

# COUNCIL MONITOR

International Service for Human Rights



Human Rights Monitor Series

## HUMAN RIGHTS COUNCIL, 6<sup>TH</sup> SESSION DAILY UPDATE, 12 DECEMBER 2007

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### Overview

The Human Rights Council (the Council) started the interactive dialogue on the report of the Special Rapporteur on Myanmar, Mr Sergio Paulo Pinheiro. The previous day, it had already heard Mr Pinheiro's presentation and the reaction of the Government of Myanmar.<sup>1</sup> The rather bitter tone of that reaction was not repeated during the interactive dialogue, as no State directly questioned the Special Rapporteur. It was, however, somewhat sobering to see how fast the political will for decisive action has disappeared, only two months after the special session on Burma/Myanmar. Many States that at the time had demanded decisive steps from the Government of Myanmar were less challenging this time or did not take the floor at all.

The afternoon meeting was dedicated to presentations by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr Rodolfo Stavenhagen, and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Mr Martin Scheinin, on their respective reports submitted to the Council for consideration. A great deal of the discussion relating to the presentation by Mr Stavenhagen was overshadowed by interventions from Asian States. Led by China, on behalf of the Asian Group, States objected to the Special Rapporteur's annexed report on the situation of the rights of indigenous peoples in Asia, claiming that they had not been consulted and that this was a clear contravention of the *Code of Conduct for special procedures*.

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<sup>1</sup> For a summary please see ISHR's *Daily Update* of 11 December 2007.

The presentation of findings from Mr Scheinin's country visits<sup>2</sup> also elicited strong responses from States, including a retort by the United States of America (USA) that a 'large part of the report (on the Rapporteurs visit to the USA) again repeats unfair and oversimplified criticisms of the United States'. South Africa, appearing to go back on earlier criticisms of the Rapporteur's visit, was more conciliatory in pointing out 'factual inaccuracies' that 'were not major' in a report that was otherwise 'insightful and sound'. The majority of debate in the interactive dialogue, however, focused on the impact of the separation barrier in the Occupied Palestinian Territories (OPT) as a means of countering terrorism. The potential role of the Rapporteur in commenting on draft legislation was also raised by a number of States.

Of the 40 States that wished to take part in the interactive dialogue, only 25 were able to take the floor within the allotted time. Subsequently, the Special Rapporteurs will respond to points raised during the dialogue at its conclusion on the morning of 13 December 2007.

Informal consultations on a number of draft resolutions were again held throughout the day. Portugal convened informal consultations on the two mandates regarding the Sudan – the Experts Group on Darfur and the Special Rapporteur on the situation of human rights in the Sudan. There were considerable disagreements on both procedure and substance between the European Union (EU) and at least parts of the African Group. This creates an interesting setting for the review, rationalisation and improvement of the mandate of the Special Rapporteur on the Sudan, scheduled for Thursday, 13 December 2007.

## Follow-up to the special session on Burma/Myanmar

The Council continued its follow-up to the resolution passed at the 5<sup>th</sup> special session on Burma/Myanmar on 2 October 2007.<sup>3</sup> On the previous day, Mr Sergio Paulo Pinheiro had delivered a presentation of his report following his visit to the country.<sup>4</sup> The Permanent Representative of the Union of Myanmar, Mr Maung Lwin, had responded to Mr Pinheiro's report, voicing strong disagreement and disappointment.<sup>5</sup> The Council continued consideration of the report as it engaged in an interactive dialogue with the Special Rapporteur. The discussion was held against the backdrop of a draft resolution on follow-up to Mr Pinheiro's report already tabled on Tuesday, 11 December 2007, but there was little focus on that initiative.<sup>6</sup>

## Interactive dialogue

A large number of States and observers, including NGOs, commented on the report. The report was generally welcomed. All States welcomed the report, and in contrast to the Permanent Representative of Myanmar on the previous day, no States questioned the foundations or the veracity of the information. On the contrary, Japan pointed out that the variety of sources of information used contributed to a more credible report.<sup>7</sup> Brazil welcomed that the report explores some of the underlying causes of the tragic events in Burma/Myanmar.

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<sup>2</sup> To South Africa, the United States of America (USA), Israel, and the Occupied Palestinian Territories (OPT).

<sup>3</sup> See ISHR's report on the special session, available on [www.ishr.ch](http://www.ishr.ch).

<sup>4</sup> A/HRC/6/14, available at <http://www2.ohchr.org/english/bodies/hrcouncil/6session/reports.htm>.

<sup>5</sup> See ISHR's *Daily Update* of 11 December 2007 for details.

<sup>6</sup> The text of the draft resolution is available on the OHCHR extranet. The OHCHR extranet can be accessed (fill out the form on the page to receive the user name and password) at [www.ohchr.org/english/bodies/hrcouncil/form.htm](http://www.ohchr.org/english/bodies/hrcouncil/form.htm).

<sup>7</sup> Amnesty International stressed that its own information confirmed that of the Special Rapporteur.

The interventions heard could largely be divided in two groups. Some States and NGOs welcomed the report, but were concerned about the situation, while other States highlighted mainly the cooperation by the Government of Myanmar.

- A number of States strongly condemned the ongoing human rights violations and were quite critical of the Government of Myanmar.<sup>8</sup> While recognising a limited degree of cooperation from the authorities, these States reiterated that the Government had made no effort to implement Council *Resolution S-5/1* adopted by consensus at the special session. They urged it to do so without delay. Many delegations asserted that severe violations of human rights continue to occur after the apparent calming of the situation, including arbitrary arrests and detention,<sup>9</sup> disappearances,<sup>10</sup> torture,<sup>11</sup> restrictions on freedom of assembly and expression<sup>12</sup> and on freedom of religion,<sup>13</sup> and forced labour.<sup>14</sup> Uruguay drew attention to areas of armed conflict between the Government and militias, deploring the recruitment of child soldiers by both sides.
- Noting that the Government had not properly implemented the recommendations of the special session, many delegations once again urged it to do so immediately. In particular, there was a call for the release of all political prisoners, including those detained before the violent crackdown,<sup>15</sup> that the Government grant unrestricted access to humanitarian workers,<sup>16</sup> that it should track down and prosecute individual perpetrators of human rights violations to end impunity,<sup>17</sup> and that it should create space for opposition parties.<sup>18</sup>
- Australia recalled the Special Rapporteur's conclusion that the recent crackdown is not an isolated incident, but the latest manifestation of a lasting and institutionalised denial of basic human rights. The USA stated that long-standing calls for reform from the international community had been met with 'empty gestures'. Both delegations were outraged that the Government had dismissed the recent protests as 'trivial'.
- Many speakers urged the Government of Myanmar to show more cooperation with the Council, the Special Rapporteur, the Secretary-General's Special Advisor on Myanmar, and the Office of the High Commissioner for Human Rights (OHCHR).<sup>19</sup> Most States agreed that the continued engagement of the international community was necessary to facilitate cooperation and dialogue. Belgium noted that dialogue is only meaningful if it leads to tangible action, and New Zealand stressed that the dialogue should also address the humanitarian and socio-economic situation underlying the violently repressed protests.

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<sup>8</sup> Portugal, on behalf of the European Union (EU), Switzerland, United Kingdom (UK), New Zealand, Liechtenstein, Australia, Canada, USA, Chile, Italy, Netherlands, France, Belgium, Sweden, Spain.

<sup>9</sup> UK, Liechtenstein, Amnesty International, Reporters without Borders, Human Rights Watch, International Commission of Jurists (ICJ).

<sup>10</sup> UK, Asian Legal Resource Centre.

<sup>11</sup> Liechtenstein.

<sup>12</sup> Reporters without Borders.

<sup>13</sup> Sweden.

<sup>14</sup> Uruguay.

<sup>15</sup> Portugal (on behalf of the EU), Canada, Italy, Netherlands, Philippines, UK, Norway, New Zealand, Liechtenstein, USA, Amnesty International.

<sup>16</sup> Italy, Netherlands, Switzerland, Norway, Liechtenstein, Federation internationale des ligues des droits de l'homme (FIDH).

<sup>17</sup> Spain, Panama, France, Liechtenstein, France, Liechtenstein, Amnesty International, Reporters without Borders.

<sup>18</sup> Philippines, Republic of Korea, Indonesia, New Zealand, USA, Sweden, Spain.

<sup>19</sup> Philippines, Switzerland, Bangladesh, New Zealand, Uruguay.

Besides the States clearly dissatisfied with the efforts of the Government of Myanmar, a number of States highlighted the cooperation the Government had extended to the Special Rapporteur and the Secretary-General's Special Advisor on Myanmar, Mr Ibrahim Gambari:<sup>20</sup>

- These States noted that the invitations extended to Mr Pinheiro and Mr Gambari indicated that Myanmar was on the right path towards democratisation and national reconciliation. Bangladesh and Vietnam claimed that the human rights situation had improved since the special session. The Philippines recalled that the consensual resolution at the special session was passed in a spirit of dialogue, that Mr Gambari had the opportunity to visit the country twice, and that the general developments since September were clear indicators of the willingness of the Government of Myanmar to engage with the international community.
- Indonesia welcomed the release of some political prisoners, and pointed to this as another indicator of progress and cooperation.
- A number of States referred to initial steps undertaken in the implementation of the 'roadmap to democracy', noting this as a sign of progress.<sup>21</sup> It was mentioned that dialogue with other communities and Daw Aung San Suu Kyi had begun<sup>22</sup> and that the international community must have more patience to allow for developments to take place.<sup>23</sup> Vietnam described the process as a long one, which should be supported rather than dictated by the international community.
- Some States voiced clear opposition to the idea of an international commission of inquiry as recommended by the Special Rapporteur in his report.<sup>24</sup> The Russian Federation was of the view that such a commission would risk duplicating the work of the Special Rapporteur and politicise the situation.
- Laos supported the statement made by the representative of the Government of Myanmar on the previous day, claiming that the entire situation is a matter of internal affairs.

Like during the special session, the regional context was also touched upon. China highlighted that 'political stability and social harmony' in Burma/Myanmar was of obvious interest for the Southeast Asian region. A number of States assured that the Association of Southeast Asian Nations (ASEAN) would engage with Myanmar, and work towards the transition to democracy.<sup>25</sup> Thailand recalled that the ASEAN heads of States had, at a recent ASEAN summit, reiterated their call on the Government of Myanmar to engage in meaningful political dialogue with political forces. A number of States attached importance to the recent signing of the *ASEAN Charter*, including by Myanmar.<sup>26</sup> FORUM-ASIA, in a joint statement, supported a strong role by ASEAN, but regretted that ASEAN was not firm enough with its 'recalcitrant member'.<sup>27</sup> Some non-Asian States highlighted the important contribution neighbouring countries and the region as a whole should play.<sup>28</sup>

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<sup>20</sup> China, Malaysia, Japan, Indonesia, Bangladesh, Russian Federation, Brazil, Uruguay, Nicaragua, Thailand, Laos, Panama.

<sup>21</sup> China, Malaysia, Laos.

<sup>22</sup> China, Malaysia, Cambodia.

<sup>23</sup> China, Philippines, Laos, Malaysia.

<sup>24</sup> Pakistan, Bangladesh, Russian Federation.

<sup>25</sup> Malaysia, Indonesia. Just prior to the special session, the Association of Southeast Asian Nations (ASEAN) had issued a notably strong statement, condemning the violent crackdown and urging the Government of Myanmar to refrain from further human rights violations.

<sup>26</sup> Republic of Korea, Thailand, Indonesia.

<sup>27</sup> Joint statement with International NGO Forum on Indonesian Development (INFID), Ain O Salish Kendra and Meditation Centre (ASK), Centre for Organization Research and Education (CORE), MINBYUN - Lawyers for a Democratic Society, Peace Boat & Non-Violence International.

<sup>28</sup> Portugal (on behalf of the EU), Nicaragua.

Despite the draft resolution tabled by Portugal (on behalf of the EU), most proposals for action by the Council remained relatively vague. Some States said the Council should ensure appropriate follow-up to the Special Rapporteur's report.<sup>29</sup> However, some more specific points were also made:

- Sweden called for continued attention to the situation by the Council, as anything less would harm its credibility. The USA called for the adoption of a 'strong resolution'.
- Others thought that the Council should 'acknowledge the positive steps' to give the process more momentum,<sup>30</sup> or cautioned against 'endangering the cooperation'.<sup>31</sup>
- A number of States supported the extension of the mandate of the Special Rapporteur, and Uruguay proposed that he should coordinate the follow-up to his report.<sup>32</sup>
- Many States and NGOs called for an international commission of inquiry or fact-finding mission to shed light on the Government's actions during the crackdown, which was also recommended by the Special Rapporteur in his report.<sup>33</sup> FORUM-ASIA, in a joint statement, suggested that this mission should include other relevant special procedures mandate holders.<sup>34</sup>
- The International Federation of Human Rights Leagues (FIDH) suggested that the Council call for 'effective sanctions to cut the regime's economic lifeline'.
- The International Work Group for Indigenous Affairs called for the inclusion of the military militia in the Security Council terrorism list.

In his replies, Mr Pinheiro recalled the statement made on the previous day by the representative of the Government of Myanmar, who had accused him of having submitted an inaccurate and biased report. According to the representative, the report was 'intrusive and filled with unfounded, sweeping generalisations'. In this light, Mr Pinheiro expressed his puzzlement over the interactive dialogue on his report. He suggested that the report must have some merit, given that 33 States and many NGOs had just accepted it as the basis of their discussion. He added that while he appreciated the opportunity to interact with the Government of Myanmar, clearly, it was time for the Government to make some concessions and acknowledge some of the facts in his report. He closed by encouraging the Government of Myanmar to prepare 'some concessions' before Special Advisor Gambari presents his report to the Security Council<sup>35</sup> – as this at least would allow Mr Gambari to present some positive developments.

Report of the Special Rapporteur on the  
situation of human rights and fundamental  
freedoms of indigenous people

### **Presentation by the Special Rapporteur**

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<sup>29</sup> UK, Sweden, Uruguay, Switzerland, Belgium, Chile.

<sup>30</sup> Thailand.

<sup>31</sup> Vietnam.

<sup>32</sup> Republic of Korea also asked for the extension of his mandate.

<sup>33</sup> Switzerland, Belgium, Chile, Amnesty International, FORUM-ASIA (joint statement), Asian Legal Resource Centre, International Commission of Jurists, Human Rights Watch. See recommendation xii of the report. The draft resolution tabled by the EU also asks for the implementation of recommendation xii.

<sup>34</sup> Switzerland also highlighted the contribution that thematic special procedures could make.

<sup>35</sup> Mr Gambari is expected to address the Security Council on 18 December 2007.

The Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr Rodolfo Stavenhagen presented his report to the Council.<sup>36</sup> This report covers the period from January 2007 to Mr Stavenhagen's recent visit to Bolivia. Mr Stavenhagen began his presentation by commending the recent adoption of the UN *Declaration on Rights of Indigenous Peoples* by the General Assembly. He believed that this provides a specific framework for the formulation, implementation, and evaluation of State policies.

Mr Stavenhagen's report focused on the respect for self-determination in the context of development. He listed a number of principles that States should take into account in relation to indigenous peoples in the formulation of development policies, including prior free and informed consent, participation and empowerment, autonomy, enhanced territorial control, and non-discrimination. He briefly referred to positive examples from a number of developing countries.<sup>37</sup> Mr Stavenhagen declared that the right of indigenous peoples to give prior and free consent is the indispensable threshold for any development activities that are directed towards indigenous peoples. He also saw the need for effective participation of indigenous communities in the identification of priorities, design, implementation, and evaluation of development activities. Finally, Mr Stavenhagen highlighted the need to pay particular attention to the situation of indigenous women, and the need to empower them to ensure their effective participation in the process of development.

Mr Stavenhagen also presented his general study on the situation of the rights of indigenous peoples in Asia. He noted that he had had only one opportunity to conduct a visit to the region during the time of his mandate. He stated that indigenous peoples of Asia share economic and social characteristics with indigenous peoples in other parts of the world, and that they were equally excluded from decision-making processes. He noted that in some cases, indigenous peoples are at risk of totally disappearing as peoples as a result of extensive agriculture and a staggering deforestation rate. Furthermore, mega-dam projects in India, China, and Laos continue to give rise to a 'human cost of incalculable scope'. According to Mr Stavenhagen, in certain cases forced displacement is part of deliberate policies, and indigenous communities have no alternative than to resort to violence.

Finally, Mr Stavenhagen commented that the adoption of the *Declaration on the Rights of Indigenous Peoples* confirms the oft-repeated notion that 'the rights of indigenous peoples are human rights'. He emphasised that now that the norm-setting had been completed there was the crucial phase of implementation of these norms. Mr Stavenhagen called upon the Council to continue to fulfil its responsibility towards protecting the rights of indigenous peoples through the new expert body on indigenous peoples.<sup>38</sup>

Mr Stavenhagen also reported on his visit to **Bolivia** from 25 November to 7 December 2007. He pointed out that an indigenous president was elected for the first time in 2005. President Morales implemented policies to promote deep-seated change in policies to ensure indigenous peoples' benefit and to rectify historical injustices.<sup>39</sup> He noted that the *Declaration on the Rights of Indigenous Peoples* has the status of internal law in Bolivia. Furthermore, the new constitution incorporates many visions related to indigenous peoples, and recognises the pluri-national nature of the State. Despite these positive developments, Mr Stavenhagen reported continuous racism and discrimination against indigenous peoples, especially indigenous women at both the national and sub-national levels. He also expressed his concern about the negative health and environmental effects of mining activities on indigenous lands. While major progress in recognition of the

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<sup>36</sup> A/HRC/6/15, available at <http://www2.ohchr.org/english/bodies/hrcouncil/6session/reports.htm>.

<sup>37</sup> Brazil, India, Chile, Bolivia, Ecuador, Mexico, Uganda.

<sup>38</sup> Bolivia has presented a draft resolution to establish an expert mechanism on the rights of indigenous peoples. The text can be found on the OHCHR extranet. The OHCHR extranet can be accessed (fill out the form on the page to receive the user name and password) at [www.ohchr.org/english/bodies/hrcouncil/form.htm](http://www.ohchr.org/english/bodies/hrcouncil/form.htm).

<sup>39</sup> These included the appointment of indigenous ministers, and the replacement of the Ministry of Indigenous Affairs and Aboriginal Peoples by a Presidential Ministry.

rights of indigenous peoples in national life had been made in Bolivia, attacks on indigenous leaders and human rights defenders were of concern and reflected the State's difficulties in constructing a pluralistic and democratic society.

### Interactive dialogue

**Bolivia** first spoke as a concerned country by thanking the Special Rapporteur for his visit at its request. The representative proceeded to speak at length about the situation in the country. She added that the plan for indigenous development is underway and that other developments, such as the Declaration, also favour this development. She stated that an imbalance still exists between developing and developed States, and that indigenous ideas should inform multilateral discussions on development. The representative thanked the Special Rapporteur for recognising the efforts that were being made as well as the challenges the country faced. However, she regretted with some surprise the existence of racist groups in the country, and was quick to emphasise that these play no part in the Government of Bolivia.

The ensuing interactive dialogue was dominated by States that objected to the Special Rapporteur's annexed report on the situation of the rights of indigenous peoples in Asia.<sup>40</sup> India was the first to state that the drafting of this report was not in accordance with the Council's *Code of Conduct for special procedures*, which requires that special procedures 'take into account in a comprehensive and timely manner, in particular information provided by the State concerned'.<sup>41</sup>

China, speaking on behalf of the Asian Group, complained that the report was drawn from NGO information and did not reflect the views of States. It recalled Article 6(b) of the code of conduct, and alleged that this report constituted a 'clear disregard for the code'. This position was later endorsed by Bangladesh, Malaysia, and Vietnam. China further stated that it failed to understand the need for such a report, as a large number of Asian countries' 'entire populations are indigenous'. Lastly, it claimed that a lack of balance was evident in the report given that the Special Rapporteur claimed not to be exhaustive yet had made 'sweeping recommendations'.<sup>42</sup>

India also challenged the Special Rapporteur's categorisation of certain groups in India as indigenous peoples. By wilfully quoting one part of the definition of indigenous peoples as provided in ILO *Convention No. 169*, while ignoring two other critical elements,<sup>43</sup> the representative concluded that 'we regard the entire population of India at Independence, and their successors, to be indigenous'. On misleading grounds they therefore reasoned that the Special Rapporteur's reference to *Adivasis* or tribal peoples as indigenous peoples was 'unacceptable'.

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<sup>40</sup> UN Doc A/HRC/6/15/Add.3, available at <http://www2.ohchr.org/english/bodies/hrcouncil/6session/reports.htm>

<sup>41</sup> Article 6(b) provides that special procedures must 'take into account in a comprehensive and timely manner, in particular information provided by the State concerned on situations relevant to their mandate', available at [http://www2.ohchr.org/english/bodies/chr/special/docs/CodeofConduct\\_EN.pdf](http://www2.ohchr.org/english/bodies/chr/special/docs/CodeofConduct_EN.pdf)

<sup>42</sup> This was re-iterated by Malaysia.

<sup>43</sup> In fact, India quoted only Article 1.1(b) of ILO *Convention No. 169* and not the entire definition, as completed by Articles 1.1(a) and 1(2). Article 1.1(b) states that the Convention applies to 'Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions'. India claimed that 'this is the definition used in the Convention and their position 'is consistent with this definition'. However, Article 1.1(a) provides that the Convention applies to 'Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations'. Article 1.2 further provides that 'Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply'. This full incorporation of the definition contradicts India's selective interpretation.

Mexico, in contrast, congratulated Mr Stavenhagen on his 'great professional attitude' and asserted that the greatest compliment it could give was its intention to implement all of his recommendations in relation to his visit to La Parota alongside the Special Rapporteur on housing, Mr Miloon Kothari.

Other thematic areas of discussion raised during the interactive dialogue included:

- Portugal (on behalf of the EU) drew attention to the importance of the adoption of the *Declaration on the Rights of Indigenous Peoples* by the General Assembly in 2007 (also mentioned by the Russian Federation, Nicaragua, and Norway) and questioned how States may ensure that it has an impact on development policy.
- Norway queried whether there was any follow-up on the Special Rapporteur's recognition of the importance of UN country teams in prioritising matters relating to the rights of indigenous peoples, and asked how the OHCHR might assist in this regard.
- Cuba drew attention to paragraph 60 of the Special Rapporteur's report and claimed that the structural causes have not been tackled in explaining why indigenous communities suffer from the lowest levels of social and economic development. The Russian Federation also sought clarification on the type of indicators envisaged to measure the treatment of indigenous peoples.
- Indonesia challenged the factual accuracy of the Special Rapporteur's analysis of the situation in Aceh, informing the Council that the people there are afforded autonomy under the 2006 Peace Agreement.
- Canada requested that the Special Rapporteur consider giving increased focus to urban indigenous issues.
- Norway sought elaboration on the concept of free, prior, and informed consent and in particular its relevance in relation to 'multilateral development actors'.

Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

### **Presentation by the Special Rapporteur**

Mr Scheinin began his presentation by recognising that the Council had needed to devote its time to institution building but now hoped that it was in a position to act upon reports before it. He stated that co-operation with his mandate appeared to have improved and was optimistic for the future, thanking South Africa, the USA, Israel and the OPT for facilitating visits, and alerting the Council that he would travel to Spain on 7 to 14 May 2008.<sup>44</sup> He noted that visit requests were outstanding to Algeria, Egypt, Malaysia, Pakistan, and Tunisia.

The Special Rapporteur briefly informed the Council that his thematic report addressed the dual negative impact that counter-terrorism measures can have on economic, social and cultural rights and the role of promoting economic, social and cultural rights in preventing terrorism, before turning his attention to his country visits.

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<sup>44</sup> The Special Rapporteur also mentioned that a visit to the Philippines was planned for January 2008, 'to provide through my report input to the forthcoming universal periodic review of the Council', but the Government was unable to confirm dates.

In the case of **South Africa**, he stated that the authorities perceived the terrorist threat as coming primarily from foreigners, and that foreigners may be detained for security-related reasons without trial or effective court review. He identified both elements of best practice – including the absence of racial profiling, use of preventive detention or special courts – and areas of concern, including new legislation which contains an extremely broad list of crimes deemed to be terrorist acts. Finally, in response to news that South Africa had expressed certain critical remarks about his country visit, Mr Scheinin informed the Council that his visit had been undertaken in a spirit of frank and constructive dialogue, but at the same time he was ‘shocked, and expressed my astonishment, at views expressed by some high-level Government representatives which in my assessment were incompatible with the *non-refoulement* obligations of South Africa’.

Turning to **the USA**, the Special Rapporteur identified the country as a world leader, which as such bore a ‘special responsibility’ in the protection of human rights while countering terrorism. He expressed ‘grave concern’ at the situation of detainees held at Guantánamo Bay and the lack of judicial guarantees and fair trial procedures afforded to individuals suspected of terrorist activity.<sup>45</sup> He orally updated his report, following the invitation by the USA to observe a Military Commission at Guantánamo Bay from 3-7 December 2007, by stating that the hearings illustrated ‘the practical difficulties in providing fair trials at a distant military base and confirmed the difficulties or even impossibility of the defence to provide evidence.’ He also referred to proposals in the USA to introduce new legislation on preventive or administrative detention, which he determined would ‘unavoidably amount to arbitrary detention’.

On his visit to **Israel and the OPT**,<sup>46</sup> Mr Scheinin identified serious situations of incompatibility between the State’s human rights obligations and its counter-terrorism practice, including the prohibition of torture, the right to life, and the right to fair trial. He concluded that, building on the Advisory Opinion of the International Court of Justice, Israel should withdraw all settlements and replace the still unfinished barrier with a security structure along the Green Line or a line ‘otherwise accepted by the Palestinians’.

The Rapporteur finally turned to the content of his thematic paper and stated that, ‘while there is no scientific evidence of a causal connection between economic and social grievances’, patterns of correlation can be demonstrated to suggest these factors can be a breeding ground for terrorism. Accordingly, he recommended, among others, that ‘development cooperation should be fostered keeping in mind the importance of the promotion of economic, social and cultural rights in preventing terrorism’, and that this should be addressed by the Counter-Terrorism Committee of the Security Council.

### Interactive dialogue

The Ambassador of **South Africa**, speaking as a concerned country, began by welcoming the report of the Special Rapporteur and stated that South Africa had been grateful for the opportunity to interact with the Special Rapporteur and to learn from his extensive experience. However, a few factual inaccuracies were observed that the Ambassador sought to clarify, such as the fact that South Africa *did* have an independent monitoring agency carrying out visits to police stations, contrary to what was stated in the report. These were considered to be ‘not major’ difficulties, which contrasts with South Africa’s previous expressions in relation to Mr Scheinin’s visit.

South Africa was very pleased to note that the Special Rapporteur commended the full and non-monitored access during his visit to immigration detention facilities at Johannesburg Airport. The Ambassador added that it was not always possible to meet an *ad hoc* request on demand, referring to the Special Rapporteur’s regret that he did not have access to some police detention facilities. She ensured, however, that the Government would stand ready to accommodate reasonable requests in a follow-up visit. In closing, the

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<sup>45</sup> UN Doc A/HRC/6/17/Add.3, available at <http://www2.ohchr.org/english/bodies/hrcouncil/6session/reports.htm>

<sup>46</sup> UN Doc A/HRC/6/17/Add.4, available at <http://www2.ohchr.org/english/bodies/hrcouncil/6session/reports.htm>

Ambassador reiterated that the Government would continue to work on an appropriate balance between implementing counter-terrorism measures whilst promoting and protecting human rights.

The **USA**, speaking as a concerned country, appreciated the opportunity to respond to Mr Schenin's visit to the USA, but did not thank the Special Rapporteur for his report. It stated that the logistical challenges observed by Mr Scheinin at the Military Commission in Guantánamo were 'challenges that we believe could occur in any domestic criminal system in any country', and expressed its disappointment that he declined an offer to tour the facilities on the same terms as a number of international observers.<sup>47</sup> The US delegate otherwise discarded the Special Rapporteur's comments on the 2006 *Military Commissions Act* and the legitimacy of such commissions as 'revisiting well-worn, ill-conceived criticisms'.

Whilst listing a number of positive aspects in the report, including 'the United States leadership in the international fight against terrorism', and concrete examples of best practice, the USA otherwise expressed that it was 'extremely disappointed' with the report as it 'simply catalogues well-known criticisms' and 'fails even to acknowledge that there are multiple ways of approaching the difficult issues discussed'. It categorised the Special Rapporteur's comments on the rights of detainees at Guantánamo as a duplication of the work of the other five special procedures who had reported on Guantánamo, 'the very duplication of work that the mandate was supposed to avoid'.<sup>48</sup>

The Ambassador of **Israel**, speaking as a concerned country, began by condemning the recent terrorist attacks in Algeria. He stated that Israel was facing a similarly constant threat of terrorism, which was why it was compelled to remain under a state of emergency. When considering Israel's conduct he claimed that the acute dilemmas the country faced must be taken into account. He proceeded to challenge certain conclusions made by the Special Rapporteur, including that the 'security fence' had a negative impact on the Palestinian 'fabric of life'. He emphasised that the reason why the fence was not necessarily following the Green Line was because it was first and foremost a security fence and not a political one, adding that when the security threat to Israel was removed, the barrier could be dismantled. Israel also disagreed with the Special Rapporteur that the definition of terrorism was overly broad. The Ambassador also stated that Israel was aware of the humanitarian situation of Palestinians in Gaza, and were open to suggestions as to how improve the circumstances for these people. He added however, that the humanitarian situation of the Israelis, who were facing numerous Kassam rocket attacks, should not be ignored either. Finally, the Ambassador informed the Council that Israel was presently drafting new counter-terrorism legislation and invited comment on the new Bill from the Special Rapporteur.

The representative of **Palestine**, speaking as a concerned country, thanked the Special Rapporteur for his report, which had asked Israel to abide by international law in its practices toward the Palestinian people in the OPT. He expressed his disappointment at the fact that Israel had decided to extend its settlement on Palestinian territory, hereby deflating the optimism generated by the Annapolis Conference, and alleged that Israel was resorting to 'all the tricks in the lexicon of foreign occupiers' to prevent the establishment of a sovereign State. The statement ended with a poem addressing Israel as 'Mr Jailman'.

Following the statements by concerned countries, the floor was opened first to States to engage in the interactive dialogue with the Special Rapporteur. Portugal (on behalf of the EU) referred to the mandate as among the 'major special procedures of the Council' on account of the Special Rapporteur's work with the Counter-Terrorism Committee of the Security Council and the UN Office on Drugs and Crime, among other bodies. Mexico saluted Mr Scheinin's 'professionalism and rectitude' in discharging his mandate. Issues raised during the dialogue included:

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<sup>47</sup> This referred to 'representatives from the Parliaments of two members of this Council as well as the Parliamentary Assembly of the OSCE'.

<sup>48</sup> E/CN.4/2006/120, 15 February 2006.

- Pakistan, on behalf of the Organization of the Islamic Conference (OIC), Algeria, Cuba, Egypt, Iran and Venezuela condemned the existence of **the Israeli separation barrier** and demanded that Israel dismantle it.<sup>49</sup> In exercising its right of reply Israel noted that Egypt, Algeria, and Pakistan had yet to reply to requests from the Special Rapporteur to visit their countries, and stated that he would be happy to comment on recommendations of the Rapporteur directed towards them at that juncture.
- Cuba was the only State to address the conclusions of the Rapporteur on his visit to the USA, and claimed that various elements of his report bear out many criticisms already levelled at the USA, including the serious **incompatibility between US practice and international law**. They pointed to the 2006 *Military Commission Act* as a recent example. Cuba expressed its disappointment that Mr Scheinin could not visit detainees at Guantánamo on agreeable terms and urged the Special Rapporteur to work together with the five Rapporteurs who had published a report in 2006 on the situation of detainees in Guantánamo. The representative asked them to provide a full follow-up report on these issues.<sup>50</sup>
- Several member States shared the Special Rapporteur's concern regarding the impact that counter-terrorism measures have on **economical, cultural and social rights**.<sup>51</sup> The majority of States agreed that promotion and protection of economic, social and cultural rights were also an important step when trying to prevent terrorism. In this context the representative of Portugal on behalf of the (EU) asked for additional information on the link between extreme poverty and examples of terrorism, and asked whether the Special Rapporteur had communicated with the Committee on Economic, Social and Cultural Rights or other relevant special procedures in considering how to address this issue.
- The Special Rapporteur also mentioned in his report that counter-terrorism measures had a negative impact on charity work. The representative of Sri Lanka stated that even though he supported funding to **charity work**, there was a zero tolerance policy in his country when this charity work was a cover for funding weapons to the Tamil Tigers or other terrorist groups.<sup>52</sup> He drew close attention to Mr Schenin's reference to the Tamil Rehabilitation Organisation in paragraph 45 of his report, and stated that his reference to this organisation was dated. In fact, this organisation is now listed as having funded terrorist activities.
- Some of the States also expressed concern that terrorism in some countries was equated with Islam, resulting in **Islamophobia** and discrimination. Pakistan (on behalf of the OIC) urged that strong political measures should be taken to deal with this trend.<sup>53</sup> The representative of China added that terrorism should not be linked to a certain race or religion, and urged States not to apply double standards by recognising terrorist attacks of some countries but not others.
- Israel and Egypt called upon the Special Rapporteur to assist them to implement **national legislation** on counter-terrorism that would incorporate international best practice. Portugal (on behalf of the EU) expressed interest in the role of the Special Rapporteur in relation to Israel's pending legislation, and asked Mr Scheinin if he could identify any other international body that might be able to assume such a role in the future.
- Norway requested further information on the manner in which the **listing of proscribed terrorist groups**, as required by relevant Security Council resolutions, might be undertaken.
- China 'categorically rejected unfounded allegations of human rights violations in the country' as presented in Mr Schenin's report.

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<sup>49</sup> Pakistan on (behalf of the OIC), Algeria, Cuba, Egypt, Iran, Venezuela

<sup>50</sup> E/CN.4/2006/120, 15 February 2006

<sup>51</sup> South Africa, Portugal (on behalf of the EU), Pakistan (on behalf of the OIC), Egypt, Korea, Sri Lanka, Norway

<sup>52</sup> Supported by the Russian Federation.

<sup>53</sup> Supported by Brazil, Algeria, Russian federation

## Informal consultations

### **Draft resolutions on the Special Rapporteur on the Sudan and the Experts Group on Darfur**

Portugal convened an open-ended informal consultation during the lunch break to receive comments on its draft resolutions on the mandate of the Special Rapporteur on the Sudan and the Experts Group on Darfur.<sup>54</sup> It informed that it had held frank and open discussions with the African Group over the past weeks. These discussions had not lead to an agreement on the extension of the mandate of the Special Rapporteur, although an agreement had been close on transferring the mandate of the Experts Group to the Special Rapporteur. As agreement had not been reached on the way forward, the EU had decided to table both its draft resolutions and hold open and transparent consultations.

Portugal explained that its draft resolutions suggested extending the mandate of the Special Rapporteur for one year and that of the Experts Group for six months. It also stated that it hoped that a consensual outcome could be attained.

Several States presented general comments on the drafts and in particular on the process adopted by the EU for their presentation. Egypt (on behalf of the African Union) and Algeria expressed concern, disappointment, and surprise about the tabling of the resolutions. Egypt (on behalf of the African Union) emphasised the need to build on a collaborative approach and ensure that there would be no duplication of mechanisms. It mentioned that it had tabled formal amendments to both drafts. Trying to meet concerns about duplication, and an unnecessary prolongation of the mandate of the Experts Group voiced by some delegations, Uganda then suggested that transferring the functions of the Experts Group to the Special Rapporteur could be a way forward.<sup>55</sup> Norway seemed to agree in principle to this suggestion, but cautioned that the Special Rapporteur should not be overburdened by such an extension of her responsibilities.

The discussion turned to specific comments on the text of the draft resolution on the Experts Group. Egypt argued that the resolution on the Experts Group in paragraph 3 did not sufficiently acknowledge the efforts made by the Government of the Sudan to implement the recommendations and improve the situation. In response Portugal referred to the report of the Experts Group that had concluded that many recommendations had not been implemented and that the situation on the ground had not improved. Egypt also argued that insufficient support had been received from the international community. In response to these allegations, several States shared information about the aid and support they were providing to the Sudan.

There was heated discussion in relation to the paragraph on impunity and the lack of cooperation with the International Criminal Court (operative paragraph 4). Egypt and the Russian Federation argued that the Council should not urge the Government to cooperate with the Court. Egypt said that the Sudan already had its own judicial system addressing the serious human rights violations, and the Russian Federation argued that a reference to the Court was beyond the mandate of the Council. Egypt also claimed that the Sudan was already cooperating with the Court, since the Chief prosecutor of the Court had visited Khartoum.

In commenting on the draft resolution on the mandate of the Special Rapporteur on the Sudan, Egypt informed that its amendments to the draft would delete several paragraphs of the text, in particular preambular paragraphs 5, 8 and 9 and operative paragraph 1, which provided for the extension of the mandate for one year. By an additional amendment, Egypt would replace operative paragraph 1 by a paragraph deferring the

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<sup>54</sup> The text of the draft resolutions are available on the OHCHR extranet. The OHCHR extranet can be accessed (fill out the form on the page to receive the user name and password) at [www.ohchr.org/english/bodies/hrcouncil/form.htm](http://www.ohchr.org/english/bodies/hrcouncil/form.htm).

<sup>55</sup> These functions are currently specified in operative paragraph 8 of the EU draft resolution on the Experts Group.

decision on the future of the mandate until the 8<sup>th</sup> session of the Council in June 2008. As pointed out by some delegations, this seemed a rather puzzling move, after the long debate about who should table a resolution on the mandate.

### Other issues

The Russian Federation regretted that neither the report of the Experts Group on Darfur nor the report by the Special Rapporteur on the situation of human rights in Myanmar had been translated into Russian, which in its view was a violation of the methods of work used in the Council. The report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people was only available in English, French, and Spanish, and the English version was only published in the morning before the consideration of the report.

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The Council Monitor forms part of the Human Rights Monitor Series produced by ISHR. It provides you with information about all the key developments at the Human Rights Council, including Daily Updates during the session of the Council, an Overview of the session, briefings and updates on the major issues of concern in the transition from the Commission on Human Rights to the Council and other key reports. It is currently an online publication that can be found at [www.ishr.ch/hrm/council](http://www.ishr.ch/hrm/council)

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