, led the very difficult negotiations with little skill. Canada has become increasingly marginalised in the Council and its strong opposition to resolutions on the occupied Palestinian territories did not help it in these negotiations either. Some States, led by Pakistan (on behalf of the OIC) and the Arab Group, through a combination of better strategy and the confidence of supreme voting power, successfully pushed through an amendment to the original draft resolution that alters the basic thrust of the mandate on freedom of expression.<sup>71</sup>

62

See the section on country focus at p. 26 for a compilation of country missions reported on in 2008.

63

See ISHR's extensive coverage on the institution-building process, available at [www.ishr.ch/publications](http://www.ishr.ch/publications).

64

ISHR, *Human Rights Monitor 2007*, (Geneva, 2008).

65

See [www2.ohchr.org/english/issues/water/ieexpert/index.htm](http://www2.ohchr.org/english/issues/water/ieexpert/index.htm).

66

Mexico.

67

The mandate of the Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprise for instance is based on a cross-regional initiative, and was co-sponsored by Argentina, India, Nigeria, Norway and the Russian Federation.

68

For a detailed discussion of the review of this key mandate see ISHR's *Analytical overview of the 7th session of the Human Rights Council*, available at [www.ishr.ch/council\\_session\\_overviews](http://www.ishr.ch/council_session_overviews).

69

*Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Internationally Recognized Human Rights and Fundamental Freedoms* (commonly known as the 'Declaration on Human Rights Defenders'), General Assembly Resolution 53/144 (A/RES/53/144), 8 March 1999.

70

Council Resolution 7/8.

71

The amendment added additional tasks for the Special Rapporteur, namely 'to report on instances in which the abuse of the right to freedom of expression constitutes an act of racial or religious discrimination', taking into account Articles 19 (3) and 20 of the *International Covenant on Civil and Political Rights*, and General Comment No. 15 of the Committee on the Elimination of All Forms of Racial Discrimination, which stipulates that the prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with the freedom of opinion and expression. The inclusion of such a provision had been discussed at length during the negotiations on the draft, but no agreement could be found. For more details, see ISHR's *Analytical overview of the 7th session* at [www.ishr.ch/council\\_session\\_overviews](http://www.ishr.ch/council_session_overviews).

72  
Twenty-seven votes in favour, 17 votes  
against, and three abstentions.

73  
Angola, Ghana, Madagascar, Mauritius,  
South Africa, Zambia.

74  
See section on key thematic debates  
below.

75  
The Cuban amendment added a  
line to Preambular Paragraph 10:  
'Recognizing the importance of all  
forms of the media, including the  
print media, radio, television and the  
Internet, in the exercise, promotion  
and protection of the right to freedom  
of opinion and expression, and the  
importance for all forms of media to  
report and to deliver information in a  
fair and impartial manner' (new text in  
italics). The amendment was adopted  
with 29 votes in favour, 15 against, and  
three abstentions. For more details  
on the questionable adoption of this  
amendment, see ISHR's *Analytical  
overview of the 7th session*, available  
at [www.ishr.ch/council\\_session\\_oversviews](http://www.ishr.ch/council_session_oversviews).

76  
The resolution was adopted by 32 votes  
in favour with 15 abstentions.

77  
Algeria, China, the Philippines,  
Singapore, India, Sri Lanka, the Russian  
Federation, Indonesia.

78  
'States which have so far failed to  
respond affirmatively to requests for  
a visit are Algeria, Bangladesh, El  
Salvador, Guinea, India, Indonesia,  
the Islamic Republic of Iran, Israel,  
Kenya, the Lao People's Democratic  
Republic, Nepal, Pakistan, Peru, Saudi  
Arabia, Singapore, Thailand, Trinidad  
and Tobago, Togo, Uganda, the  
United States of America, Uzbekistan,  
Venezuela (Bolivarian Republic of),  
Viet Nam and Yemen.' A/HRC/8/3,  
Para. 11, available at [www2.ohchr.org/english/bodies/hrcouncil/8session/reports.htm](http://www2.ohchr.org/english/bodies/hrcouncil/8session/reports.htm).

79  
See ISHR's *Analytical Overview of  
the 8th session of the Human Rights  
Council*, available at [www.ishr.ch/council\\_session\\_oversviews](http://www.ishr.ch/council_session_oversviews).

80  
Egypt (on behalf of the African Group),  
Pakistan (on behalf of the OIC), and  
Singapore. It should be emphasised  
that previous Commission resolutions  
on extrajudicial executions, including  
*Resolution 2004/37* have called on  
States to abolish the death penalty.  
These resolutions have traditionally  
been adopted by a vote.

81  
However, these assertions appeared  
inconsistent with past voting records of  
some African States on this issue. For  
example, the 2007 General Assembly  
*Resolution 62/149, 'Moratorium on  
the use of the death penalty'*, which  
explicitly urges States to abolish the  
death penalty, was co-sponsored by five  
African States (Angola, Benin,

The amendment proposed by the OIC and Arab Group tasks the Special Rapporteur to also focus on abuses of freedom of expression that amount to racial or religious discrimination. The amendment was adopted by vote.<sup>72</sup> The votes against came from EU members and Latin American States (with the exception of Cuba and Nicaragua), while Japan, Bolivia, and the Republic of Korea abstained. The remaining Asian States voted in favour as did the entire African Group, including six African States that are not members of the OIC.<sup>73</sup> Some of these States changed their vote on the resolution on 'defamation of religions' compared to 2007, which may indicate that positions of States within the African Group are more fluid than the outside view would show.<sup>74</sup>

A second amendment, introduced by Cuba against the will of the original co-sponsors, was accepted in a vote that was questionable from a procedural point of view. It encourages all forms of media to report fairly and objectively.<sup>75</sup> Most States outside the Western Group that voted against the OIC amendment then voted in favour of the Cuban amendment with the exception of Mexico and Uruguay. This led many co-sponsors to withdraw their sponsorship and abstain on the amended resolution, as a strong display of disapproval.<sup>76</sup>

### Attacks on individual mandate holders

As in previous years, individual special procedures mandate holders were criticised for the way they carry out their work and accused of 'exceeding their mandates'. This occurs on a regular basis, particularly against those mandate holders that do not hesitate to openly express their concern about human rights violations.

The reviews of the mandates of the **Special Rapporteur on torture** and of the **Special Rapporteur on extrajudicial, summary or arbitrary executions** both gave rise to much criticism of their work and methodology.

Several States argued that they had violated the Code of Conduct.<sup>77</sup> In his report to the June session of the Council, the Special Rapporteur on extrajudicial, summary or arbitrary executions highlighted for instance a number of States that

had failed to respond positively to his requests for visits.<sup>78</sup> Considering that India was among these countries, it is hardly surprising that it spearheaded the attempts to replace Mr Alston as mandate holder. These attempts were unsuccessful, but were used as leverage in the negotiations on the presidential statement on terms in office for mandate holders (see above at page 16). Similar comments were made during the review of the mandate of the Special Rapporteur on torture, Mr Manfred Nowak, with the Russian Federation and Indonesia arguing that he had violated the Code of Conduct and should be replaced.<sup>79</sup>

Common to both reviews was the tendency to turn the review of the mandate into a review of the mandate holder. Throughout 2008, there were repeated references to breaches of the Code of Conduct and the need to respect it, often in conjunction with disagreements on the facts reported by a special procedure mandate holder. States should avoid mistaking substantive disagreements on the facts of a particular visit with a violation of the Code of Conduct. States, and in particular members of the Council, should increase their efforts to cooperate with the special procedures, which was the stated aim of the Code of Conduct.

Despite attacks on the mandate holders, the Council renewed both mandates through consensus resolutions. Both resolutions preserve the substance of the mandates. The resolution on the mandate of the Special Rapporteur on extrajudicial, summary or arbitrary executions, however, also led to much substantive debate. Of particular concern was the Special Rapporteur's work on the death penalty. While he has clearly stated that his mandate is not to advocate for the abolition of the death penalty, many States continue to oppose any attention to the abolition of the death penalty, claiming that this issue is not commonly agreed among States.<sup>80</sup> Throughout the review process Egypt, as the African Group coordinator, asserted the opposition of the Group to any mention of the death penalty.<sup>81</sup> The resolution renewing the mandate asks the Special Rapporteur, among other things, to 'continue monitoring the implementation of existing international standards on safeguards and restrictions relating to the imposition of capital punishment.'<sup>82</sup>

### Other mandates renewed by vote

Only a small number of mandates were renewed by a vote, but they were not subject to significant or controversial negotiations. All of these resolutions were presented by Cuba.<sup>83</sup> This was the case of the mandates of the Independent Expert on human rights and **international solidarity**,<sup>84</sup> the Independent Expert on the effects of **foreign debt** on human rights,<sup>85</sup> and the Working Group on the **use of mercenaries** as a means of violating human rights and impeding the exercise of the right of peoples to self-determination.<sup>86</sup> These resolutions are traditionally supported by the large majority of 'developing countries' of the Council (and in the world) and opposed by 'developed countries'. The votes indicate a fundamental disagreement on the role of the Council in discussing these topics, and the basic thrust of the mandates. Neither side invests resources in trying to reconcile these fundamentally opposed positions.

It is evident that some resolutions, including some of those presented by Cuba mentioned above, are very politically divisive. However, the Council should address human rights issues of particular concern to 'developing countries' although they may be politically sensitive to 'developed countries'. This is for instance the case of the issue of migration, which was brought up repeatedly throughout the year by Latin American and African States, but was resisted by many Western countries.<sup>87</sup> If 'developed countries' want to strengthen the universal protection of human rights and overcome the divisions between 'developing' and 'developed' countries they will have to engage on all fronts, and in particular on issues that are sensitive to them.

### Appointment process for new mandate holders

One of the most controversial issues during the institution building was the process for the selection and appointment of new special procedures mandate holders.<sup>88</sup> During the March session, this new selection process was put in action for the first time. Prior to the session, the President of the Council held wide consultations with all stakeholders on the list of pro-

posed candidates as required by the institution-building text. Despite these consultations, many States and NGOs were dissatisfied with the lack of transparency of the process.<sup>89</sup> Of particular concern was whether the shortlist prepared by the Consultative Group should include several candidates for each vacancy, and if the President was free to choose from that list or was bound by the preferences expressed by the Group in its recommendations.

The first list of recommendations prepared by the Consultative Group did not include a substantiation of their selection of candidates, nor did it shed light on the working methods of the Group in making a selection. This was in contradiction with the institution-building text. However, over the course of the year, the working methods of the Group improved somewhat. This is perhaps in part due to a change in its membership.<sup>90</sup> The list of candidates presented to the President at the September session for the third round of selections was partly substantiated, including an explanation of the Group's working methods and lists of the candidates considered at each stage of the selection process.

Throughout 2008, the Council endorsed the appointment by the President of three sets of a total of 27 new mandate holders.<sup>91</sup> Although the process was generally uncontroversial, some States complained that their own nationals had not been chosen.<sup>92</sup> While there is still some room for further improving the process, it represents significant progress over the selection process of the Commission. Whether the individuals appointed in 2008 will fulfil the criteria of high expertise and complete independence will be tested through their work.

## KEY THEMATIC DEBATES

### Racism

The Council continued to give a great deal of attention to the question of racism. With a dedicated item on this topic on the Council's agenda (Item 9) and preparations underway for the Durban Review Conference, which will be held in April 2009 in Geneva, this is not surpris-

Cape Verde, Gabon, Guinea-Bissau) and 15 African States voted in favour (Algeria, Angola, Benin, Burkina Faso, Burundi, Cape Verde, Cote d'Ivoire, Gabon, Mali, Mauritius, Mozambique, Namibia, Rwanda, Sao Tome and Principe, and South Africa). Egypt was one of 11 African States to vote against the resolution (Botswana, Comoros, Egypt, Ethiopia, Libya, Malawi, Mauritania, Nigeria, Sudan, Uganda, and Zimbabwe), while 21 African countries abstained (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).

<sup>82</sup> See Para. 7(e), Council Resolution 8/3, available at <http://ap.ohchr.org/Documents/gmainec.aspx>.

<sup>83</sup> See also the section on decision-making patterns at p. 33.

<sup>84</sup> In 2008, the Council adopted two resolutions on this issue. One at its March session renewing the mandate of the Independent Expert, and a second, substantive, resolution at its September session. Both resolutions were adopted with 13 votes against and the support of the rest of the Council members. The European States, Canada, the Republic of Korea, and Japan voted against these resolutions.

<sup>85</sup> The mandate used to be called 'Independent Expert on the effects of economic reform policies and foreign debt on the full enjoyment of all human rights, particularly economic, social and cultural rights' and was renamed 'Independent Expert on the effects of foreign debt and other related obligations of States on the full enjoyment of all human rights'. The resolution was adopted with the same voting pattern as that on international solidarity (34 in favour, 13 against, no abstentions).

<sup>86</sup> The voting pattern was similar to the above two resolutions, but with the abstention of Switzerland and Ukraine.

<sup>87</sup> Nevertheless, the mandate of the Special Rapporteur on the human rights of migrants was extended without a vote (Council Resolution 8/10).

<sup>88</sup> The outcome of the negotiations on the selection and appointment of mandate holders is a compromise that involves elements of both major proposals. It was agreed that OHCHR sets up a public list of eligible candidates that can be put forward by States, NGOs or even the candidates themselves. The candidates must meet certain technical and objective criteria that were adopted by the Council at its 6th session in September 2007. From this list, a Consultative Group made up of a representative from each of the five regional groups serving in their

personal capacity makes substantiated recommendations for the appointment of candidates for each of the vacancies.

The President then selects one candidate for each vacancy and seeks the Council's endorsement after broad consultations. See Paras 39-53, Council Resolution 5/1.

89

See ISHR's *Daily Update* of 26 March 2008 for further details, available at [www.ishr.ch/daily\\_updates](http://www.ishr.ch/daily_updates).

90

The members of the first Consultative Group were Blaise Godet (Switzerland), Idriss Jazaïry (Algeria), Masood Khan (Pakistan), Valery Loshchinin (Russian Federation), and Juan Martabit (Chile, replaced by Carlos Portales for the selection during the June session). With the change in membership, the Consultative Group changed to Alejandro Artucio (Uruguay), Petko Draganov (Bulgaria), Javier Garrigues Flórez (Spain), Dayan Jayatilaka (Sri Lanka), and Babacar Carlos Mbaye (Senegal).

91

Check <http://portal.ohchr.org/portal/page/portal/HRCExtranet/SpecialProcedures> for more information and for lists of upcoming vacancies. Currently, there is only one vacancy to be filled in March 2009 (that of the Special Rapporteur on the situation of human rights in Cambodia).

92

See for instance ISHR's *Daily Update* of 18 June 2008, available at [www.ishr.ch/daily\\_updates](http://www.ishr.ch/daily_updates).

93

Council Resolution 7/19.

94

Against: Canada, France, Germany, Italy, Netherlands, Romania, Slovenia, Switzerland, Ukraine, UK. Abstaining: Bolivia, Brazil, Gabon, Ghana, Guatemala, India, Japan, Madagascar, Mauritius, Mexico, Peru, Republic of Korea, Uruguay, and Zambia.

95

Council Resolution 4/9.

96

A/HRC/9/7.2  
See A/HRC/6/1, 31 July 2007.

97

A/HRC/9/12.

98

For more information, see: [www2.ohchr.org/english/issues/opinion/articles1920\\_iccpr](http://www2.ohchr.org/english/issues/opinion/articles1920_iccpr).

99

Egypt (on behalf of the African Group).

100

For more information about the process to develop these complementary standards, see [www2.ohchr.org/english/issues/racism/AdHocCommittee.htm](http://www2.ohchr.org/english/issues/racism/AdHocCommittee.htm).

101

Council Resolution 1/5.

ing. Much of the debate again revolved around the balance between the rights to freedom of expression and freedom of religion, an alleged increase in 'Islamophobia', and the concept of 'defamation of religions'. Some important progress has finally been made in this debate - it seems that the Council has reached a common understanding of the need to use human rights law terminology in addressing the substantive issues related to 'incitement to racial and religious hatred'.

At the March session, the Council adopted by vote a resolution on '**combating defamation of religions**'<sup>93</sup> which was introduced by Pakistan (on behalf of the OIC). The resolution was adopted with 21 votes in favour, ten votes against, and 14 abstentions.<sup>94</sup> Several States expressed concerns about the resolution, with the EU arguing that human rights law does not protect religions or beliefs as such, but only freedom of persons to hold beliefs and have or not have a religion. India also noted that the resolution takes a narrow approach to a complex issue with its focus on racism. The previous resolution on defamation of religions, adopted at the 4th session in March 2007, was passed by a larger majority with 24 votes in favour, 14 against, and nine abstentions.<sup>95</sup> The two resolutions are almost identical in content. Both request the Special Rapporteur on contemporary forms of racism to report on defamation of religions and in particular on the impact of 'Islamophobia' on human rights. This year's resolution additionally requests the High Commissioner to prepare a study on legislation and jurisprudence regarding defamation of religions, which she presented in September.<sup>96</sup> The change in voting is due to Gabon, Mauritius, and Mexico no longer supporting the resolution but abstaining instead. Guatemala, Japan, and the Republic of Korea no longer opposed it and abstained instead, while Nigeria voted in favour instead of abstaining. Among the new members for 2008, it is worth noting that Bolivia and Madagascar abstained. Only the EU and Western States are squarely opposed to this initiative. However, the move by some States from voting in favour to abstaining is significant, as is the votes against by some African States. This has resulted in a crack in an otherwise generally common African Group position. Surprisingly, some of the States opposed to this resolution voted in favour of the

OIC amendment to the resolution on freedom of expression, discussed above.

In September, the new **Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance**, Mr Githu Muigai, presented the report of the former Special Rapporteur, Mr Doudou Diène, on 'the manifestations of defamations of religions and in particular on the serious implications of Islamophobia on the enjoyment of all rights'.<sup>97</sup> The report calls for a shift in focus from 'defamation of religions' to the legal concept of 'incitement to national, racial and religious hatred, hostility and violence' contained in Article 20 of the *International Covenant on Civil and Political Rights*. Mr Muigai also emphasised that the best strategic response to hate speech is 'more speech'. Nevertheless some States continued to argue that freedom of expression should be limited to prevent religious and racial intolerance.

It seems that the report and the expert seminar convened by OHCHR in October on the 'links between articles 19 and 20 of the International Covenant on Civil and Political Rights: Freedom of expression and advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence'<sup>98</sup> may have laid the ground for a shift in approach. It will be particularly interesting to see if Pakistan again introduces a resolution on 'defamation of religions' in March 2009 and what approach it may take.

Throughout the year, the Council considered reports from several of the mechanisms established to **follow up on the** Durban Declaration and Programme of Action (DDPA), including the Intergovernmental Working Group on the effective implementation of the Durban Declaration and Programme of Action and the Ad-Hoc Committee on the elaboration of complementary standards. During the ensuing debate, some States criticised others for a lack of political will to implement the DDPA.<sup>99</sup> States were divided on the issue of the development of 'complementary standards' to fight racism.<sup>100</sup> While a study by five experts mandated by the Council<sup>101</sup> had concluded in 2007 that there was no clear need for such new standards,<sup>102</sup> many States continued to argue that existing standards were inadequate, in particular to address contemporary forms of racism.<sup>103</sup>

In March, the Council also adopted by a large majority a resolution entitled 'from rhetoric to reality: a global call for concrete action against racism, racial discrimination, xenophobia and related intolerance'.<sup>104</sup> The abstentions came from EU States as well as Canada, Japan, the Republic of Korea, Ukraine, and Switzerland. The EU explained that in its view the resolution was unbalanced as it selectively quoted from the DDPA.

In June, the Durban Preparatory Committee<sup>105</sup> updated the Council on its preparations for the **Durban Review Conference**. This process has revealed clear fault lines with respect to the objectives and outcomes of the Review Conference. The question of whether it should also examine contemporary forms of racism that have emerged since September 2001, as strongly argued by African countries and OIC members but opposed by the EU, is probably the most prominent of these fault lines. In May, the Preparatory Committee established an Intergovernmental Working Group to review contributions to the drafting of the outcome of the Review Conference. The Working Group began drafting the outcome in November after having held several preparatory meetings.

### Right to food

In May, the Council convened its first special session on a thematic topic of urgent concern to the international community: the global food crisis. The initiative was prompted by Cuba with the unprecedented support of 41 of the Council's 47 members<sup>106</sup> and more than 40 other States. After having held six special sessions on country situations of concern, this was a new use of the Council's mandate to convene to address an emergency situation, and it established an important precedent.

The special session demonstrated the ability of the Council to mobilise in response to an issue of global concern and saw significant engagement from international organisations and UN agencies. Regrettably, many NGOs outside of Geneva were unable to attend due to the short notice of the session. The majority of States did not focus on the Council's role in mainstreaming a human rights approach in the UN's response to the world food crisis. The Council as a whole

failed to set out its position or assert its role in addressing the human rights aspects of the crisis. The resulting resolution, adopted without a vote,<sup>107</sup> invited the Food and Agriculture Organisation to invite the High Commissioner and the Special Rapporteur on the right to food to its High-level meeting on World Food Security and the Challenges of Climate Change and Bioenergy in June. In September, the new Special Rapporteur on the right to food, Mr Olivier de Schutter, presented a report on the impact of the global food crisis on the protection of the right to food as follow-up to the special session.<sup>108</sup> He emphasised that solutions to the world food crisis will only be sustainable if they are grounded in human rights, and that States bear the primary responsibility for the crisis. The resolution adopted by the Council at its September session under Item 3 requests the Special Rapporteur to continue to 'promote the right to food and the follow up to the world food crisis in all relevant forums' and report to the Council on its implementation.<sup>109</sup> The right to food was also taken up by the Advisory Committee in August, see our chapter in this edition.

### Panel discussions

During the year the Council held a number of panel discussions, including on 'human rights voluntary goals'; violence against women; maternal mortality; gender integration; and missing persons. Many of the panel discussions were characterised by their lack of concrete outcomes. It was also generally unclear how the Council would follow up on the discussions or on the proposals made during the debates.

The discussions on **violence against women** and on **maternal mortality** were held to give focused attention to the human rights of women.<sup>110</sup> It was not clear whether the Council would follow up on at least some of the interesting and useful proposals made, including the creation of a new special procedures mandate on discrimination against women, suggested by France. Ms Arbour had supported this idea during her tenure. At the September session, the new High Commissioner was very cautious in her response to the proposal and only supported the creation of a 'special mechanism of whatever nature', stressing the need for States to drive the process for establishing a new mechanism. Hopefully,

102  
A/HRC/4/WG.3/6. Report on the study by the five experts on the content and scope of substantive gaps in existing international instruments to combat racism, racial discrimination, xenophobia and related intolerance. The five experts were: Mr Syafi'i Anwar (Indonesia), Ms Jenny Goldschmidt (the Netherlands), Mr Tiyanjana Maluwa (Malawi); Ms Dimitrina Petrova (Bulgaria); and Mr Waldo Luis Villalpando (Argentina).

103  
Egypt (on behalf of the African Group), Russian Federation, Nigeria, Azerbaijan.

104  
Council *Resolution 7/33*. Thirty-four votes in favour, none against, and 13 abstentions.

105  
The Council is acting as the Preparatory Committee.

106  
Cameroon, Madagascar, Republic of Korea, Azerbaijan, Slovenia, Canada, and the UK did not sign the request.

107  
Council *Resolution S-7/1*.

108  
A/HRC/9/23.

109  
Council *Resolution 9/6*.

110  
The debates were organised in implementation of Council *Resolution 6/30*.

Ms Pillay will over time grow bolder in her support for much needed and innovative new protection mechanisms, and in her demands on governments.

The panel on **gender integration** focused on the work of the special procedures. It also served to give further momentum to specific proposals on how to advance this issue in the Council's work. The suggestion by the civil society panellist to create a 'gender focal point' of States within the Council to lead the work on gender integration was particularly interesting. The suggestion by Morocco and New Zealand that the Council should keep a record of the main conclusions and recommendations of previous debates on gender integration was extremely useful, and should be applied to all panel discussions to allow for effective follow-up.

The panel on **missing persons** resulted in a request to the Advisory Committee to prepare a study on best practices for the Council's 12th session in September 2009.<sup>111</sup> The panel on **human rights voluntary goals** organised by Brazil gave input to the development of a set of human rights voluntary goals to mark the 60th anniversary of the *Universal Declaration of Human Rights* subsequently adopted at the September session.<sup>112</sup> While many NGOs and States were concerned that this initiative could seriously undermine existing human rights standards, such a disaster was averted through intense negotiations of the resolution on human rights voluntary goals.

111

Council Decision 9/101.

112

Council Resolution 9/12.

113

The agenda is available at [www2.ohchr.org/english/bodies/hrcouncil/docs/8session/A.HRC.8.1April25.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/8session/A.HRC.8.1April25.pdf).

114

Cuba, Pakistan (on behalf of the OIC), China, Iran, Russian Federation. During the review of Israel under the UPR, Iran stated that this mechanism is inadequate for addressing the situation of human rights violations by Israel against the Palestinian people.

115

The following list only includes visits reported on in 2008. It does not cover the reports on 'communications to and from governments' presented by many special procedures, although these could potentially also be used by the Council.

While some States pursued political agendas by referring to contentious human rights issues or by selectively highlighting parts of the Declaration, the overwhelming consensus was that governments must avoid complacency and increase their efforts to ensure the enjoyment by all of the rights promulgated in the UDHR.

## COUNTRY FOCUS

The Council discussed human rights situations in particular countries under several agenda items, including Item 4, Item 7, Item 8, and Item 10.<sup>113</sup> These debates were often contentious and raised questions about the scope of these agenda items. This section examines these debates in more detail.

The year saw attacks on several existing country mandates and the **discontinuation of the mandates on Liberia and the Democratic Republic of the Congo**. There was little or no sign of willingness by any States to establish new mechanisms to monitor and report on any human rights situation not currently scrutinised by the Council. Many States opposed to country resolutions and country-specific mandates continued to argue that the examination of country situations should only take place in the context of the UPR.<sup>114</sup>

## List of visits

In 2008, the special procedures (both thematic and country-specific) presented 71 reports on visits to 53 countries.<sup>115</sup> The reports by the country mandates received a reasonable amount of attention because of the one hour set aside for holding a debate with each mandate holder. On the other hand, the reports on country visits by the thematic special procedures attracted less attention. Most often only the country that had received the visit commented on the report, while other States tended to focus on the thematic reports. Whether this was due to the limited time available for the dialogue with thematic mandate holders, or some other reason, the Council should consider how it could better

## Commemorative session on the 60th anniversary of the Universal Declaration of Human Rights

On 12 December, the Council convened for a day of high-level statements to commemorate the 60th anniversary of the *Universal Declaration of Human Rights* (UDHR). All those that spoke underlined that while the UDHR should be celebrated for its ground-breaking codification of the inherent rights of all people, much still needs to be done if those rights are to be universally implemented. Many speakers stressed the need for meaningful global co-operation to confront poverty reduction, the world food crisis, the financial crisis, and climate change as precursors to affirming human rights worldwide.

follow up on the recommendations of the special procedures in relation to their visits.

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#### Africa

- **Algeria:** Special Rapporteur on violence against women, its causes and consequences (A/HRC/7/6/Add.2)
- **Angola:** Working Group on arbitrary detention (A/HRC/7/4/Add.4), Special Rapporteur on freedom of religion or belief (A/HRC/7/10/Add.4)
- **Burkina Faso:** Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of human rights, particularly economic, social and cultural rights (A/HRC/7/9/Add.1)
- **Burundi:** Independent Expert on the situation of human rights in Burundi (A/HRC/9/14)
- **Central African Republic:** Representative of the Secretary-General on the human rights of internally displaced persons (A/HRC/8/6/Add.1), Special Rapporteur on extrajudicial, summary or arbitrary executions (A/HRC/8/3/Add.5)
- **Democratic Republic of the Congo:** Representative of the Secretary-General on the human rights of internally displaced persons (A/HRC/8/6/Add.3), Special Rapporteur on the independence of judges and lawyers (A/HRC/8/4/Add.2), Special Rapporteur on violence against women, its causes and consequences (A/HRC/7/6/Add.4), Independent Expert on the Democratic Republic of the Congo (A/HRC/7/25)
- **Equatorial Guinea:** Working Group on arbitrary detention (A/HRC/7/4/Add.3)
- **Ghana:** Special Rapporteur on violence against women, its causes and consequences (A/HRC/7/6/Add.3)
- **Liberia:** Independent Expert on the situation of human rights in Liberia (A/HRC/7/67), Independent Expert on the situation of human rights in Liberia (A/HRC/9/15)
- **Mauritania:** Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance (A/HRC/7/19/Add.6)

- **Morocco:** Special Rapporteur on the right to education (A/HRC/8/10/Add.2)
- **Nigeria:** Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (A/HRC/7/3/Add.4), Special Rapporteur on extrajudicial, summary or arbitrary executions (A/HRC/8/3/Add.3)
- **South Africa:** Special Rapporteur on adequate housing as a component of the right to an adequate standard of living (A/HRC/7/16/Add.3)
- **Sudan:** Special Rapporteur on the situation of human rights in the Sudan (A/HRC/7/22), Special Rapporteur on the situation of human rights in the Sudan (A/HRC/9/13 and Add.1)
- **Togo:** Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (A/HRC/7/3/Add.5)
- **Uganda:** Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (A/HRC/7/11/Add.2)
- **Tanzania:** Special Rapporteur on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights (A/HRC/7/21/Add.3)

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#### Asia

- **Afghanistan:** Special Rapporteur on extrajudicial, summary or arbitrary executions (A/HRC/8/3/Add.6)
- **Cambodia:** Special Rapporteur for human rights in Cambodia (A/HRC/7/42)
- **Democratic People's Republic of Korea:** Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea (A/HRC/8/20)
- **India:** Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (A/HRC/7/11/Add.4)
- **Indonesia:** Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (A/HRC/7/3/Add.7), Special Rapporteur on the situation of human rights defenders (A/HRC/7/28/Add.2)

- **Malaysia:** Special Rapporteur on the right to education (A/HRC/8/10/Add.3)
- **Myanmar:** Special Rapporteur on the situation of human rights in Myanmar (A/HRC/7/18 and A/HRC/7/24), Special Rapporteur on the situation of human rights in Myanmar (A/HRC/8/12)
- **Philippines:** Special Rapporteur on extrajudicial, summary or arbitrary executions (A/HRC/8/3/Add.2)
- **Sri Lanka:** Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (A/HRC/7/3/Add.6), Representative of the Secretary-General on the human rights of internally displaced persons (A/HRC/8/6/Add.4), Special Rapporteur on extrajudicial, summary or arbitrary executions (A/HRC/8/3/Add.3)
- **Tajikistan:** Special Rapporteur on freedom of religion or belief (A/HRC/7/10/Add.2)

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#### Eastern Europe

- **Azerbaijan:** Representative of the Secretary-General on the human rights of internally displaced persons (A/HRC/8/6/Add.2), Special Rapporteur on the right to freedom of opinion and expression (A/HRC/7/14/Add.3)
- **Bosnia and Herzegovina:** Special Rapporteur on the right to education (A/HRC/8/10/Add.4)
- **Estonia:** Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance (A/HRC/7/19/Add.2)
- **Latvia:** Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance (A/HRC/7/19/Add.3)
- **Lithuania:** Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance (A/HRC/7/19/Add.4)
- **Serbia:** Special Rapporteur on the situation of human rights defenders (A/HRC/7/28/Add.3)
- **The former Yugoslav Republic of Macedonia:** Special Rapporteur on the situation of human rights defenders (A/HRC/7/28/Add.4)

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#### Latin America and Caribbean

- **Bolivia:** Special Rapporteur on the right to food (A/HRC/7/5/Add.2)
- **Brazil:** Special Rapporteur on extrajudicial, summary or arbitrary executions (A/HRC/8/3/Add.4), Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people (A/HRC/9/9)
- **Chile:** Working Group on the use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination (A/HRC/7/7/Add.4)
- **Colombia:** Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (A/HRC/7/11/Add.3)
- **Dominican Republic:** Independent Expert on minority issues (A/HRC/7/23/Add.3), Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance (A/HRC/7/19/Add.5)
- **Ecuador:** Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (A/HRC/7/11/Add.3), Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people (A/HRC/9/9)
- **El Salvador:** Working Group on enforced or involuntary disappearances (A/HRC/7/2/Add.2)
- **Haiti:** Independent Expert appointed by the Secretary-General on the situation of human rights in Haiti (A/HRC/8/2)
- **Honduras:** Working Group on enforced or involuntary disappearances (A/HRC/7/2/Add.1), Working Group on the use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination (A/HRC/7/7)
- **Mexico:** Special Rapporteur on the sale

of children, child prostitution and child pornography (A/HRC/7/8/Add.2)

- **Paraguay:** Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (A/HRC/7/3/Add.)
- **Peru:** Working Group on the use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination (A/HRC/7/7/Add.2)

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#### Western Europe and other States

- **Canada:** Special Rapporteur on adequate housing as a component of the right to an adequate standard of living (A/HRC/7/16/Add.4)
- **France:** Independent Expert on minority issues (A/HRC/7/23/Add.2)
- **Norway:** Working Group on arbitrary detention (A/HRC/7/4/Add.3)
- **Spain:** Special Rapporteur on adequate housing as a component of the right to an adequate standard of living (A/HRC/7/16/Add.2)
- **United Kingdom:** Special Rapporteur on freedom of religion or belief (A/HRC/7/10/Add.3)
- **United States of America (US):** Special Rapporteur on the human rights of migrants (A/HRC/7/12/Add.1)

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#### Country mandates and country resolutions

In September, the Independent Expert on the situation of human rights in **Burundi**, Mr Akich Okola, presented his report<sup>116</sup> and called attention to a worsening human rights situation. Burundi stated that it supported the extension of the mandate until an independent national human rights institution is established. States that spoke during the review, including Kenya, the DRC, and Ghana, favoured an extension. The resolution extending the mandate was adopted without a vote.<sup>117</sup> The Council endorsed the condition put forward by Burundi that the mandate would only last until an independent national human rights commission is established in accordance with the *Paris Principles*.<sup>118</sup> It is uncertain how the Council will assess when this condition is

met. The International Coordination Committee of national human rights institutions in the context of its accreditation process should carry out the assessment and the Council should rely on that. Since the ‘expiry date’ for the mandate of the Independent Expert has not been clearly established, the Council should take an explicit decision about when to discontinue the mandate and could not just let it lapse through inaction.

The Special Representative of the Secretary-General on human rights in **Cambodia**, Mr Yash Ghai, presented his annual report in March.<sup>119</sup> In September, the Council extended the mandate but changed the title to Special Rapporteur in line with similar decisions on other mandates.<sup>120</sup> At that session, Mr Ghai resigned, apparently as a result of a very tense relationship with the Government. He quoted several remarks by high-ranking public officials about his person and national origin, that he considered highly offensive. Although the resolution on the mandate was adopted without a vote, the negotiations leading to that outcome were far from easy. Cambodia, with the support of several other States, successfully opposed proposals by several Western States that would have made the resolution more critical of the human rights situation.

At the March session, the Special Rapporteur on the situation in the **Democratic People’s Republic of Korea**, Mr Vitit Muntarbhorn, presented his annual report to the Council.<sup>121</sup> The DPRK rejected the report as ‘slanderous’. Some States expressed concern about the continued and longstanding non-cooperation of the DPRK with the Special Rapporteur and stressed that the Government should not be rewarded for this by reduced international scrutiny of a ‘grave human rights situation’.<sup>122</sup> The extension of the mandate was explicitly supported by several States.<sup>123</sup> While the resolution renewing the mandate received opposition from familiar quarters, this opposition was often voiced as a general resistance to country mandates.<sup>124</sup> Cuba called for a vote on the resolution.<sup>125</sup> Brazil, which is generally opposed to country resolutions that do not enjoy the support of the country concerned, voted in favour. So did Ghana, Jordan, Madagascar, and Saudi Arabia. African States generally abstained (with the exception of a vote against from Egypt), while Latin American countries voted in favour (with the exception of votes against from Nicaragua and Cuba), and Asia was divided. It was

116  
A/HRC/9/14.

117  
Council Resolution 9/19.

118  
Principles relating to the status and functioning of national institutions for protection and promotion of human rights, contained in Commission on Human Rights Resolution 1992/54 and General Assembly Resolution 48/134.

119  
A/HRC/7/42.

120  
Council Resolution 9/15.

121  
A/HRC/7/20.

122  
Slovenia (on behalf of the EU).

123  
Slovenia (on behalf of the EU), Japan, Argentina, Canada, Republic of Korea.

124  
Algeria, China, Cuba, Pakistan (on behalf of the OIC), Vietnam, Zimbabwe. Only Cuba, Zimbabwe and Algeria explicitly called for the termination of the mandate.

125  
Council Resolution 7/15. Twenty-two votes in favour, seven votes against, and 18 abstentions. In favour: Bolivia, Bosnia and Herzegovina, Brazil, Canada, France, Ghana, Italy, Japan, Jordan, Madagascar, Mexico, Netherlands, Peru, Republic of Korea, Romania, Saudi Arabia, Slovenia, Switzerland, Ukraine, UK, Uruguay. Against: Indonesia, China, Cuba, Egypt, Malaysia, Nicaragua, Russian Federation. Abstained: Angola, Azerbaijan, Bangladesh, Cameroon, Djibouti, Gabon, Guatemala, India, Mali, Mauritius, Nigeria, Pakistan, Philippines, Qatar, Senegal, South Africa Sri Lanka, Zambia.

the only resolution on a country mandate that was voted on this year.

The adoption of this resolution clearly demonstrates that positions within the Council in relation to country mandates are not as regionally cohesive as argued by some regional or other groupings, in particular by the coordinators of the African and OIC Groups. It also shows that States that have enunciated or endorsed a principled position against country mandates are not always faithful to their own principles. Only a relatively small group of those States opposed in principle to country mandates cast a negative vote on this occasion. It seems that real political motivations, but hopefully also human rights considerations, continue to guide States' positions on country mandates.

The Independent Expert on the **Democratic Republic of the Congo** reported to the Council at its March session.<sup>126</sup> During the review of the mandate, Egypt highlighted 'progress' in the human rights situation and argued that it would be counter-productive to renew the mandate against the will of the country concerned. The majority of States that spoke supported a renewal.<sup>127</sup> However, this proved insufficient, and the resolution, adopted without a vote, discontinued the mandate.<sup>128</sup> Instead, it requested several thematic special procedures to make recommendations on 'how best to technically assist the DRC in addressing the situation of human rights' and report to the Council in March 2009.<sup>129</sup> It is worth noting that three of the seven required special procedures have recently visited the DRC and already reported to the Council this year. The EU, Canada, and Switzerland expressed disappointment with the outcome but joined the consensus. All of the Council's members must assume the responsibility for that decision, although some members may argue that they did not have a real choice due to their limited influence.

In December, the Council responded to the deteriorating human rights and humanitarian situation in the country. It adopted a consensus decision at its **special session on the human rights situation in the east of the DRC**. The session was requested by the EU, but did not have the explicit support of the African Group. Prior to the session, the EU had initiated negotiations on a resolution, but the African Group did not

participate. The African Group accused the EU of 'forcing the special session down [its] throat', and of not having consulted with it in relation to the process. Subsequently, the African Group presented its own draft resolution, which led the EU to withdraw its text.<sup>130</sup> The resulting resolution adds little in terms of concrete outcome to the decision taken in March, as it reiterates the invitation to the same list of special procedures mandate holders to visit and report on the situation. A suggestion by the EU to add the Special Rapporteur on torture and the Special Rapporteur on extrajudicial, summary, and arbitrary executions to the list, was not included. However, it is noteworthy that the resolution 'expresses its serious concern at the deteriorating human rights and humanitarian situation in North Kivu' and condemns all acts of violence, and in particular sexual violence and the recruitment of child soldiers. Notably, it also 'emphasizes the importance of strengthening the mandate of MONUC with a view to increasing its capacity to protect civilians.' The expression of concern was largely based on the EU draft text.

In June, the Independent Expert on the situation of human rights in **Haiti**, Mr Louis Joinet, presented his report to the Council.<sup>131</sup> At the session, the Council also appointed Mr Michel Forst to succeed to Mr Joinet whose term had come to an end. In September, the Council adopted a presidential statement to extend the mandate of the Independent Expert for a further two years.<sup>132</sup> This was a welcome departure from the usual one-year renewal of country mandates.

The Independent Expert for technical cooperation and advisory services in **Liberia**, Ms Charlotte Abaka, presented her annual report in March.<sup>133</sup> In September, Ms Abaka again presented a report to the Council highlighting grave civil rights violations.<sup>134</sup> At the initiative of France (on behalf of the EU),<sup>135</sup> the Council adopted a resolution to discontinue the mandate, but requesting OHCHR to provide technical assistance to the country. The discontinuation of the mandate seems to be based on an assessment by the EU that the situation has sufficiently improved and that the mandate was not needed. It may also relate to an unwillingness to confront those opposed to country mandates, including in particular the African Group, while remaining engaged in difficult negotiations on the future of the mandate on the Sudan.

126

A/HRC/7/25.

127

Slovenia (on behalf of the EU), Netherlands, UK, France, Belgium, US, Norway, Switzerland, Sweden, Canada.

128

Council Resolution 7/20.

129

The special procedures are the: Special Rapporteur on violence against women, Special Representative of the Secretary-General on internally displaced persons, Special Rapporteur on the independence of judges and lawyers, Special Rapporteur on the right to health, Special Rapporteur on human rights defenders, Special Representative of the Secretary-General on transnational corporations and other business enterprises, and Special Representative of the Secretary-General on children and armed conflict.

130

A/HRC/S-8/L.2/Rev.1.

131

A/HRC/8/2.

132

Presidential statement 9/1.

133

A/HRC/7/67.

134

A/HRC/9/15.

135

Previously, the UK was the main sponsor of the mandate.

In March, the Special Rapporteur on the situation of human rights in **Myanmar**, Mr Paulo Sergio Pinheiro, presented his annual report and a follow-up report to the special session held in October 2007.<sup>136</sup> Myanmar accused the Special Rapporteur of lacking ‘objectivity and impartiality’ and claimed that there were no political prisoners in the country. The report received broad support from all other countries and NGOs that took part in the interactive dialogue. The mandate was also reviewed during the session. Not surprisingly, China and Pakistan again expressed general opposition to country mandates, while other States supported the extension of this mandate. The Council adopted two resolutions relating to Myanmar: one deals substantively with the human rights situation in the country,<sup>137</sup> while the other is rather procedural and extends the mandate of the Special Rapporteur.<sup>138</sup> Both resolutions were adopted without a vote. In June, the Council followed up to the special session and discussed a report by the Special Rapporteur.<sup>139</sup> Myanmar reiterated the same criticisms of the report as in March. The discussion focused on the recent referendum on the draft constitution and the natural disaster that had hit Myanmar in May. While the ensuing resolution was adopted without a vote, it did not enjoy broad co-sponsorship outside of the Western and Eastern European Groups. It appeared that the momentum of the special session, which had mobilised broad support, was wearing off.

States largely presented well-worn positions regarding the situation in the occupied **Palestinian and other Arab territories** in the many discussions over the course of the year. While much time was devoted to debating the human rights situation in this area, the Council failed to advance beyond the usual impasses.

In January at the request of the OIC and the Group of Arab States, the Council convened a **special session on the situation in Gaza**. The resulting resolution was adopted by vote.<sup>140</sup> In March, the Council adopted a resolution on Gaza at the beginning of the session in departure from usual practice and in order to be seen to respond to developments that had occurred in the days and weeks before the beginning of the session as a result of Israeli military attacks on Gaza.<sup>141</sup> The resolution was passed with 33 votes in favour, one against, and 13 abstentions.<sup>142</sup> Switzerland and Ghana voted in favour instead of abstain-

ing as they had done in January and Gabon was present to cast a positive vote.

During the March session, the Council also discussed follow-up to the outcome of its 1st and 3rd **special sessions on the occupied Palestinian territories**. The High Commissioner stated that Israel’s unwillingness to cooperate with the Council hampered the effective implementation of these resolutions. The Council did not take further action. In September, the Council received the final report of the high-level fact-finding mission to Beit Hanoun, headed by Archbishop Desmond Tutu, which had been dispatched after the 3rd special session.<sup>143</sup> Archbishop Tutu called for an independent international inquiry into the human rights violations of Beit Hanoun, which he argued amounted to war crimes. He called on the international community to implement the recommendations in the report, noting that silence ‘begets complicity’. Egypt (on behalf of the African Group) lauded the report’s ‘meticulous legal analysis’, while France (on behalf of the EU) expressed ‘serious reservations’ about several of its conclusions, including the legal evaluation of the bombing of Beit Hanoun and the responsibilities attributed to the international community. The Council adopted by vote a resolution calling for the full and immediate implementation of the report’s recommendations.<sup>144</sup>

In March the Council adopted without a vote a resolution on ‘the right of the Palestinian people to **self-determination**’.<sup>145</sup> At the same session, the Council also adopted by an overwhelming majority a resolution on ‘Israeli **settlements** in the occupied Palestinian territories, including East Jerusalem’.<sup>146</sup> The resolution on ‘human rights in the occupied **Syrian Golan**’ was adopted by vote.<sup>147</sup>

In June, the **new Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967**, Mr Richard Falk, addressed the Council for the first time. He introduced a fresh point of contention by arguing that the scope of the mandate should be extended to include human rights violations committed by Palestinian armed groups. State reactions to this proposal were predictable with Jordan, Egypt, and Cuba squarely opposing it, and the EU favouring it. Sri Lanka and Brazil believed it merited further consideration. However, as men-

136  
A/HRC/7/18 and A/HRC/7/24.

137  
Council Resolution 7/31.

138  
Council Resolution 7/32.

139  
A/HRC/8/12.

140  
Council Resolution S-6/1. Adopted by 30 votes in favour, one vote against, and 15 abstentions. Against: Canada. Abstaining: Bosnia and Herzegovina, Cameroon, France, Germany, Ghana, Guatemala, Italy, Japan, Netherlands, Republic of Korea, Romania, Slovenia, Switzerland, Ukraine, UK.

141  
Council Resolution 7/1.

142  
Against: Canada. Abstentions: Bosnia and Herzegovina, Cameroon, France, Germany, Guatemala, Italy, Japan, Netherlands, Republic of Korea, Romania, Slovenia, Ukraine, UK.

143  
A/HRC/9/26. See ISHR’s *Human Rights Monitor 2006*, (Geneva, 2007) for more information on the 3rd special session, as well as our detailed report available at [www.ishr.ch/council\\_special\\_sessions](http://www.ishr.ch/council_special_sessions).

144  
Council Resolution 9/18. Thirty-two votes in favour, nine votes against, and five abstentions. Against: France, Germany, Netherlands, UK, Slovenia, Slovakia, Italy, Canada, Japan. Abstaining: Bosnia and Herzegovina, Cameroon, Republic of Korea, Switzerland, Ukraine.

145  
Council Resolution 7/17.

146  
Council Resolution 7/18. Forty-six votes in favour, and one vote against from Canada.

147  
Council Resolution 7/30. Thirty-two votes in favour, one vote against, and 14 abstentions.

tioned above, the mandate was not reviewed. It is the only mandate not to have been reviewed as part of the institution-building process.

In March the Council reviewed and extended the mandate of the Independent Expert on the human rights situation in **Somalia**.<sup>148</sup> This resolution did not cause any controversy and was adopted without a vote. The mandate enjoys the support of Somalia and was endorsed by Egypt (on behalf of the African Group). It should be noted that the title of the mandate was changed, in line with previous Council decisions. The Council appointed Mr Shamsul Bari as the new mandate holder. Italy and Switzerland called for the establishment of an OHCHR office in Somalia. However, the resolution merely requests OHCHR to 'strengthen its presence' and provide technical assistance to the authorities. In September, the Independent Expert reported to the Council. Mr Bari suggested that the Council convene a special session to consider the situation in the country from 'a multi-dimensional perspective'. This proposal was first made by Human Rights Watch in March, but has yet to be followed up by the Council.

The Special Rapporteur on the situation of human rights in the **Sudan**, Ms Sima Samar, presented her annual report in March.<sup>149</sup> In December 2006 the Council terminated the mandate of the Experts Group on Darfur and tasked the Special Rapporteur with continuing its work.<sup>150</sup> The Sudan disputed several findings in her report and highlighted its efforts to improve the human rights situation. While many States expressed serious concern about the situation, others argued that the Special Rapporteur was not providing an objective analytical assessment of the situation. A weak resolution passed at the session failed to address a number of significant issues highlighted by the Special Rapporteur, including the prevalence of impunity. It only expresses concern about the failure to hold to account perpetrators of serious violations of human rights and humanitarian law in Darfur.<sup>151</sup>

In September, the Special Rapporteur again reported on the situation and painted a bleak picture.<sup>152</sup> States were again divided in relation to the assessment of the overall situation. During the review of the mandate, Egypt (on behalf of the African Group) stated that it wanted an

end to the 'proliferation of human rights mechanisms on the Sudan' referring to the presence of OHCHR and the Sudan's review by the UPR in 2011. Further, Egypt argued that it would consider terminating the mandate but it wanted a consensual outcome. Clearly, the decision on the future of this mandate is not solely in the hands of Egypt or the African Group. States supporting the mandate are not likely to simply agree to terminate it. Perhaps Egypt's comments can best be understood as a reflection of its knowledge that decisions on country mandates on African countries have largely been decided by the will of the African Group, or perhaps of its most influential members. Accentuating this *de facto* hegemony is the fact that those States that generally support country mandates have so far simply accepted this situation. They have yet to publicly hold the entire Council to account for its decisions and challenge the members to a vote. Perhaps 2009 will be the time for that.

At the September session, the Council extended the mandate of the Special Rapporteur on the Sudan until June 2009, a significant departure from one-year duration stipulated as the standard duration in the institution-building text.<sup>153</sup> Not surprisingly, the Sudan applauded the 'partial renewal' as a step 'in the right direction'. The renewal of this mandate will be a major challenge for the Council next year as much of the momentum gathered by the special session on Darfur in December 2007 and in response to the situation in the Sudan in general has been lost as a result of sustained opposition to any Council action by several members of the African Group and the OIC in particular.

### Complaint procedure

In September, the Council decided to discontinue consideration of the situation in the Maldives under its complaint procedure. It kept the situation in Turkmenistan pending. It is unclear how many cases are currently before the complaint procedure, but there seems to be a significant reduction in the number of situations that it is considering. As the complaint procedure is confidential it is unfortunately not possible to obtain information about its work until it is made public by the Council.

<sup>148</sup>  
Council Resolution 7/35.

<sup>149</sup>  
A/HRC/7/22.

<sup>150</sup>  
Council Resolution 6/34.

<sup>151</sup>  
Council Resolution 7/16.

<sup>152</sup>  
A/HRC/9/13, A/HRC/9/13/Add.1.

<sup>153</sup>  
Council Resolution 9/17.

<sup>154</sup>  
Raised by Canada, Lithuania, Poland, Slovenia, UK.

<sup>155</sup>  
Sweden, UK, Amnesty International, Human Rights Watch, International Commission of Jurists, Society for Threatened Peoples in a joint statement on behalf of the Asian Forum for Human Rights and Development, the Asian Indigenous and Tribal Peoples Network, Mouvement contre le Racisme et pour l'amitié entre les Peuples.

<sup>156</sup>  
Colombian Commission of Jurists.

<sup>157</sup>  
Canada, France and Slovenia (on behalf of the EU), Ireland, Japan, UK.

<sup>158</sup>  
Belgium, Canada, France in its national capacity and as previously Slovenia on behalf of the EU and Croatia, Macedonia, Albania, Bosnia and Herzegovina, Montenegro, Iceland, Liechtenstein, Netherlands, Switzerland, UK.

<sup>159</sup>  
Australia, Belgium, Canada, France in its national capacity and as previously Slovenia on behalf of the EU and other States, UK, Baha'i International Community, Fédération Internationale des Droits de l'Homme (FIDH).

<sup>160</sup>  
France (on behalf of the EU), Japan, UK.

## Debates on country situations with no outcomes

In 2008, the Council debated country situations under several of its agenda items. The recurrent situations at each session were: Belarus,<sup>154</sup> China,<sup>155</sup> Colombia,<sup>156</sup> the DPRK,<sup>157</sup> the DRC,<sup>158</sup> Iran,<sup>159</sup> Myanmar,<sup>160</sup> Nepal,<sup>161</sup> Somalia,<sup>162</sup> Sri Lanka,<sup>163</sup> and Zimbabwe.<sup>164</sup> No action was taken in relation to Belarus for which the Special Rapporteur was discontinued in 2006, or in relation to China, Colombia, Iran, Sri Lanka or Zimbabwe. The situations in Colombia and Nepal received international attention through the presence of OHCHR, and the General Assembly passed a resolution on Iran again this year.<sup>165</sup> For the other situations where there are currently no special procedures mandate there seems little prospect of Council action.

Other situations were also discussed over the course of the year. In March and June Kenya received attention.<sup>166</sup> In March, the situations in Chad, Iraq, Pakistan, and Uganda were also raised. In June, NGOs called attention to secret detention programmes, Guantánamo Bay,<sup>167</sup> and the situations in Bangladesh<sup>168</sup> and Pakistan. In September, for the first time several States outside the Western Group used the item on 'situations that require the Council's attention' (Item 4). As a result, the following situations were raised: Canada,<sup>169</sup> France,<sup>170</sup> Germany,<sup>171</sup> Bolivia,<sup>172</sup> Republic of Korea,<sup>173</sup> and the United Kingdom (UK) including its actions in Iraq and Afghanistan.<sup>174</sup> In addition, concerns were expressed about the situations in Eritrea,<sup>175</sup> India,<sup>176</sup> and Uzbekistan.<sup>177</sup> Cuba raised concerns about the use of secret prisons and torture in the context of the 'war on terror', while the Russian Federation expressed concerns about the situation in Afghanistan and Iraq,<sup>178</sup> and suggested that the Council consider re-establishing special procedures for these countries.<sup>179</sup> The proposal to reinstate the Special Rapporteur on Iraq was also supported by Human Rights Watch.

The number of situations addressed through these discussions remains very limited and is largely the same at every session. Unless the Council moves beyond this set list of countries for its debates and actions, its impact, too, will remain limited.

## DECISION-MAKING PATTERNS: OVERWHELMING CONSENSUS

The Council adopted the vast majority of its resolutions without a vote. A total of 80 resolutions, decisions, and presidential statements were passed, 18 (or 22%) of which were passed by vote. No resolution was rejected by the Council. Only two amendments were brought to a vote, both in relation to the resolution on freedom of expression. In addition, it adopted 32 decisions related to the outcome of the UPR reviews of the 1st and 2nd sessions.

Eight of the 'divisive' resolutions where a vote was called for were presented by Cuba: on the composition of OHCHR staff; the mandate of the Independent Expert on international solidarity; the mandate of the Working Group on mercenaries; the mandate of the Independent Expert on the effects of foreign debt; promotion of a democratic and equitable international order; promotion of the right of peoples to peace; human rights and international solidarity; and on human rights and unilateral coercive measures. These resolutions were adopted by a large majority of the Council's members from Asia, Africa, and Latin America (between 32 and 34 States). They were generally opposed by States such as the EU, Canada, Japan, and the Republic of Korea. Abstentions came from Switzerland and Ukraine on the resolution on the Working Group on mercenaries; Switzerland and the Republic of Korea on the resolution on the composition of OHCHR's staff; Ghana and Mexico on the resolution on the right to an equitable international order; and from Mexico and India on the resolution on the right to peace.

All five resolutions on the occupied Palestinian and other Arab territories were adopted by vote: Gaza, Syrian Golan, Israeli settlements, Beit Hanoun, Beit Hanoun follow-up. However, the voting differed widely, as examined above. The resolution on Israeli settlements was the only one to have the support of the entire Council with the exception of Canada, which was also the only State to vote against all the other resolutions, although it was joined by the EU on the resolution on follow-up to Beit Hanoun.

Other controversial resolutions dealt with the mandate of the Special Rapporteur on the promotion and protection of the right to freedom

161 Japan, Society for Threatened Peoples in a joint statement on behalf of the Asian Forum for Human Rights and Development, the Asian Indigenous and Tribal Peoples Network, Mouvement contre le Racisme et pour l'amitié entre les Peuples.

162 Netherlands, UK, Human Rights Watch, FIDH.

163 Canada, France in its national capacity and as previously Slovenia on behalf of the EU and other States, Ireland, Japan, Netherlands, Switzerland.

164 Australia, Canada, Germany, Japan, Iceland, Ireland, Netherlands, New Zealand, Slovenia (on behalf of the EU and other States), UK, Switzerland, Amnesty International, Human Rights Watch, International Commission of Jurists World Organisation against Torture (OMCT).

165 For a detailed discussion, see the chapter on the General Assembly, at pp. 87-98.

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

167 Amnesty International.

168 Asian Legal Resource Centre.

169 Iran.

170 Iran.

171 Iran.

172 Chile, on behalf of the Latin American and Caribbean Group (GRULAC).

173 Forum Asia and Lawyers for a Democratic Society.

174 Iran.

175 Netherlands.

176 Franciscans International and the World Lutheran Federation, Libération.

177 Netherlands.

178 Arab Lawyers Union, International Organisation for the Elimination of All Forms of Racial Discrimination, Human Rights Watch.

179 Belgium made the point that civilians in Iraq and Afghanistan continued to be affected by violence, and that both country situations were characterised by the absence of the rule of law.

of opinion and expression, the role of good governance in the promotion and protection of human rights, the situation of human rights in the DPRK, defamation of religions, and racism. These all divided the Council along different lines. Notably, the resolution on good governance received broad support but Bolivia, China, Cuba, Nicaragua, the Russian Federation, and Sri Lanka abstained. The other resolutions are discussed above.

The high level of consensual decision-making does not in fact reflect the often very deep divisions in the Council. It is rather a demonstration of the declared wish of States to work on the basis of cooperation, dialogue, and consensus. Nevertheless, the consensuses achieved have often come at a high price in terms of human rights promotion and protection, as agreement was often only possible on the basis of the lowest common denominator. Reaching consensus should be required for decisions related to institutional issues, as has been the case over the past two years. Although these decisions often fell short of the expectations of human rights defenders, this kind of decision-making process is necessary to ensure the broadest possible support within the UN membership for the Council's institutions. However, the same principle does not always apply to decisions on substantive human rights concerns. The Council's members should give further consideration to when it may be in the best interest of human rights or for preserving their credibility to simply have a vote.

### LOOKING TO 2009

The short version of an assessment of the Council's work in 2008 is that the picture is still mixed. The Council was often divided along regional and communal lines and unable to overcome its divergences of opinion. The two High Commissioners who addressed the Council this year proposed part of the solution: the end of a 'pursuit of consensus and use of regional or communal positions' in the words of Ms Arbour and 'the need to engage all States in human rights agendas' in the words of Ms Pillay. 2009 and beyond must see a higher level of engagement from many States that have not made their voices heard this

year, either because of the power of the voices of the representatives that claim to speak for them, or because of an apparent lack of interest in the discussions. The Council must hear the voices of more States in the African Group than just Egypt and from more Latin American States in general. Particularly, member States of the Council must display more leadership in pushing the human rights agenda forward. Southern States enjoying credibility across the Council, such as India, Mexico, Brazil, and South Africa, will have an important role in transforming the polarised environment of the Council and they must pursue a more progressive agenda. While many EU States have begun to make their individual voices heard, many more still remain largely silent. Perhaps the practice of the UPR can also serve as an inspiration for States to move away from group positions. While consensus continues to be an important model for decision-making in multi-lateral affairs and in particular on institutional issues, it has significant limitations in relation to substantive human rights issues and upholding fundamental human rights principles. It should not be pursued at any price. Hopefully, 2009 will see increased efforts to bridge differences of opinion. And after all efforts have been made to agree, the Council's members may agree to disagree.

The Council often failed to strongly and timely respond to human rights violations, although it held three special sessions and extended a number of its country mandates, many of which are coming under increasing pressure. As noted, the work in this area was limited both in relation to the range of discussions and of actions. Tensions among States run particularly high in relation to independent human rights monitoring and reporting that may lead to criticism against individual countries. Since the Council's establishment there has been a clear trend toward elimination and weakening of country mandates in particular, and of independent mechanisms in general. That trend is unlikely to be reversed in 2009. All the more reason for members of the Council to start exploring additional opportunities and tools for scrutinising human rights violations, including through more strategic follow-up to the reports of all of its special procedures and of the High Commissioner, and the outcomes of the UPR.

Warnings of 'politicisation' and selectivity have been voiced by many States during the year in

relation to the Council's country-specific discussions and decisions. Criticising governments for being politically motivated in their interaction with other governments is regrettably not a new discovery; it is self-evident. The Council, made up of 47 member States, is the UN's primary *political* human rights body. The question is therefore not whether the Council is political but whether it should allow these considerations to overshadow human rights concerns. It is no revelation either that those States that most often use the language of 'politicisation' do so for ill-disguised political aims. The Council should avoid repeating the self-fulfilling prophecy of 'politicisation' that contributed to the Commission's downfall. The first step for the Council is to accept its limitations due to its inherently political nature, and reaffirm the importance and legitimacy of its expert mechanisms.

As we look to 2009, there are also new challenges and opportunities. The Durban Review Conference in April 2009, for which preparations are underway in the Council, will be an important event that is likely to affect the atmosphere in the Council both in March and subsequently. Should the Review Conference turn out to be a less than satisfactory process, as feared by some and expected by others, it will undoubtedly have a major impact on the Council and its reputation.

In May 2009, the General Assembly will elect 18 new members, potentially replacing almost 40% of the membership.<sup>180</sup> It will be a key opportunity to strengthen the Council. The 2008 elections showed that there is some hope that the Council's membership can be improved through the elections. Some States have been held to account by the General Assembly for their human rights record as members or candidates for the Council.<sup>181</sup>

The decision by the US in June 2008 to disengage from the Council may also be reviewed, and hopefully overturned by the new Obama Administration. Even if the US decides to re-engage it is unlikely that it will be in time for the next elections to the Council in May 2009. The US may therefore not become a member for the first time until 2010. Be this as it may, the US should start playing a more active role on the Council, either as a member or as an observer.

In 2011, the General Assembly will review the status, work, and functioning of the Human Rights Council since 2006. While it is likely that discussions on the matter will start to echo down the corridors of the Palais des Nations, no formal discussion in 2009 is planned at this stage. Yet many stakeholders will be speculating on how the General Assembly evaluates the Council's performance. Whether the Council will be influenced in its work by this upcoming five-year assessment is yet to be seen. We will certainly continue to keep a keen watch.

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The following States will end their first term in June 2009: Azerbaijan, Bangladesh, Cameroon, Canada, China, Cuba, Djibouti, Germany, Jordan, Malaysia, Mauritius, Mexico, Nigeria, Russian Federation, Saudi Arabia, Senegal, Switzerland, Uruguay. All of them are eligible for a second term, but may also be replaced by new members.

181

Sri Lanka, for instance, was an initial member of the Council, and even held the Vice-Presidency in the 2007-2008 cycle. It was not re-elected to the Council in May 2005, but its seat was taken by Bahrain.