

# DETERMINED EFFORTS TO UNDERMINE SPECIAL PROCEDURES AND TREATY BODIES MAKE FOR AN UNEXPECTEDLY CONTROVERSIAL YEAR

## INTRODUCTION

In comparison to recent years, the main session of the General Assembly in 2009, its 64th session, was relatively dull in terms of its human rights outcomes. In the absence of any new initiatives, and with the ‘death penalty resolution’ now occurring every other year, it was more a case of Western States, together with a handful of Latin American States,<sup>1</sup> endeavouring to hold the line against moves by the African Group, the Organisation of the Islamic Conference (OIC), the Non-Aligned Movement (NAM) or the Arab Group to weaken hard-won human rights protections and standards in resolutions. The one wild card during the session proved to be the report of the Special Rapporteur on counter-terrorism. Given the report’s consideration (inter alia) of the impacts of counter-terrorism measures on the human rights of lesbian, gay, bisexual, transgender and intersex persons (LGBTI), many delegations anticipated the heated interactive dialogue and the complications it would create for the associated resolution. However, few foresaw the extent to which it would percolate through the work of the Third Committee, nor its future potential to negatively impact on States’ enthusiasm for ‘gender mainstreaming’ across the UN system.

The session was also marked by confrontational exchanges between member States in the Third Committee and some special procedures, more reminiscent of the heated exchanges that are commonplace at the Human Rights Council. Those experts who were perceived to have ‘singled out’ individual States for alleged human rights abuses, or ventured into controversial areas of international human rights law were particularly targeted. China, along with members of the African Group, used these opportunities to demand that independent experts strictly adhere to the Code of Conduct for special procedures mandate holders (the Code of Conduct). As a result, some delegations sought to incorporate references to the Code of Conduct into several resolutions, but only succeeded in the case of counter-terrorism.

Treaty bodies were not spared from harsh words either, particularly where States perceived them to have drawn on ‘unverified sources’ to frame their concluding observations. However, more concerning was the decision of the General Assembly to refuse to acknowledge the adoption of three general comments from the two treaty bodies overseeing the international human rights covenants. This caused the procedural resolution on the international covenants to be put to a vote for the first time in its 40-plus year his-

<sup>1</sup> Key here were Argentina, Chile, Mexico, and Uruguay. It was widely noticed that Brazil abstained on most of the controversial resolutions, including: defamation of religions, all country resolutions, and amendments to the international covenants resolution. It was speculated that this was prompted by its ambitions for a non-permanent seat on the UN Security Council.

tory. Treaty body experts may interpret this outcome as a vote of no confidence in their expertise and an encroachment on their independence by the General Assembly.

One of the welcome surprises this year was the adoption by consensus of the resolutions on the rights of the child and the right to food, for the very first time in both cases, as a result of the United States (US) Government's new commitment to positive re-engagement on human rights matters. The US' constructive approach to negotiations on a range of resolutions was welcomed by many States, and some suggested this might help re-engage other key players, including the Russian Federation and China. Good news also prevailed in relation to the three country resolutions,<sup>2</sup> which were adopted by slightly larger margins than last year, and in a departure from previous years, there was no attempt to shut down discussions using 'no-action' motions. This year also saw a welcome return to the adoption of the Human Rights Council report by consensus, and a very late decision by the General Assembly to upgrade the post of Director of the New York Office of the High Commissioner for Human Rights (OHCHR) to the level of Assistant Secretary-General.

Nonetheless, these positive developments were overshadowed by the persistence of negative trends, such as the adoption of a resolution on 'defamation of religions' for the fifth consecutive year, and the return to polarised positions along North-South lines in relation to the 'right to development', 'cultural diversity' and follow-up to the Durban World Conference against racism. Member States remained split on critical questions, such as the division of labour between the Council, the Third Committee, and the General Assembly, and seemed relieved to be able to defer these matters to the review of the Council that will occur in 2011. Although many States mentioned the review and their interest in participating in it, it was clear that they are only at the very formative stages in their thinking on the matter.

Scheinin.<sup>3</sup> He prefaced his introductory remarks to the Committee with the profound understatement that the report 'exceeds many expectations by taking the issue of gender beyond merely focusing on [the] human rights of women' to also address 'how sexual minorities ...face particular hardship due to either insensitive or maliciously targeted counter-terrorism measures'. Although he was at pains to point out that the bulk of the report and its recommendations dealt with women's and to a lesser extent, men's human rights, the contentious nature of sexual orientation and gender identity at the General Assembly<sup>4</sup> meant this aspect of the report completely dominated its reception at the Third Committee.

The backlash against the report and the Special Rapporteur's interpretation of his mandate was led by Tanzania (on behalf of the African Group). However, it was obvious on the floor of the Third Committee that all interventions and strategic decisions on the matter were coordinated by Egypt. The African Group, along with Malaysia (on behalf of the OIC), Sudan (on behalf of the Arab Group), India, and St Lucia accused the Special Rapporteur of multiple breaches of the Code of Conduct. These included overstepping his mandate, reinterpreting the internationally agreed definition of gender, failing to use information from 'relevant credible sources', and incorporating personal political opinion in his work.<sup>5</sup>

In response, the Special Rapporteur defended his interpretation of his mandate and explained the methodology underpinning it. He reiterated his view that gender was not a static concept, and protecting the rights of LGBTI individuals did not take away from the rights of women. He could not agree that any breach of the Code of Conduct had occurred. Rather he defended the *Yogyakarta Principles*<sup>6</sup> as a 'fully legitimate' source of expert opinion and reminded delegates that sexual orientation and gender identity had been discussed on a number of occasions at the Human Rights Council, by the treaty bodies, and various other UN entities.

A number of Western and Latin American States came to the defence of the Special Rapporteur and his report<sup>7</sup> or at least spoke up for his right as an independent expert to interpret his mandate as he saw fit.<sup>8</sup> Several of them pointed out that the ability of special procedures to speak

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The Democratic Republic of Korea (DPRK), Iran, Myanmar.

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A/64/211.

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December 2008 marked the first occasion that the General Assembly formally and substantively addressed human rights violations based on sexual orientation and gender identity. A joint statement co-sponsored by 66 States was delivered by Argentina affirming that the principle of non-discrimination applied equally to every human being regardless of their sexual orientation and gender identity. Syria, on behalf of 57 States, delivered a counter-statement questioning the 'so-called notions of sexual orientation and gender identity' and expressing serious concern at the attempt to introduce these 'ominous' terms into the UN.

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These two latter alleged breaches of the Code were prompted by references in the report to the *Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity*, which St Lucia dismissed on the basis that they were not evidence-based standards and lacked any endorsement at the inter-governmental level. The Principles are available at [www.yogyakartaprinciples.org](http://www.yogyakartaprinciples.org).

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See footnote 5 above.

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Australia, Canada, Chile, Finland, the Netherlands, Norway, Switzerland, Uruguay, the UK, the US.

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Argentina, Mexico, Sweden (on behalf of the EU).

## CIVIL AND POLITICAL RIGHTS

The most controversial item on this year's Third Committee agenda was the report of the **Special Rapporteur on counter-terrorism**, Mr Martin

freely and to work on sensitive and complex human rights issues was the very reason such positions were created by the Council. This ensured that overall, there was a balance of positive and negative reactions to the report, and the tone remained civil, if somewhat strained. Another critical factor that helped to prevent the dialogue from descending into an outright attack on the Special Rapporteur was the decision at the Ambassadorial level within the African Group that delegates from the region would not discuss the content of the report in the Third Committee. This decision was most likely prompted by the fact that there is a very wide range of views on sexual orientation and gender identity within the African Group, and in order to maintain an outward appearance of unity, it was probably deemed prudent to avoid a substantive discussion.

Although Uruguay regretted the ‘missed opportunity’ to discuss discrimination on the basis of sexual orientation and gender identity, other States were relieved. A number of States (including some that had publicly advocated for the rights of LGBTI persons and been strong defenders of the independence of special procedures) held reservations about the Special Rapporteur’s decision to broadly interpret his mandate on gender, and did not want to divert attention away from the very serious forms of discrimination experienced by women in the context of counter-terrorism responses. Others had concerns that States’ polarised positions on sexual orientation and gender identity would have rendered a constructive debate on the subject impossible and could have led some supportive States to reconsider their position on the issue.

The mandates of several other special procedures also require them to incorporate a gender perspective in their work, and it remains to be seen whether they will take a similarly broad interpretation to this task as Mr Scheinin. It is also unclear whether Mr Scheinin’s approach will cause some States to interpret any references to ‘gender’ in other UN fora as code for ‘sexual orientation and gender identity’, thereby adversely impacting the goal of gender mainstreaming across the UN. This concern was given some credence by remarks Egypt made at a high-level side event on sexual orientation and gender identity on international human rights day.<sup>9</sup>

While the Special Rapporteur might have ‘got off lightly’ in the interactive dialogue, the annual **counter-terrorism resolution** did not fair so well.<sup>10</sup> Traditionally brought by Mexico and adopted by consensus, the resolution has always referred to the current report of the Special Rapporteur and generally incorporated some of its key recommendations. However this year, the adverse reaction to the report signaled the need for a strategy of harm minimisation.

In the many negotiations that were held, Mexico made no attempt to incorporate language associated with the controversial views in the Special Rapporteur’s report. Rather, it went out of its way to try to accommodate the divergent views of all delegations in an effort to retain consensus. Ultimately the African Group rejected these overtures, including the suggestion to just ‘take note’ of the Special Rapporteur’s report,<sup>11</sup> which Mexico termed ‘the most neutral language possible’. Instead, Zambia (on behalf of the African Group) introduced oral amendments in the Third Committee to remove any reference to the Special Rapporteur’s current report, and only ‘take note of’ his ‘previous work’. Further, a reference to the Code of Conduct was proposed, along with a second oral amendment to direct the Special Rapporteur to only make recommendations ‘within the context of his mandate’.<sup>12</sup> Zambia explained that these amendments were essential given the ‘serious violations’ of the Code of Conduct, which, if left unchecked, would ‘undermine the credibility of the whole special procedures system’.

At the request of Mexico, the two African Group oral amendments went to a vote, and were adopted.<sup>13</sup> Although some delegations expressed concern that the amendments set a poor precedent for dealing with controversial expert reports in the future<sup>14</sup> or sought to clarify that their support for the resolution did not imply any encroachment on the independence of the special procedures,<sup>15</sup> the UK was the only delegation to withdraw its co-sponsorship of the resolution in protest. Regardless of their objections to particular amendments, almost all delegations<sup>16</sup> subsequently voted to adopt the resolution, agreeing that the fight against terrorism was ‘too important’ to vote ‘no’. In the General Assembly the resolution was adopted by consensus.<sup>17</sup>

9 Egypt reiterated its opposition to all forms of discrimination, but expressed concern that the ‘controversial’ and ‘disturbing’ notions of sexual orientation and gender identity were being introduced at the UN, and suggested that the Scheinin report had created confusion amongst States as to what they mean when they use the term ‘gender’. Egypt warned that this in turn could have negative implications for the level of support some States (itself included) may have towards the new UN gender entity, which was agreed to by the General Assembly in September 2009 after several years of debate.

10 A/C.3/64/L.43/Rev.1. All Third Committee resolutions are available at [www.un.org/ga/third/64/propolist.shtml](http://www.un.org/ga/third/64/propolist.shtml).

11 OP 12 of A/C.3/64/L.43/Rev.1. The last two General Assembly counter-terrorism resolutions (A/63/185 and A/62/159) have taken note ‘with appreciation’ of the Special Rapporteur’s report, and ‘taken note’ of its recommendations and conclusions.

12 Oral amendment to OP19 of A/C.3/64/L.43/Rev.1.

13 The vote on OP12 was 77 in favour, 73 against, and 23 abstentions. The vote on OP19 was 81 in favour, 73 against, and 20 abstentions. The Solomon Islands did not vote on OP12, but voted in favour of the amendment to OP19. Congo, Fiji, and Singapore abstained on the vote on OP12, but voted in favour of the vote on OP19. Brazil, India, Indonesia, Nepal, and Thailand abstained on both votes.

14 Mexico, New Zealand, Venezuela.

15 The EU.

16 The vote on the resolution as a whole was 181 in favour, none against, and one abstention (St. Kitts and Nevis).

17 A/RES/64/168.

18  
A/C.3/64/L.22.

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General Comment 20 on 'Non-discrimination in economic, social and cultural rights (Art.2, Para.2)', Para.32.

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Zambia objected to the 'vague' wording of General Comment No.33 from the Human Rights Committee on the reporting obligations of State parties under the optional protocol (OP9). General Comment No. 19 from CESCR, the right to social security, was mentioned in the same paragraph as General Comment No.20 (OP10).

Zambia objected to the General Assembly 'taking note' of these two general comments because they were yet to be submitted to ECOSOC and had not been included in CESCR's most recent annual report. In relation to General Comment No.20, it further objected to the treaty body commenting on 'controversial' views regarding sexual orientation and gender identity. Finland argued that Zambia had failed to present any valid procedural or substantive reasons for deleting the neutral references to all three general comments.

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The latter part of OP6, which was deleted, read: '...and welcomes the reports submitted by the Special Rapporteur' on counter-terrorism.

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The vote to delete OP9 (General Comment No.33) was 70 in favour, 69 against, and 25 abstentions.

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The vote to delete OP10 was 71 in favour, 72, and 23 against. After either not voting, or abstaining from the vote on OP9, the following States voted in favour of deleting OP10: Bahrain, Bangladesh, Jamaica, St Lucia, Timor-Leste.

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A/RES/64/152. The vote to delete OP10 was adopted by 76 in favour, 72 against, and 26 abstentions. The resolution as a whole was adopted unanimously by the 185 States present.

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Finland, Canada, Chile, Mexico, New Zealand, Switzerland, the UK.

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This comprehensive approach to the examination of the theme of torture was brought about by provisions in the 2009 General Assembly Resolution on torture (A/RES/63/166), for which Denmark was the main sponsor.

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A/64/44, Annex VII, Second Annual Report of the Sub-Committee, Paras 1-5 and 62-76. The Sub-Committee warned (Para.76 of Annex VII) that a 'stark choice' has to be made: 'Either lip service is paid to the idea of a system of visits by preventive bodies or a major injection of funds is required. Prevention of torture and other cruel, inhuman or degrading treatment or punishment is not cost neutral'.

Also part of the collateral damage of the Scheinin report was the procedural **resolution on the international covenants**,<sup>18</sup> which went to a vote for the first time in over 40 years. Finland has traditionally brought this biennial resolution to raise awareness about key developments in relation to the Covenants, such as the adoption of new optional protocols and general comments. Since 2003, in the wake of September 11, the resolution has also included a standard acknowledgement of the work of the Special Rapporteur on counter-terrorism, which Finland quickly realised would be untenable this year.

The passage of the resolution was further complicated by the fact that it sought to 'take note' of General Comment No.20, which had been adopted by consensus by the Committee on Economic, Social and Cultural Rights (CESCR) in May 2009. This General Comment deals with State party obligations in relation to non-discrimination, and amongst other things, provides that State parties should ensure that neither a person's sexual orientation nor their gender identity can be used as a barrier to their enjoyment of Covenant rights.<sup>19</sup> Given the African Group's reaction to the Scheinin report, it was not surprising that it also took strong exception to even the most neutral reference to this general comment in the international covenants resolution. However, it was less apparent why Zambia (on behalf of the African Group) also sought to delete the reference to the adoption of two other general comments in the draft text that dealt with State party reporting obligations under the optional protocol (No.33) and social security (No.19).<sup>20</sup>

In a strange turn of events at the Third Committee, the African Group achieved only partial success with its amendments. In the interest of consensus, Finland withdrew the latter part of the paragraph that would have 'taken note' of the report of the Special Rapporteur on counter-terrorism,<sup>21</sup> and the African Group's proposal to delete the paragraph that took note of the Human Rights Committee's General Comment No.33, succeeded by one vote.<sup>22</sup> However, the African Group's proposal to delete a second paragraph that took note of the two CESCR general comments, failed by one vote,<sup>23</sup> meaning that the real subject of the African Group's ire, General Comment No.20, remained in the text.

When it came time for the General Assembly

plenary to consider the text, there was anticipation that it would be reopened to revive the amendment to delete the paragraph noting General Comment No.20. However, rather than this role being taken by the African Group, it fell to Iraq (on behalf of the Arab Group), suggesting that the African Group's appetite for the matter had waned in the interim. Despite Finland's best efforts to discourage this course of action, the General Assembly voted to delete the paragraph and then adopted the resolution as a whole.<sup>24</sup> As a number of delegations had warned at the Third Committee, this sent a message that the General Assembly no longer has full confidence in the expertise of these two treaty bodies, and may well be construed as an attack on the independence of the treaty body system as a whole.<sup>25</sup>

This year's consideration of the theme of **torture and other cruel, inhuman or degrading treatment or punishment** benefited from a half day discussion with the Chairperson of the Committee against Torture (CAT), the Chairperson of the Sub-Committee on the Prevention of Torture, and the Special Rapporteur on torture.<sup>26</sup> This proved an effective means of raising awareness about the complimentary and mutually reinforcing nature of the three mandates. It also gave the experts a platform to emphasise their interest in working with States in a constructive partnership to build capacity and facilitate greater compliance with international legal obligations, rather than simply setting out to find fault. The Danish mission and civil society organisations provided a further opportunity for fruitful discussion in the form of a side event with the three experts.

In both for the Chairpersons of CAT and of the Sub-Committee expressed concern about the serious resource constraints facing their Committees, a problem they said was common to all treaty bodies. In the case of the Sub-Committee, with the 50th ratification of the optional protocol in September 2009, its membership is set to increase from 10 to 25. However, without a commensurate increase in resources, the Sub-Committee warned that it will not be able to fully discharge its duties, as it is already deficient in terms of its ability to conduct preventive visits to State parties and has no budget for direct work with national preventive mechanisms, even though this is a uniquely important feature of the optional protocol.<sup>27</sup> In a similarly tight financial corner, the CAT appealed to the

General Assembly to provide sufficient financial support to hold an additional four weeks of meetings in 2010 and 2011 so it could keep pace with its review of State party reports.<sup>28</sup> The Chairperson of CAT made the salient point that the treaty bodies are now competing with the universal periodic review (UPR) mechanism for scarce UN resources, and not doing well. Given the preference amongst many States for the UPR process (as compared to the more rigorous treaty body process),<sup>29</sup> this imbalance in resource allocation is concerning.

This focused discussion on torture also had a positive effect on the passage of Denmark's annual **resolution on torture**, which was again adopted by consensus and included the US amongst its co-sponsors.<sup>30</sup> Even though delegations were required to grapple with technically complex amendments, negotiations were less dramatic than last year and progress was made in a number of key areas. Foremost here was stronger language that explicitly 'urges' States to 'ensure that secret places of detention and interrogation are abolished'.<sup>31</sup> Further, existing language regarding when and how States investigate allegations of torture and ill-treatment was strengthened by incorporating language from the *Convention against Torture*.<sup>32</sup> Advances were also made in relation to the prohibition of cruel, inhuman or degrading treatment or punishment.<sup>33</sup>

The Special Rapporteur's increased concern about conditions of detention and his call for a convention on the rights of detainees translated into stronger language on the minimum standards of detention in the resolution.<sup>34</sup> Although no specific amount of money was requested, the resolution drew the Secretary-General's attention to the particular financial needs of the Sub-Committee, which may prove useful in addressing its serious budget shortfall during the next budget round.<sup>35</sup> Finally, in addition to the long-standing practice of the Special Rapporteur reporting to the General Assembly, the two treaty body Chairs were invited to return to present oral reports and dialogue with States next year, indicating that this practice might also become institutionalised through the resolution.

What was *not* included in this year's resolution on torture was also of note. Despite a concerted effort by the main sponsor and others, a new paragraph prohibiting the use of corporal pun-

ishment, particularly on children, did not succeed. Rather than agreeing to vague and potentially regressive language, the strategic decision was taken to revisit this contested topic next year.<sup>36</sup> Given that the Special Rapporteur's mandate from the Council explicitly recognises that 'corporal punishment, including of children, can amount to cruel, inhuman or degrading punishment or even to torture',<sup>37</sup> there is grounds for hope that progress can be made.

A more welcome omission from the final text was a reference to the Code of Conduct, despite a concerted effort on the part of China to include it. Surprisingly the resolution maintained language to 'take note with appreciation' of the report of the Special Rapporteur, although China disassociated itself from this paragraph at the Third Committee on the basis that the report included 'unfounded allegations against States'.<sup>38</sup> China also advised it would not be following up on recommendations and concluding observations of the relevant treaty bodies and the Special Rapporteur (OP4), given their 'politicised' and 'biased' approach to their mandates (see sections below on special procedures and treaty bodies).

China was not the only State to loudly protest against the UN using information provided by civil society organisations. In an unexpected turn of events, the US' biennial resolution on **strengthening the role of the UN in elections**,<sup>39</sup> which has enjoyed near universal support in recent years, became a point of contention for the Russian Federation. Although the Russian Federation was 'grateful' for the US' return to an open and constructive approach to the negotiation of the text, it objected to a proposed new paragraph that would 'express appreciation' for the *Declaration of Principles for International Election Observation and the Code of Conduct for International Observers*.<sup>40</sup> When introducing the text, the US acknowledged these documents were the product of civil society initiatives but pointed out that they had been endorsed by the African Union, Organisation of American States and Council of Europe, amongst others. The Russian Federation, however, argued that they had not been part of inter-governmental negotiations or an inter-State process and therefore could not be legitimised by the General Assembly. Even though the Russian Federation had no dispute with the content of the documents,

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A/64/44, Paras 20-22.

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China and Sri Lanka both commented at the Third Committee that the treaty body reporting process is unnecessarily complex and burdensome. China went further to argue that the mandates of the treaty bodies were overlapping and duplicative; that certain [unnamed] treaty bodies were exceeding their mandates; and that there 'are even cases of abuse of power by individual committee members'. China warned the treaty bodies to exercise caution when dealing with 'unverified information from unreliable sources' – code for information from non-governmental organization (NGOs).

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A/C.3/64/L.23.Rev.1. Co-sponsorship by 89 States reflected the growing consensus around this text.

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OP20.

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OP6 now requires that States 'must' investigate 'wherever there is reasonable ground' to believe torture or ill-treatment has been occurred. In addition, new language was agreed to that goes beyond Art. 12 of the Convention and is more in line with communications to State parties from the treaty body, namely that the domestic investigative authority must be 'effective' and 'independent', not just 'prompt' and 'impartial'.

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States were encouraged to enact a blanket prohibition against cruel, inhuman or degrading treatment or punishment in domestic legislation (OP2), and 'called upon' to 'consider' enacting a prohibition on the use of statements obtained as a result of cruel, inhuman or degrading treatment or punishment (OP13).

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OP21.

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OP36.

36  
OP10 in the first draft of the resolution (A/C.3/64/L.23) provided: 'Reminds States that corporal punishment, including of children, in certain circumstances' amounts to CIDTP or even torture, and 'calls on States to ensure that their domestic legislation is in full conformity with their obligations under international law.'

37  
OP7(a) of Human Rights Council *Resolution 8/8* (18 June 2008, adopted by consensus).

38  
China's comments probably related to information sourced from NGOs.

39  
A/C.3/64/L.26/Rev.1. The full title is 'Strengthening the role of the UN in enhancing periodic and genuine elections and the promotion of democratisation.'

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These documents were developed through a multi-year process involving more than 20 intergovernmental and international NGOs concerned with election observation around the world. They are available at [www.idea.int/publications/other/upload/dec\\_obs\\_coc.pdf](http://www.idea.int/publications/other/upload/dec_obs_coc.pdf).

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The vote was 121 in favour, 19 against, and 28 abstentions on the question of retaining the US text as drafted.

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This was not before Egypt sought to force the resolution as a whole to a vote on procedural grounds. In an embarrassment to the Egyptian delegate, the Russian delegate intervened to explain that the Russian Federation did not want to cause the resolution to go to a vote, but supported its adoption by consensus.

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A/C.3/64/L.27.

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The voting tally in 2008 was 86 in favour, 53 against, and 42 abstentions. In 2007 it was 108 in favour, 51 against, and 25 abstentions.

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Sweden on behalf of the EU explained their call for a vote by stressing that the concept of defamation of religion was inconsistent with human rights law, which protected individuals in the exercise of their freedoms and did not offer protection to religious belief systems. The EU statement is available at [www.eu-un.europa.eu/articles/fr/article\\_9315\\_fr.htm](http://www.eu-un.europa.eu/articles/fr/article_9315_fr.htm).

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In the Third Committee, the draft resolution on defamation of religions was approved by a vote of 81 in favour, 55 against, and 43 abstentions.

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At the Human Rights Council's 10th session, Chile also voted against a similar defamation of religion resolution, whereas Uruguay and Mexico abstained.

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There were only two States (Congo and the Dominican Republic) that went against the general trend by switching from an abstention last year, to voting in favour of the resolution this year in the General Assembly. A few States also changed from voting 'no' last year, to abstaining this year: Belize, Cape Verde, and Liberia.

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A similar text has been adopted annually at the Human Rights Council and before it, at the Commission on Human Rights since 1999. Since 2005, similar texts have been adopted annually in the General Assembly.

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Singapore (though it voted in favour of the text) and Jamaica (which abstained).

51

Both States abstained.

it introduced an oral amendment to delete the reference entirely. Although the Russian Federation's amendment was resoundingly defeated<sup>41</sup> and the resolution was eventually adopted by consensus,<sup>42</sup> Cuba, Iran, Egypt, and Venezuela disassociated themselves from consensus as they could not support the reference to documents that had not been endorsed at the inter-governmental level.

## DEFAMATION OF RELIGION AND RACIAL DISCRIMINATION

Support for the **defamation of religion resolution**<sup>43</sup> declined again this year, with six less States voting in favour of the text in the General Assembly than in 2008.<sup>44</sup> Following the EU's call for a vote,<sup>45</sup> the final text won 80 votes in favour to 61 against, with 42 abstentions, and earned the unfavorable title of receiving the most 'no' votes of any Third Committee text adopted by the General Assembly in 2009.<sup>46</sup> Encouragingly, Chile, Mexico and Uruguay, three States from the Group of Latin American and Caribbean Countries (GRULAC) who currently sit on the Human Rights Council,<sup>47</sup> voted against the text instead of abstaining as they did the previous year. Other States which voted against the text this year and had also abstained in the General Assembly last year were Nauru, Panama, Papua New Guinea, St Lucia, Timor-Leste, Tonga, and Vanuatu. Those States that switched from a 'yes' vote last year to an abstention this year were Antigua and Barbuda, the Bahamas, Fiji, Honduras, Jamaica, and Lesotho.<sup>48</sup>

This year's resolution, tabled by Malaysia of behalf of the Organization of the Islamic Conference (OIC), Belarus, and Venezuela, contained language similar to previous years.<sup>49</sup> By expressing deep concern at the 'negative stereotyping of religions', and emphasising that the exercise of freedom of expression carries 'special duties and responsibilities', and may therefore be subject to limitations as are provided for by law', the text continued to threaten protections for the rights to freedom of expression and freedom of thought, conscience and religion. Such threats led the EU to vote against the resolution, and Columbia to abstain. Other States opposed its singular focus on one religion<sup>50</sup> and the attempt

to link defamation of religion with racism. The latter issue was particularly aggravating to Albania and India<sup>51</sup> as the resolution requested the Secretary-General to submit a report on the correlation between defamation of religions and the intersection of religion and race at the next session. However the shift in voting pattern by the Latin American States signaled less a concern with a specific issue or new language, as much as a no-confidence vote against the use of the concept of defamation of religion and growing acknowledgement of its potential danger to the human rights framework.

The increasing number of States turning away from the concept comes at a crucial time, given the OIC's recent efforts to entrench it in a new human rights instrument. In October at the 2nd session of the Ad Hoc Committee on the Elaboration of Complementary Standards,<sup>52</sup> Pakistan (on behalf of the OIC) and Nigeria (on behalf of the African Group) proposed provisions for a new optional protocol to the *International Covenant on the Elimination of all forms of Racial Discrimination* to combat the defamation of religions.<sup>53</sup> This recent setback came on the heels of more optimistic developments earlier in the year when provisions on defamation of religion were dropped from the draft outcome document of the Durban Review Conference, and a jointly-run resolution by the US and Egypt on the freedom of expression omitting reference to defamation of religion was adopted by consensus at the Council. The expectation by some that this compromise text, notwithstanding its problematic elements,<sup>54</sup> might positively influence the dynamics in New York did not occur. In fact there seemed to be little recognition of the new developments at the Council, as the final defamation of religion resolution did not reflect any of the concessions that won support in Geneva earlier in the year.<sup>55</sup>

Several special procedures discussed defamation of religions during their interactive dialogues with the Third Committee. Both the **Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance**, Mr Githu Muigai, and the **Special Rapporteur on freedom of religion and belief**, Ms Asma Jahangir, argued against the creation of new standards. Rather, Ms Jahangir bought the Assembly's attention to a joint statement<sup>56</sup> made by herself, Mr Mugai, and one other special pro-

cedure in April 2009, which stressed the importance of anchoring the debate about limitations to freedom of expression in the 'relevant existing international legal framework.' Mr Mugai recalled his recent report to the Human Rights Council on the defamation of religions,<sup>57</sup> and encouraged the universal membership to shift away from the sociological concept towards the legal norm of non-incitement to national, racial or religious hatred. He also urged States to refocus the debate back to the rights of individuals affected by religious intolerance, discrimination or violence and the prevention and combating of such acts.

Many States resisted the efforts of the special procedures to re-anchor the debate in the human rights framework. Algeria, Egypt, Iran, Libya, Malaysia (on behalf of the OIC), Pakistan, Syria, and the Sudan (on behalf of the Group of 77 and China) continued to reflect their view that religions, religious ideas and objects warrant protection under international human rights law. They also argued that restrictions on freedom of expression should be applied in some cases of defamation of religion, even if they override individual rights. Issues touched on by these countries included: the need to curtail freedom of expression to protect places of worship and to ban any form of speech that defames religion; the need to respond to early-warning indicators in the context of Islamophobia; the need for States to take measures to end anti-Islamic regulations as they constitute deliberative offensive acts which impinge on the rights of the followers of Islam; and the lack of sufficient mechanisms to tackle defamation of religions as a modern form of intolerance.

Few substantive additions to the EU text on **the elimination of all forms of intolerance and of discrimination based on religion or belief**<sup>58</sup> were made this year. The EU directed its efforts at streamlining the text to focus on the protection of the individual. Core language reaffirming the importance of freedom of thought, conscience and religion or belief, expressing concern about serious instances of discrimination on the grounds of religion and belief, and detailing the actions that States need to take to eliminate these forms of discrimination, including through education and legal guarantees, was maintained. Reflecting concern with an issue highlighted in Ms Jahangir's interim report to

the General Assembly,<sup>59</sup> the text also includes some additional new language on violence faced by religious minorities.<sup>60</sup> The OIC, after expressing dissatisfaction with the deletion of previously agreed text as a result of the streamlining process, managed to achieve reinsertion of some modest language which highlighted its continuing concerns that the text did not contain enough contextualising information and that it weighted freedom of opinion and expression too heavily vis-a-vis other rights.<sup>61</sup> The OIC decided however to join consensus and the resolution was passed without a vote as in previous years.

The General Assembly took up two texts related to Durban this year. One was a three-paragraph decision adopting the **outcome document of the Durban Review Conference**.<sup>62</sup> The other was the annual five-part omnibus resolution on **the comprehensive implementation of and follow-up to the Durban Declaration and Programme of Action (DDPA)**.<sup>63</sup> Both texts were sponsored by the Sudan (on behalf of the G77 and China). The reasons for dealing with the Durban outcome document in a separate text, rather than integrating relevant language into the DDPA resolution, was not entirely clear. The African Group likely viewed the division as a way to gain visibility for the outcome document and well as to gain direct and explicit endorsement by the General Assembly, thus giving it, in their view, added political weight. This option was deemed preferable to including it as one more element of the omnibus resolution, which tackles substantively all issues related to implementation of the DDPA and follow-up processes.

The decision on the Durban Review Conference welcomed the outcome document, endorsed it, and decided to implement it as a part of the wider implementation of the DDPA. The DDPA resolution framed the language on implementation of the outcome document slightly differently, stressing that implementation should be undertaken in the same framework and by the *same mechanisms* as the outcome of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (the World Conference). This paragraph and others<sup>64</sup> that referred only positively to the World Conference's follow-up mechanisms seemed to contradict the recognition of the need to improve the use of and interaction between those mechanisms, as expressed in the Review Conference's

52  
For further information on developments at the Ad Hoc Committee, please see the chapter on standard-setting (pp. 125-135.) in the present edition of the Human Rights Monitor.

53  
The draft report of the Ad Hoc Committee's 2nd session (A/HRC/13/55) is available at [www.article19.org/pdfs/publications/racism-racial-discrimination-xenophobia-and-all-forms-of-discrimination.pdf](http://www.article19.org/pdfs/publications/racism-racial-discrimination-xenophobia-and-all-forms-of-discrimination.pdf).

54  
The text contains problematic language condemning 'religious stereotyping' as an alternative to defamation of religion, and also makes reference to Council Resolution 7/36, which diluted the mandate of the UN Special Rapporteur on freedom of expression.

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It was alleged by one European State that in informal negotiations during the Third Committee session on the defamation of religion resolution, Egypt proposed that some language from the Council text be included in the text, but other States, including South Africa, rejected this.

56  
The joint statement by Mr Muigai, Ms. Asma Jahangir, and Mr Frank La Rue, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression is available at [www2.ohchr.org/English/issues/religion/docs/SRjointstatement22april09.pdf](http://www2.ohchr.org/English/issues/religion/docs/SRjointstatement22april09.pdf).

57  
The report on all manifestations of defamation of religions, and in particular on the serious implications of Islamophobia on the enjoyment of all human rights by their followers (A/HRC/12/38) is available at [www2.ohchr.org/english/bodies/hrcouncil/12session/reports.htm](http://www2.ohchr.org/english/bodies/hrcouncil/12session/reports.htm).

58  
A/C.3/64/L.39/Rev.1.

59  
Interim report of the Special Rapporteur on freedom of religion or belief (A/64/159).

60  
PP8, OP8, OP11 (k) and (l).

61  
For example, in PP5, the General Assembly considers that 'religion or belief, for those who profess either, is one of the fundamental elements in their conception of life and that freedom of religion or belief should be fully respected and guaranteed.'

62  
A/C.3/64/L.55.

63  
A/C.3/64/L.54/Rev.1.

outcome document.<sup>65</sup> A long paragraph outlining preparations for the commemoration of the ten-year anniversary of the World Conference caused disagreement among States, including apprehension about yet another outcome document,<sup>66</sup> and concern about the budget implications for such an event that may have no substantive outcome.<sup>67</sup> The compromise solution was a call by the General Assembly for a one-day plenary event during the high-level segment of the General Assembly during its 66th session in 2011.

Both texts went to a vote,<sup>68</sup> though the decision adopting the outcome document garnered more votes than the substantive text. As expected, Israel and the US voted against them for a variety of reasons, including that the Durban Review Conference's outcome document contains language reaffirming the entire outcome document of the original 2001 World Conference, which neither supported. The EU was split on both texts,<sup>69</sup> reflecting the very public division amongst its members on whether to attend the Durban Review Conference in April 2009. However the majority of EU States voted in favour of the decision welcoming the outcome document, whereas no EU States vote in support of the DDPA text.

The outcome document was adopted after a call for a re-vote by the Russian Federation<sup>70</sup> with 166 votes in favour to 7 against (Australia, Canada, Israel, Marshall Islands, the Netherlands, Palau and the US), with 9 abstentions (Czech Republic, Georgia, Germany, Italy, New Zealand, Poland, Romania, Tonga, and Vanuatu). Of the ten States that boycotted Durban, the US, Canada, Australia, the Netherlands, Israel all voted against the resolution, while Italy, Germany, New Zealand, Poland, and the Czech Republic abstained.

The DDPA text was adopted by considerably less votes: 128 votes in favour to 13 against, with 43 abstentions.<sup>71</sup> Of the ten States which boycotted Durban, nine voted against the text (the US, Canada, Australia, the Netherlands, Italy, Germany, Poland, the Czech Republic, Israel), with the other, New Zealand, abstaining.<sup>72</sup> Those that could not support the resolution had a number of criticisms, including complaints about the limited number of consultations that the main sponsor undertook.<sup>73</sup> The US expressed concern

for the way in which the resolution tackled the concept of hateful speech, and did not agree that the best way to combat such speech was to prohibit it.<sup>74</sup> It proposed a three-pronged approach to better address the issue, including strengthening legal protection against hate crimes, safeguarding freedom of expression, and reaching out to religious groups. The EU supported the US position, and opposed positive references to the Ad Hoc Committee on Complementary Standards, stressing again that existing legal norms were sufficient to reconcile freedom of expression, freedom of religion and belief, and the fight against racism.

In his report and interactive dialogue,<sup>75</sup> Mr Githu called on States that chose not to participate in the Durban Review Conference to nonetheless publicly express their support for the outcome document and identify concrete measures taken at the domestic level to implement it. Several States that abstained or voted against the Durban-related texts heeded this call and stressed their commitment to working towards eradicating racism domestically and/or internationally, and some even expressed lukewarm support for the outcome document. New Zealand said it did not oppose the general approach of the outcome document, and Canada expressed support for the strategies outlined at the 2001 Conference.<sup>76</sup> The Netherlands described its national action plan against racism, including its commitment to setting up anti-discrimination boards nationwide, and the US recalled its action plan to combat racial and religious discrimination and intolerance that it had presented during the meeting of the Ad Hoc Committee on Complementary Standards.

The discussion in the interactive dialogue with Mr Githu centred mainly on the relationship between freedom of expression and freedom of religion, and 'defamation of religion'. States also sought Mr Githu's comments on the implementation of the Durban outcome document, racial discrimination against migrants in developed countries, the growth of extremist political parties, and one of the several thematic issues discussed in his interim report: discrimination based on descent. On the latter, India continued to try to undermine the legitimacy of the Special Rapporteur's attention to this type of discrimination on the basis of descent, communicating the same position that it did at the Council's

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Although the mechanism is inactive, OP17 emphasised the importance of the mandate of the group of independent eminent experts on the implementation of the DDP. OP15 expressed appreciation for the continuing work of the mechanisms mandated to follow up the World Conference.

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OP 124 of the outcome document requested the Council to consider the necessary measures to enhance the effectiveness of the follow-up mechanisms to the DDPA. It also recommended that the Council enhance the interface among and focus on follow-up mechanisms with a view to achieving greater synchronisation and coordination at all levels, including through restructuring and reorganisation of their work.

66

Norway.

67

Switzerland.

68

Israel called for both votes.

69

The EU split three ways on the outcome document decision and two (abstain and no) on the DDPA resolution.

70

Following a call by the Russian Federation in the Third Committee for a re-vote for technical reasons, 163 States voted in favour, 5 against (Australia, Canada, Israel, Netherlands, the US), with 9 abstentions. The first vote registered at 161 in favour, 6 against (Australia, Canada, Israel, Marshall Islands, the Netherlands and the US), with 12 abstentions. The DPRK and Bosnia and Herzegovina, as well as the Russian Federation, changed their votes from abstentions to 'yes'. The Marshall Islands, which initially voted 'no' was absent during the second vote, as was Macedonia, which had voted 'yes' originally.

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In the Third Committee the vote was 122 in favour, 13 against, and 45 abstentions.

72

Denmark, Romania, the Marshall Islands, and Palau joined those voting against the text.

73

The EU, Norway, and Iceland.

74

During the informals, the US repeatedly suggested the deletion of provisions that reflect the prohibition of hate speech (i.e OP 29 and 41). The proposal was struck down by the sponsor.

75

Interim report A/64/271.

11th session where it rejected Mr Githu's views of caste-based discrimination as a form of racial discrimination.

Like last year, the annual **resolution on the inadmissibility of certain practices that contribute to fuelling contemporary forms of racism**, racial discrimination, xenophobia and related intolerance, sponsored by the Russian Federation, was adopted by the General Assembly with a split vote.<sup>77</sup> The US called for the vote and was the sole State opposed to the text for the third consecutive year. The resolution expressed serious concern over the rise of extremist movements and political parties such as Neo-Nazis and skinheads that disseminate ideologies of fascism and racial superiority, and condemned acts of glorification of the Nazi movement and former Waffen SS members. The US raised similar concerns with this resolution as it did on the DDP text, underscoring that it did not regard the prohibition of expression as an effective or appropriate means to curb intolerance, and pressed States to take up alternative ways to combat it. The inaccurate reference to the judgment of the Nuremberg trials, among other issues, led the EU group to abstain.<sup>78</sup>

Looking forward, there are several opportunities in the coming year for human rights defenders to engage on reshaping the debate on defamation of religion and to help stymie the roll back of standards to protect freedom of expression. In March, the Human Rights Committee will meet in New York and continue their discussion on a draft General Comment to guide States Parties in the implementation of the right to freedom of expression. At the same time, the Human Rights Council will be considering the defamation of religions resolution again at its 13th regular session. A new development at the next session of the General Assembly will be a dialogue with the **Special Rapporteur on the Right to Freedom of Opinion and Expression**, Mr Frank La Rue (Guatemala), who is invited for the first time.<sup>79</sup> His participation will offer both key opportunities to influence the universal membership's views on important aspects of the debate, as well as (ironically, given the title of the mandate) an additional opening for censure by those States seeking to suppress and contain the mandate to their particular political interpretations.<sup>80</sup>

## SPECIAL PROCEDURES<sup>81</sup>

Maintaining its increased level of engagement with the independent experts of the Council, the Third Committee held interactive dialogues with 26 special procedures and five representatives of treaty bodies.<sup>82</sup> Although most of the interactive dialogues were constructive and routine exchanges, there was a marked increase in the level of criticism directed at a handful of special procedures and in some cases, treaty body chairs,<sup>83</sup> which adversely affected the tone of the session.

The **Special Rapporteur on torture**, Mr Manfred Nowak came under fire from China, Nigeria, and Kazakhstan, which each took exception to critical remarks in the country reports he issued after conducting official visits.<sup>84</sup> Although China and Nigeria accused him of breaching the Code of Conduct, the Special Rapporteur responded substantively to their concerns and explained how he had complied with his mandate. Botswana also sought to correct the Special Rapporteur's opinion that there was a prohibition against corporal punishment in international law, but after 'strongly disagreeing' with this interpretation, the Special Rapporteur appealed to all States to abolish the practice, especially in relation to children.

A similarly hostile exchange occurred with the **Special Rapporteur on extrajudicial executions**, Mr Philip Alston. Prompted by critical remarks in the Special Rapporteur's report<sup>85</sup> regarding the operation of police death squads in Kenya and other serious human rights violations by the State, the Kenyan delegate accused the Special Rapporteur of 'completely rubbishing' the Code of Conduct, acting illegally by interfering in Kenya's internal political structure, and plagiarising from the report of the Kenyan Human Rights Commission. As he had done at the 11th session of the Council when Kenya leveled similar criticisms at him, the Special Rapporteur refuted the allegations as fabrications, and received support from several States.<sup>86</sup>

Against this backdrop, it was not surprising that some delegations sought to incorporate references to the Code of Conduct in resolutions dealing with counter-terrorism, torture, human rights defenders, and freedom of religion and belief. Although ultimately these efforts only suc-

76 Canada and New Zealand also stated that their refusal to support the outcome document stemmed from the anti-Israeli rhetoric at the Durban Review Conference.

77 The vote on this year's text (A/C.3/64/L.53) was (127 in favour, one against, and 54 abstentions). In 2008 the vote was (122 in favour, one against, and 54 abstentions).

78 The EU's explanation of vote is available at [www.swedenabroad.com/Page\\_\\_\\_100539.aspx](http://www.swedenabroad.com/Page___100539.aspx).

79 The resolution on freedom of opinion and expression (A/HRC/RES/12/16) sponsored by Egypt and the US at the Council's 12th session in OP17 requested the Special Rapporteur to submit an annual report to the Council and the General Assembly on the activities relating to his mandate.

80 Mr La Rue was accused of violating the Code of Conduct by the African Group and the OIC at the Council's 11th session, and an increasingly vocal set of States are referring to the Code of Conduct at the Third Committee whenever they consider special procedures to be overstepping their mandates.

81 ISHR's online 'news archive' on the 64th session of the General Assembly contains a number of articles that elaborate on some of the interactive dialogues with the special procedures. It is available at [www.ishr.ch/archive-general-assembly](http://www.ishr.ch/archive-general-assembly).

82 The schedule for the interactive dialogues with the special procedures and treaty body chairpersons is available at [www.un.org/ga/third/64/dialogues.pdf](http://www.un.org/ga/third/64/dialogues.pdf).

83 During the dialogue with the Chairperson of CAT, China criticised the Committee for 'turning a blind eye' to information submitted by the Government and incorporating 'misrepresentative information' in the concluding observations. China warned that this was counter to professional ethics and that the Committee had breached the Code of Conduct.

84 China was concerned that 'unverified information' (code for information submitted by NGOs) about its detention facilities and 're-education through labour' programme had been used. Nigeria accused the Special Rapporteur of 'ambush diplomacy', alleging it had not had an opportunity to correct factual inaccuracies in the report before its release. Kazakhstan questioned why the Rapporteur's country report had commented on the alleged prevalence of violence against women when the purpose of his visit had been to examine places of detention.

ceeded in the counter-terrorism resolution, they signaled a new-found willingness on the part of the General Assembly to discipline special procedures, a practice that has generally been relegated to the Council. It seems likely that this campaign at the General Assembly to intimidate special procedures will only embolden certain members of the Council to escalate their efforts in this respect in Geneva. It should be noted however, that neither the General Assembly nor the Council have gone so far as to take any formal action under the Code of Conduct with respect to any alleged breaches by special procedures.

85

A/64/187, Para.9.

86

Botswana, New Zealand, Sweden (on behalf of the EU), Switzerland, the US.

87

Special Representative of the Secretary-General on violence against children, Chairperson of the Subcommittee on the Prevention of Torture, Chairperson of the Committee against Torture.

88

A/C.3/64/L.41/Rev.1. New OP2 related to the impact of the current economic crisis, and new OP4 and OP5(b) and (c) relate to the vulnerability of children migrants.

89

This year, the Iran resolution (A/C.3/64/L.37) was adopted in the Third Committee by a vote of 74 in favour, 48 against, and 59 abstentions, and in the General Assembly by a vote of 74 in favour, 49 against, and 59 abstentions. Last year the vote in the Third Committee was 70 in favour, 51 against, and 60 abstentions, and the General Assembly vote was 69 in favour, 54 against, and 57 abstentions. The highest margin for adoption occurred in 2005, when the Third Committee vote was 77 in favour, 51 against, and 43 abstentions and the General Assembly vote was 75 in favour, 50 against, and 43 abstentions. Given its critical role in the OIC, it was noteworthy that in the General Assembly Saudi Arabia voted in favour of this year's text, rather than voting 'no' as it had in 2008. Also in the General Assembly, a number of States voted in favour of the resolution this year after abstaining last year: Dominican Republic, Papua New Guinea, and the Solomon Islands. Some members of the African Group also changed from voting 'no' last year to abstaining this year: Malawi, South Africa, and Togo.

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The human rights violations committed by the Iranian Government in the wake of the elections are documented in the Secretary-General's report on Iran (A/64/357) and the General Assembly resolution (A/C.3/64/L.37).

91

Some States were concerned about the budget implications of a new post, as well as how this might adversely affect the overall vote on the resolution.

Prompted by the growing attacks on the independence of special procedures at the Council and their general under-utilisation within the UN system, the High Commissioner for Human Rights (the High Commissioner) organised a **high-level roundtable to promote the role of special procedures as early warning mechanisms**. It was held during the Third Committee's interactive dialogues with the special procedures, enabling the High Commissioner and several of these experts to take part. The event sought to 'provide evidence of fruitful interaction' between the special procedures and the UN system on both thematic and country-specific issues, and to encourage 'effective channels of communication and institutionalised cooperation' between these experts and UN entities, such as the Security Council. In addition, during her interactive dialogue with the Third Committee, the High Commissioner was forceful in her defence of the independence of the special procedures. In response to questions from Malaysia and Pakistan about what her Office would do to ensure mandate holders uphold the Code of Conduct, she advised that OHCHR had begun a practice of organising information sessions for incoming mandate holders to familiarise them with their mandates, working methods, and the Code of Conduct.

For a number of the special procedures and treaty body members, it was their first interaction with the Third Committee.<sup>87</sup> The **Chairperson of the Committee on Migrant Workers**, Mr Abdelhamid El Jamri, and the **Special Rapporteur on migrants**, Mr Jorge Bustamante, both drew attention to the disproportionate impact of the global economic crisis on migrant workers and encouraged States to enact national laws to

protect them, rather than to discriminate against them or criminalise their behavior. The Special Rapporteur was concerned by the acute vulnerability of women and child migrants to a range of serious human rights abuses, including trafficking, sexual exploitation, and forced labour. Both of these concerns were reflected in new language in the annual resolution on migrants, brought by Mexico.<sup>88</sup> Both experts were invited to address the General Assembly at its next session, reflecting its ongoing interest in this matter.

## COUNTRY SITUATIONS

Although the Third Committee dealt with the same three country-specific resolutions as last year (Iran, Myanmar, and the Democratic People's Republic of Korea), there were significant differences in the outcome this year. Not only were all resolutions adopted by a slightly higher margin, but neither Iran nor Myanmar sought to introduce a no-action motion to shut down consideration of the resolution they were the subject of. Nonetheless, a large number of States, particularly from the Asian region and the African Group, abstained from the votes, indicating that political considerations rather than any deterioration in the human rights situation remain the decisive factor in determining their vote.

Given that the resolution on **Iran** brought by Canada was perhaps the strongest text on this situation considered by the General Assembly to date, it was significant that it was adopted by the highest margin in the last four years.<sup>89</sup> Most observers put this down to the dramatic deterioration in the human rights situation in Iran following the 12 June elections, which was detailed in the resolution.<sup>90</sup> Another contributing factor may have been effective lobbying of New York delegations (including some members of the African Group) by Ms Shirin Ebadi, the Iranian winner of the 2003 Nobel Peace Prize. In any case, her advocacy contributed to the Secretary-General pledging to personally visit Iran in the near future.

Although some non-governmental organisations (NGOs) were disappointed that the resolution did not call on the Secretary-General to appoint a special envoy on Iran,<sup>91</sup> it did incorpo-

rate two noteworthy new operative paragraphs. The first of these ‘urges’ Iran to ‘fully cooperate’ with all thematic special procedures, including by granting them country visits. This was significant because despite its standing invitation to all special procedures, Iran has not granted any requests to visit since 2005 and continues to use the standing invitation as evidence of its ‘exemplary human rights record’. The second new paragraph represents a compromise on the idea of a special envoy. It ‘invites’ a group of six special procedures to investigate and report on the human rights violations in the wake of the June elections.<sup>92</sup> However, given Iran’s non-cooperation with special procedures and its dismissal of the resolution as ‘yet another highly politically charged and motivated’ initiative of Western States, few hold out hope that these experts will be able to carry out such an investigation. In any case, any action to address the human rights situation in Iran is likely to be postponed until after it is reviewed in the UPR process in February 2010.

In the case of the resolution on **Myanmar** brought by Sweden (on behalf of the EU),<sup>93</sup> there were a number of adverse developments that likely contributed to the increase in votes.<sup>94</sup> The decision of the military junta in August to extend the house arrest of Daw Aung San Suu Kyi by a further 18 months effectively rendered her participation in the 2010 elections impossible, lowering expectations amongst the international community that these elections could be either free or fair. Adding to concern about the electoral process was the point made by the **Special Rapporteur on Myanmar**, Mr Tomas Quintana, when he alerted the Third Committee to the fact that no date had been set nor any electoral laws enacted. Further, although some 130 political prisoners had been released in the past 12 months, this was disproportionately low compared to the 2,000 such prisoners that were believed to exist.

The glaring absence of any significant progress on the human rights situation, even after repeated visits by the UN Secretary-General, his Special Adviser, and the Special Rapporteur, prompted a number of delegations to question whether the strategy of constructive engagement with the Government of Myanmar was really working. It was telling that rather than reiterating the Secretary-General’s five-point plan for

Myanmar, the **Special Adviser to the Secretary-General on Myanmar**, Mr Ibrahim Gambari, presented the Third Committee with a cut-down list of only three immediate concerns that the Government needed to meet.<sup>95</sup>

Even though the text was significantly streamlined and included multiple references to areas where the Government had improved its cooperation with the international community, the overall message remained one of ‘strong condemnation’ of the human rights situation and the need for urgent action to turn this around. A new paragraph in the text urged Myanmar to respond to the Secretary-General’s proposal to establish a UN office to support the mandate of his Special Adviser on Myanmar. However, given that Myanmar accused Gambari of ‘exceeding the bounds of his Good Offices role’ at the Third Committee, it appears unlikely to embrace such a proposal.

The resolution on the human rights situation in the **Democratic People’s Republic of Korea (DPRK)**, brought by Sweden (on behalf of the EU) and Japan was little changed from last year and again adopted by a significant majority.<sup>96</sup> This outcome reflected the fact that the DPRK had maintained its complete refusal to cooperate with OHCHR and the **Special Rapporteur on the DPRK**, Mr Vitit Muntarbhorn, who addressed the Third Committee for the last time in this capacity. In his assessment after six years as the mandate holder, the human rights situation remained ‘abysmal’ and the humanitarian situation dire. Although the resolution was co-sponsored by a cross-regional group of 53 States, the DPRK condemned it as yet another politically motivated attempt to ‘obliterate the DPRK’ and warned that it was ‘futile to expect any outcome from the resolution’. When the Council considers the renewal of this mandate in 2010, this lack of improvement in the human rights situation and complete disengagement by the Government of the DPRK may give weight to arguments that an alternative strategy is needed.

The Third Committee also held an interactive dialogue with the **Special Rapporteur on the Occupied Palestinian Territories (OPT)**, Mr Richard Falk. Coming soon after the Council’s adoption of the ‘Goldstone report’ on the Gaza conflict, it was not surprising that this topic dominated discussion. The Special Rapporteur welcomed the

92 The Special Rapporteurs on extrajudicial executions, torture, freedom of expression, human rights defenders, along with the Working Group on arbitrary detention and the Working Group on enforced or involuntary disappearances.

93 This year the Myanmar resolution (A/C.3/64/L.36) was adopted in the Third Committee by a vote of 92 in favour, 26 against, and 65 abstentions, as compared to the 2008 vote of 89 in favour, 29 against, and 63 abstentions. This year’s vote on the resolution in the General Assembly was 86 in favour, 23 against, and 39 abstentions as compared to last year’s vote of 80 in favour, 25 against, and 45 abstentions.

94 The States that changed their vote in the General Assembly from an abstention in 2008 to vote in favour of the resolution were: Jamaica, Malawi, the Solomon Islands, South Africa, Tanzania. Brazil switched from voting in favour of the resolution in 2008 to abstaining this year. The votes of ASEAN members and China were unchanged: they continued to either vote ‘no’ or abstain.

95 Principal among these was the immediate release of all political prisoners, followed by genuine dialogue between the Government and all political and ethnic groups so that free and fair elections could be held, and lastly improvement of socio-economic conditions.

96 A new Operative Paragraph 1 (vii) expressed ‘very serious concern’ at the violation of children’s human rights, particularly their lack of access to basic economic, social and cultural rights. This year, the DPRK resolution (A/C.3/64/L.35) was adopted in the Third Committee by a vote of 97 in favour, 19 against, and 65 abstentions, as compared to the 2008 vote of 95 in favour, 24 against, and 62 abstentions. This year’s vote on the resolution in the General Assembly was 99 in favour, 20 against, and 63 abstentions as compared to the 2008 vote of 94 in favour, 22 against, and 63 abstentions. The States that changed to vote in favour of the resolution in the General Assembly this year, having abstained last year were: Jamaica, Jordan, the Solomon Islands, and the United Arab Emirates. Somalia, Guinea and Sri Lanka changed from having voted ‘no’ last year to either voting in favour this year (Somalia) or abstaining (Guinea, Sri Lanka). Namibia was the only State to switch from an abstention last year to a vote against the resolution this year.

report's recommendations, which he believed challenged Israel's impunity and imposed much-needed accountability measures on its actions in the OPT, including potential recourse to the Security Council and International Criminal Court (ICC). He recommended that the General Assembly 'fully implement the Goldstone recommendations as a matter of highest priority'.

The Special Rapporteur also emphasised the 'unlawful' nature of Israel's refusal to engage with his mandate, citing its denial of repeated requests to visit the OPT and his expulsion from Israel in December 2008 as examples. This prompted his recommendation that the General Assembly request an advisory opinion from the International Court of Justice on the obligations of member States of the UN to cooperate with its representatives. He implied that such an opinion would be equally relevant to the country mandates on Myanmar and the DPRK, where non-cooperation was also a problem. The US delegate warned that this approach would not help efforts to find a just and lasting peace in the Middle East.

A significant new development emerged during the Third Committee's **general discussion on country situations**. In the past, the US has initiated country-specific resolutions and been at the forefront of 'naming and shaming' States where it believed grave human rights violations had occurred and the State concerned remained closed to attempts by the international community to assist. However, this year, not only did the US not bring a resolution on a country situation, it also chose to only refer by name to the three States that were the subject of country-specific resolutions when it spoke on this agenda item in the Third Committee. This left a handful of Western States<sup>97</sup> to draw attention to other human rights situations of concern, where they believed dialogue and cooperation had not worked and the international community had a responsibility to act or at least give voice to the victims of human rights violations. Among the situations they highlighted were **Afghanistan, Belarus, Cuba, the Democratic Republic of the Congo (DRC), Fiji, Guinea, Honduras, the OPT (particularly Gaza), Pakistan, Sri Lanka, Saudi Arabia, the Sudan (Darfur), Uzbekistan, and Zimbabwe**. Sweden (on behalf of the EU) expressed the hope that an independent expert on the DRC would be reinstated at the Council.

Although the US' commitment to 'constructive engagement' at the international level may mean it adopts this moderated approach in future, it is important to note that the US maintained its in-principle support for country resolutions. For example, it argued that these resolutions allowed States to demonstrate their collective will to address serious human rights situations, and provided space for human rights defenders to carry out their work. More importantly, the US continued its practice of voting in favour of all three country resolutions, and was instrumental in lobbying other States to ensure the adoption of the Iran resolution.

Nonetheless, this recalibration of approach by the US was significant because its silence contributed to the prominence of NAM's views on how the UN's human rights system should respond to country situations. NAM members totally rejected the consideration of country-specific resolutions by the Third Committee on the basis that they targeted developing countries and were counter-productive to progress on human rights at the country level. Rather than 'singling out' States for criticism, the international community should, in its view, focus its efforts on dialogue, cooperation, and mutual understanding. They lauded the UPR as the only effective mechanism to address country situations, given the Council's status as the UN's principal human rights organ and the UPR's grounding in the principles of universality, impartiality, and non-selectivity.<sup>98</sup> Adding to its attractiveness in their view was the fact that the review process had been positively received by the international community, as demonstrated by States' 'commendable constructive engagement' with it.<sup>99</sup>

It was significant that in addition to a few Western States, the Republic of Korea and Ukraine weighed in to temper this praise for the UPR process. They pointed out that this new mechanism, though innovative, was only one part of the UN's human rights tool kit. The special procedures and treaty bodies were in their view a more dynamic and effective means of dealing with urgent and serious human rights violations, and as such warranted strong support from all States. In her dialogue with the Third Committee, the High Commissioner also stressed the need for States to strengthen the linkages between the UPR, the treaty body system, and the special procedures to ensure that the UPR

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The EU had the most extensive list of country situations and provided information about the kinds of human rights violations occurring in each. Other States that 'named names' included Australia, Canada, and New Zealand.

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Cuba, the DPRK, Egypt, India, Malaysia, Pakistan, Nepal, Sri Lanka, the Sudan. Iran praised the UPR as a 'breakthrough'.

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Comments by Malaysia, which also acknowledged that although 'there remains areas [of the UPR] which can be further developed and strengthened, the crux remains that this innovation represents a good alternative to country-specific reports'.

becomes an effective catalyst for the implementation of human rights at the country level.

Indicating there are shades of grey in the overall NAM position on country resolutions, it was noteworthy that three of its members (the Bahamas, Guatemala, and the Philippines) made a point of drawing attention to their decision to abstain from the three country resolutions, rather than voting against them.<sup>100</sup> In the case of the Bahamas, its explanation of position was an important contribution to the debate on country-specific situations.

The Bahamas did not disagree with the point made by Western States that every member of the General Assembly had the right to bring any resolution, but as every State violated human rights to varying degrees, it suggested that the real question was what level of violations warranted a country resolution. It pointed to the fact that there were seven country resolutions in the General Assembly in 2001 and only three in 2009 despite no commensurate decline in violations.<sup>101</sup> In its view, the argument that the universal membership of the Third Committee gave its country resolutions added international legitimacy was inherently 'flawed', because the reality at the Human Rights Council was that most States were active participants in their capacity as observers. The Bahamas remained unconvinced that the confrontational nature of country resolutions could advance the human rights agenda, and encouraged all States to give the Council's UPR process an opportunity to implement its mandate before judging it. It added that should a situation be so dire as to threaten international peace and security, the Council had the ability to refer it to the Security Council.

Other States which also abstained from the country resolutions in the Third Committee because of their view that they should only be addressed at the Human Rights Council were Brazil and the Solomon Islands. Although Brazil also abstained at the General Assembly plenary, the Solomon Islands changed its position to vote in favour of them. It explained to the General Assembly plenary that this change was due to 'external pressure' having been brought to bear, and that in future, it hoped that delegations would respect the position it had taken in the Third Committee. This was a rare occurrence of a State publicly exposing (and condemning)

the otherwise very concealed reality of vote trading at the General Assembly on controversial human rights matters.

## HUMAN RIGHTS COUNCIL REPORTS, THE 2011 REVIEW OF THE COUNCIL, AND OHCHR

As was the case last year, the General Assembly determined that the Council's annual report would be allocated to the Third Committee (to take action on the recommendations) and the plenary of the General Assembly (to endorse the report as a whole). However, in making this decision, the General Assembly stipulated that no precedent was set, which is likely to mean there is no resolution of the annual allocation question prior to the 2011 review of the Council. At the request of the Human Rights Council, the President of the General Assembly later agreed that the plenary would also consider the Council's report on its 12th special session on the human rights situation in the OPT and East Jerusalem. Given the political sensitivity of the report, most delegations were relieved that the Third Committee was by-passed on this matter.

The annual report of the Human Rights Council required the General Assembly to take action on two recommendations from the Council. The first of these related to the adoption of the *Guidelines for the alternative care of children* (the Guidelines),<sup>102</sup> while the second sought financial resources for the UPR process to ensure timely translation of reports into UN languages. Brazil, which had led the process to adopt the Guidelines in Geneva, continued this leadership role in New York. It was quick to circulate a draft text that 'welcomed' the non-binding Guidelines and 'encouraged' their implementation by States and all other actors involved in deciding alternative care arrangements for children who are deprived of parental care or at risk of being so.<sup>103</sup> This helped to ensure the procedural text was adopted in the early stages of the session by consensus.

Action on the second recommendation proved more difficult, and the final product bore many of the hallmarks of last year's problematic resolution on the Council's report. For example, no State was forthcoming with a draft text, and it

<sup>100</sup> Guatemala abstained from the vote on Myanmar in the Third Committee, but voted in favour of it in the General Assembly plenary. The Philippines was absent from this vote in the General Assembly plenary.

<sup>101</sup> Iran, Iraq, the Sudan, the DRC, Myanmar (consensus), Cambodia (consensus), Afghanistan (consensus). There was also a resolution on the human rights situation in parts of SE Europe (consensus).

<sup>102</sup> For further information on the elaboration of the Guidelines for the alternative care of children, please see the chapter on standard-setting (pp. 125-135.) in the present edition of the Human Rights Monitor.

<sup>103</sup> A/C.3/64/L.50.

was not until towards the very end of the session that Zambia (on behalf of the African Group) tabled one.<sup>104</sup> However, it had not been the subject of any informal negotiations and contained a technical anomaly that further complicated its adoption.<sup>105</sup>

Although the Third Committee ultimately adopted a revised version of the resolution<sup>106</sup> on the Human Rights Council report by consensus, delegates from the DPRK and Israel both took issue with their country being singled out for criticism at the Council. More detailed criticisms were raised by Sweden (on behalf of the EU). On the procedural front, Sweden was critical of the late introduction of the text and Zambia's failure to consult with other delegations. On a substantive level, it was uncomfortable that the Third Committee was again overstepping its mandate from the General Assembly by taking action on the report as a whole, rather than limiting itself to the recommendations. Further, the fact that the text only 'took note' of the report of the Human Rights Council and 'acknowledged' its recommendations was so neutral as to be almost meaningless. To avoid these pitfalls next year, Sweden suggested that the Council's report should be sent directly to the General Assembly plenary, and each recommendation requiring action should be handled in a stand-alone resolution, similar to the one brought by Brazil this year. This would allow States to freely express a diversity of views on each issue, and have these reflected in the resolutions.

A third resolution in relation to the Human Rights Council was initiated by Switzerland. It sought to revive action on a 2008 decision of the Council which proposed the establishment of an Office of the President of the Council. Although this decision was 'acknowledged' by the General Assembly last year,<sup>107</sup> the lukewarm language was not strong enough to trigger a budget allocation to set up the Office. In this year's resolution, Switzerland proposed to 'strengthen the role and leadership of the President' of the Council, using the staff and resource arrangements of the Office of the President of the General Assembly as a model.<sup>108</sup> However, realising that this would raise significant budget implications, delegations were reluctant to support any immediate action.<sup>109</sup> As a result, Switzerland introduced a compromise text which found consensus.<sup>110</sup> Again, it only 'acknowl-

edged' the Council's recommendation to establish the Office, but it requested that the Council take up the matter as part of its review of its work and functioning in 2011.

The General Assembly's consideration of the **Council's report on its 12th special session on the human rights situation in the Occupied Palestinian Territory and East Jerusalem** spanned two full days and culminated in a vote by a large majority to endorse the report.<sup>111</sup> As was the case when the Council debated this report, member States in the General Assembly expressed a variety of views on the report and the way forward. Strong concerns about the content of the report and how it was handled in the Council were a factor in the decision of some States to oppose the resolution<sup>112</sup> or abstain from the vote.<sup>113</sup> Others were not comfortable 'endorsing' the report, but overcame their reservations to vote in favour of the resolution.<sup>114</sup> The fact that the EU vote was split three ways, with some African and Latin American States abstaining, was indicative of the extent to which this issue divided the international community.

The General Assembly resolution was more even-handed than the Council's. It called on both Israelis and Palestinians to launch 'independent, credible' investigations into the 'serious violations of international humanitarian and international human rights law' committed. It was also significant in another respect as it marked the first occasion that the Council referred a matter to both the Security Council and the General Assembly for action. Although this endeavour to link up the key UN organs with responsibility for human rights was a welcome undertaking, it seems unlikely that the Security Council will substantively take up the recommendations of the Goldstone report. This is due to the fact that the Middle East is a long-standing agenda item for the Security Council, and secondly, two permanent members (the US and the Russian Federation) publicly opposed the Goldstone report being referred to the Security Council. Nonetheless, many States will be keenly anticipating the Secretary-General's assessment of the 'independent, credible' investigations that both parties were required to undertake, which is due in early February 2010.

Although **the review of the Human Rights Council in 2011** was a frequent topic of conversation

<sup>104</sup> A/C.3/64/L.61.

<sup>105</sup> The Secretary of the Third Committee tried to reissue the text as a draft 'decision' of the Third Committee, rather than a 'resolution' as Zambia had intended. Zambia insisted that it be adopted as a 'resolution'.

<sup>106</sup> A/C.3/64/L.61

<sup>107</sup> Council Decision 9/103 (24 September 2008) was 'acknowledged' in General Assembly Resolution A/63/160, which was adopted by a vote of 121 in favour, 7 against, and 58 abstentions.

<sup>108</sup> The role and leadership of the President of the General Assembly was strengthened in General Assembly Resolution A/59/313, OP3 (2005). This Office is funded from the UN's regular budget and the staff are not part of the UN Secretariat.

<sup>109</sup> Some delegations did not want to jeopardise other funding proposals that were before the General Assembly, others did not want to pre-empt the outcome of the Council's review in 2011, and another group was concerned that other UN subsidiary bodies would seek a similar upgrade in staff and resources if the resolution were adopted.

<sup>110</sup> A/C.3/64/L.63.

<sup>111</sup> General Assembly Resolution 64/10. States in favour of the resolution numbered 114, while 18 voted against it and 44 abstained. More information on the content of the resolution and the General Assembly discussion is on the ISHR news archive for the General Assembly, available at [www.ishr.ch/archive-general-assembly](http://www.ishr.ch/archive-general-assembly) ('Goldstone report on Gaza conflict to Security Council', dated 11 November 2009).

<sup>112</sup> Australia, Canada, Israel, the Netherlands, the US.

<sup>113</sup> Liechtenstein, New Zealand, Russian Federation.

<sup>114</sup> Guatemala, India, Ireland, Mexico.

during the general discussion on the Council's report, little light was shed on when and how the General Assembly will approach its mandate to review the status of the Council.<sup>115</sup> Similarly, it remained unclear how the General Assembly's review process would interact and complement the Council's parallel review of its work and functioning.<sup>116</sup> During consideration of the Council's report, the President of the General Assembly advised member States that he had met with the President of the Council to discuss the review and would continue to work closely with him on the matter. He emphasised the need for the Council to be adequately resourced to undertake its review, and encouraged the Assembly to begin its preparations in close cooperation with the Council. Although it was widely known that the President of the General Assembly intended to appoint two facilitators to undertake preliminary consultations on the review, one from the 'North' and one from the 'South', these appointments had not been announced by year's end.

For his part, the President of the Council categorised the 2011 review<sup>117</sup> as one of the main challenges for the Council, and an important opportunity to 'fine-tune' some of its mechanisms. He warned that the review should not slow down the work of the Council or distract it from implementing its mandate. He appealed to all States and civil society to cooperate and collaborate in process so that the UN's human rights machinery would be strengthened. In terms of timeline, the President advised that the Council's working group on the review would meet in the second half of 2010 and report to the 17th session of the Council in June 2011.

During her interactive dialogue with the Third Committee, the High Commissioner, Ms Navanethem Pillay, made some general remarks about the review. She appealed to the members of the General Assembly to engage in the review process as early as possible in an inclusive and consultative spirit, and to focus on the status of the Council vis-à-vis the General Assembly.<sup>118</sup> She also called for discussions to take place at the regional level prior to the General Assembly formally taking up the matter in the latter part of 2010. During informal consultations with civil society, it was clear that Ms Pillay shared the concern of some States<sup>119</sup> that the review *not* be used to instigate substantive reform of the work and functioning of the Council. Not only would

a reform process be premature, it would also distract the Council from its core mandate. She was also an advocate of the active participation of NGOs in the process.

Comments by China, Egypt, Iran, Malaysia, Pakistan, and the Sudan suggested that they see the review process as an opportunity to reopen key elements of the institution-building package,<sup>120</sup> as well as broader questions like the mandate of the High Commissioner and her relationship to the Council.<sup>121</sup> It appeared that their repeated criticisms about key aspects of the Council's work and the operation of its human rights mechanisms were intended to pave the way for these issues to be part of the review process. Prominent here were their criticisms about the selection and conduct of special procedures; the geographic representation amongst and conduct of treaty body experts; the consideration of country-specific human rights situations; the participation of civil society in the work of the UN human rights system; and geographic representation amongst the staff of OHCHR.

Comments from States during the general discussion on the Human Rights Council report confirmed that some remain either deeply divided on the question of the status of the Council, or, in the case of the silent majority, are yet to form an opinion on the matter. For example, since the establishment of the Council, the EU, Japan, Lichtenstein, and New Zealand have consistently argued that its status as the UN's primary organ on human rights requires that its report be sent directly to the General Assembly plenary, by-passing the Third Committee. Others, such as the Sudan, have consistently argued that the report should be deliberated in the Third Committee, given its universal membership and human rights expertise. States are yet to engage on the bigger question of whether the Council should be upgraded from a subsidiary body of the General Assembly to a principal organ of the UN.

In relation to other aspects of the division of labour between the Council and the Third Committee, there were also divergent views among the few delegations that commented. For example, Iran and Indonesia suggested that the Third Committee should focus on policy-oriented discussions and strategic recommendations to the General Assembly, which in turn would guide

115  
General Assembly Resolution 60/251 states (OP1) that 'the Assembly shall review the status of the Council within five years'.

116  
General Assembly Resolution 60/251 states (OP16) that 'the Council shall review its work and functioning five years after its establishment and report to the General Assembly.'

117  
For information on discussions on the 2011 review at the Human Rights Council, please see the chapter on the Human Rights Council (pp. 9-31) in the present edition of the Human Rights Monitor.

118  
It remains unclear whether the review of status will only focus on whether the Council should remain a subsidiary body of the General Assembly or whether it will be interpreted more broadly to include issues such as the membership of the Council and its effectiveness more generally. The General Assembly resolution that established the Council and provided for the review does not provide any guidance on these questions.

119  
Argentina, Liechtenstein, Sweden (on behalf of EU).

120  
See Council Resolution 5/1.

121  
In its statement during the Third Committee's consideration of the Council's annual report, China said it did not believe that the purpose of the review was to 'start all over again, but to identify the shortcomings in the functioning of the Council and to improve its work'. However its critical remarks on various mechanisms of the Council suggested that it took a very broad interpretation of what might constitute the Council's 'shortcomings'.

the Council in its work and ‘help it mature’. In contrast, Switzerland thought the Third Committee’s universal membership suited it to a programme-based role. This would allow the Council to strengthen its operational role in the implementation of political commitments undertaken by States.

An important achievement for the High Commissioner and her Office this year was to secure **funding to upgrade the head of the New York Office of OHCHR to the level of Assistant Secretary-General (ASG)**. The High Commissioner had advocated for this upgrade from the beginning of her term in office, but finally managed to overcome significant resistance from unexpected quarters to secure the relatively small amount of money required (US\$40,000). In the Assembly’s Fifth Committee where budget matters are determined, Japan and Mexico were initially reluctant to increase OHCHR’s budget, given the economic crisis and the fact that the Office’s budget was doubled as a result of the 2005 World Summit, reflecting the international community’s recognition of human rights as the third pillar of the UN. However India proved to be a significant last-minute obstacle in the Fifth Committee, perhaps as a political rebuke for the High Commissioner’s critical remarks about caste-based discrimination during her official visit to India in March.<sup>122</sup> Although India ultimately did not stand in the way of the upgrade, it went so far as to make a statement in the Fifth Committee to officially register its displeasure in funding the post. The enhanced status of OHCHR in New York will enable it to participate in high-level Secretariat decision-making processes where it had previously been excluded, and to brief high-level organs such as the Security Council, at short notice. It also sends an important message to the highly bureaucratized UN structure that a more serious commitment to mainstreaming human rights is developing at UN headquarters.

in the closing stages of the 63rd session of the General Assembly.<sup>123</sup> However, Egypt reminded States that the establishment of this new agency was only one of several elements of a broader UN ‘system-wide coherence’ reform package, and as such, needed to be addressed in a ‘coordinated manner’. This implied that, in Egypt’s view, suggestions that the new agency would be up and running in the near future were overly ambitious as its establishment should not precede progress on other aspects of the system-wide coherence process. Nonetheless, the strong support of States for this new UN agency was welcomed in the resolutions on violence against women and the Beijing Declaration.<sup>124</sup> It was also positively received by the **Chairperson of the Committee on the Elimination of Discrimination against Women**, Ms Naela Gabr, the **Special Rapporteur on violence against women**, Ms Rashida Manjoo, and the High Commissioner, all of whom looked forward to collaborating with the new agency once it was established.

These independent mandate holders also congratulated the Security Council on its recent commitment to intensify efforts to end sexual violence against women and children in conflict situations, and its call for the new post of **Special Representative of the Secretary-General (SRSG) on sexual violence**.<sup>125</sup> In her dialogue with the Third Committee, the High Commissioner delivered a pointed message to the Secretary-General regarding her interest in ‘participating’ in the selection process for the Under Secretary-General to head the gender entity, and the appointment of the SRSG.

The focus of this year’s annual **resolution on violence against women** was on the role of the UN system in addressing and preventing violence against women. Some expected this would make it easier to negotiate than a text focusing on the role of States, which is the focus every other year.<sup>126</sup> However negotiations were difficult and frustrating for Western States, and two critical points of discussion remained unresolved at the end of the process. It was therefore no great surprise that the Sudan (on behalf of the Arab Group) introduced an amendment to reinsert a paragraph lifted from last year’s consensus text about the ‘persistence of armed conflict’ and ‘foreign occupation’ in many parts of the world.<sup>127</sup> After the Netherlands (one of the main sponsors along with France) pointed out that this year’s

<sup>122</sup> See the High Commissioner’s statement at the Indian Human Rights Commission, 23 March 2009, p.3 available at [http://idsn.org/fileadmin/user\\_folder/pdf/New\\_files/IDSN/UNHCHRspeechIndia23March.pdf](http://idsn.org/fileadmin/user_folder/pdf/New_files/IDSN/UNHCHRspeechIndia23March.pdf)

<sup>123</sup> General Assembly *Resolution 63/311* of 14 September 2009.

<sup>124</sup> PP2 of A/C.3/64/L.16/Rev.1 and PP17 of A/C.3/64/L.60.

<sup>125</sup> Security Council *Resolution 1888*, 30 September 2009.

<sup>126</sup> A/C.3/64/L.16/Rev.1.

<sup>127</sup> The Sudan’s amendment was contained in A/C.3/64/L.25.

## WOMEN’S RIGHTS

All regional blocs used the general discussion on women’s rights to reaffirm their support for **the new UN agency to support gender equality and the empowerment of women** that was agreed to

procedural text did not single out any particular form of violence, the Sudan's proposal was resoundingly defeated.<sup>128</sup>

The other point of contention in the informal negotiations was a proposal from Liechtenstein to incorporate language in both the preambular and operative paragraphs about the role of the International Criminal Court in combating impunity for violence against women. However, Egypt and the Sudan consistently argued that the ICC was *not* part of the UN system and therefore any reference to it did not belong in the resolution. A number of Western States were non-committal about its inclusion and deferred to the co-chairs to decide the matter,<sup>129</sup> much to the frustration of a cross-regional group of supportive States.<sup>130</sup> Disappointingly, the Netherlands and France decided the ICC reference did not belong in the text and Liechtenstein eventually dropped the proposal, although this probably helped the compromise text to be adopted by consensus in both the Third Committee and the General Assembly.

Lengthy and difficult negotiations on the **trafficking in persons resolution**<sup>131</sup> sponsored by Belarus underscored the division between States on how to combat trafficking. The main sponsor, with support from the African Group and the Russian Federation, opined that existing international instruments to combat trafficking had failed, and a Global Action Plan was needed. Other delegations<sup>132</sup> argued that it was not beneficial or cost-effective to divert efforts and resources away from the existing instruments and human rights mechanisms, and preferred to implement and enforce the Palermo Protocol on trafficking, and to assist governments with limited resources and capacity to do so.

This fundamental divide, plus a commitment on the part of most delegations to retain consensus, resulted in a text that was very similar to last year's. The final compromise text contained one relatively neutral paragraph which noted the appointment of facilitators to conduct consultations to 'consider' the development of a global action plan.<sup>133</sup> At the time of adoption of the text, Belarus referred to this reversion to old language as a 'smokescreen' to conceal the international community's inaction on human trafficking. Although the text was again adopted by consensus, it was clear that the international

community is along way from the 'global partnership against trafficking' that the resolution seeks.

It was therefore very timely that the OHCHR organised a high-level side event on trafficking that involved the UN Secretary-General, the High Commissioner, the Special Rapporteur on trafficking, and 4 trafficking victims. It was clearly designed to inspire a more concerted global effort, particularly on the part of States, to fight trafficking in a spirit of cooperation and using a human rights based approach. The very disturbing personal stories from all regions of the world clearly impacted on those in attendance, many of whom were State representatives.

## CHILDREN

The newly-appointed **Special Representative of the Secretary-General on violence against children**, Ms Marta Santos Pais, addressed the Third Committee for the first time since taking up her mandate in September 2009, following a very protracted appointment process. She outlined how she intended to use the recommendations of the UN study on violence against children as a 'navigation chart' to conduct her three year mandate. Thus her primary goals would be the introduction of a legal ban on all forms of violence against children and the development of a national strategy in each State.

The annual omnibus **resolution on the rights of the child** was one of the welcome upsets of this session.<sup>134</sup> The fact that the US did not call for a vote, but joined consensus for the first time in eight years, was a reflection of the policy change of the new Obama Administration.<sup>135</sup> However some credit must also go to the main sponsors, Sweden (on behalf of the EU) and Uruguay (on behalf of GRULAC). Breaking with old patterns, they began negotiations on the text very early in 2009 with a range of stakeholder groups. Although all existing sections of the text were retained, most were dramatically consolidated so that the emphasis was on new developments.<sup>136</sup> The only section not subject to this consolidation process was the thematic focus, which was on child participation and their right to be heard. The substance of this section benefited from

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The vote was 60 in favour, 52 against, and 40 abstentions.

129  
Belgium, Finland, Germany, Sweden, the UK.

130  
Argentina, Australia, Canada, Chile, Costa Rica, Finland, Kenya, New Zealand, Peru, Switzerland, Uruguay.

131  
A/C.3/64/L.11. The representative of Belarus described the negotiations as 'frank and bitter'.

132  
These included the EU, Canada, El Salvador, Japan, Norway, Switzerland, and the US.

133  
OP 8 of A/C.3/64/L.11/Rev.1

134  
A/C.3/64/L.21/Rev.1.

135  
Explaining its position, the US said its new support for the resolution did not imply that States must become a party to instruments that it has not ratified, nor did it reflect any change in the US position on customary law. Rather, it was committed to upholding the spirit of the *Convention on the Rights of the Child* and building on international progress.

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For example, the section on the 'economic and social well-being of children' was reduced from 10 paragraphs to two. The first of these (OP10) 'reaffirms' the ten paragraphs from the previous text. The second (OP11), picks up on the point made by the Chair of the Committee on the Rights of the Child and the new SRSG on violence against children, that States should ensure the global economic crisis does not threaten the full enjoyment of the rights of children.

the early involvement of UNICEF, which was later available in informals to explain the content to States and address their concerns. Support for the text was also garnered through two side events that introduced the thematic focus to States, coupled with a broad outreach campaign by the main sponsors. These improvements in process and substance meant that States such as New Zealand and Switzerland, which had been constructive critics of the resolution, were able to join as co-sponsors for the first time in three years. The fact that co-sponsors organised a side event in December 2009 to discuss the thematic focus for the 2010 resolution on the rights of the child (early childhood development), suggests that they plan to replicate this improved negotiation model.

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A/C.3/64/L.34/Rev.1, PP4. Brazil and the US objected to drawing a link between IDPs and climate change, with Brazil arguing there was no legal basis. US objections were overcome by President Obama's speech to the Copenhagen Conference in which he clearly acknowledged the link and the need for States to address it without delay.

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In relation to the former, Mr Kalin worked with UN Mediation Support Unit to produce a guide on internal displacement and peace processes for mediators, and with the latter, several of his recommendations on how to adequately address the needs of IDPs following armed conflict in the Central African Republic (CAR) were incorporated into the CAR strategic framework.

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A/C.3/64/L.30/Rev.1.

140

Although only one new paragraph (OP13) was added, Cuba made minor amendments to OP14 (indigenous peoples) and OP26 (WTO TRIPPs Agreement). The UK joined as a co-sponsor this year as a result of amendments to OP 14. The resolution was co-sponsored by 149 States, indicating the strength of support it now enjoys.

141

Argentina, Canada, Colombia, Norway, Sweden (on behalf of the EU). The US maintained that the right to food is not a formal, enforceable right, especially given it is not a party to the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).

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A/C.3/64/L.49, adopted by consensus. The new paragraphs were OP15-17.

143

For example, during informal negotiations, Cuba asserted it could not speak on behalf of NAM members, which meant discussion was very limited. When it came time to adopt the resolution, Cuba accused some States of having boycotted negotiations, and refused to introduce oral amendments it claimed were intended to achieve consensus.

144

Council Resolution 10/23, OP4.

and humanitarian actors to enhance the level of assistance they provided to the most vulnerable groups. This proved a controversial issue for some delegations, but ultimately Norway's biennial resolution on internally displaced persons incorporated strong language on the link between internal displacement and climate change.<sup>137</sup> Mr Kalin also advised that he had been collaborating with the UN Secretariat and deepened his engagement with the UN Peacebuilding Commission,<sup>138</sup> providing a much-needed model of how special procedures can act as an early warning system and an expert resource for the UN, as they were intended.

This year's resolutions on economic, social and cultural rights received a very mixed reception. The one positive stand-out was the adoption by consensus of the **resolution on the right to food**,<sup>139</sup> which was met with loud applause in the Third Committee. Rather than calling a vote and being the sole State to vote against the text, the US was able to join consensus for the very first time. This year also saw considerably more EU States join as co-sponsors as a result of Cuba's efforts to negotiate a consensus text.<sup>140</sup> Nonetheless, the US, along with a small number of other States, had lingering concerns with particular elements of the text which they drew attention to in their explanation of position.<sup>141</sup>

In contrast, the biennial **resolution on cultural diversity**, which was last adopted by consensus, went to a vote this year. This was surprising as apart from three new, non-controversial paragraphs, the text was almost the same as 2007.<sup>142</sup> However, in a break from previous years, the resolution was run by Cuba (on behalf of NAM) instead of Cuba in its national capacity, which significantly hindered any negotiation of the text.<sup>143</sup>

During the adoption of the resolution, Sweden (on behalf of the EU, Australia, Canada, New Zealand, Switzerland) and the US said they would have joined consensus again had Cuba been willing to incorporate language that they described as a 'valuable safeguard'. This language was contained in the UNESCO *Declaration on Cultural Diversity*, and had been incorporated into the consensus text on cultural diversity at the 10th session of the Council to avoid cultural diversity being used to justify infringements or restrictions on human rights.<sup>144</sup> Their disappointment was compounded by Cuba's rejection

## ECONOMIC SOCIAL AND CULTURAL RIGHTS

The human rights implications of the global economic crisis and its disproportionate impact on the poor and vulnerable populations was the focus of a number of presentations by special procedures. The **Special Rapporteurs on extreme poverty**, Ms Magdalena Sepulveda Carmona, and **foreign debt**, Mr Cephias Lumina, both drew attention to the need for States to provide social protection systems to cushion the effects of the crisis and assist all people to live with dignity. Further, they underscored States' obligation to take measures to avoid or mitigate the harmful consequences of the crisis, and to do so in a manner consistent with a human rights approach.

With the interactive dialogues taking place only a matter of weeks prior to the Climate Change Conference in Copenhagen, some special procedures drew attention to the associated human rights implications and obligations. The **Special Rapporteur on the right to adequate housing**, Ms Raquel Rolnik, stressed that a human rights approach had much to offer States that wanted to reduce the risks posed by natural disasters or develop climate change mitigation and adaptation strategies. The **Representative of the Secretary-General on internally displaced persons** (IDPs), Mr Walter Kalin, warned that the number of people displaced by climate-related disasters would increase and encouraged States

of their other request to delete the ambiguous reference to ‘universally accepted human rights’, which would have avoided the implication that some human rights were not universal. Again, this was a proposal that had been agreed to in the Council’s resolution. Rather than introduce their own amendments, the EU simply called for a vote on the resolution, which was adopted by a significant majority as a result of NAM’s united position.<sup>145</sup>

Cuba (on behalf of NAM) again displayed unwillingness to enter into good faith negotiations on the annual **right to development** resolution.<sup>146</sup> Even though the text was only slightly amended from that of 2008, largely to reflect the most recent resolution on the matter at the Council,<sup>147</sup> it met with considerable resistance this time around. On a substantive front, Western States<sup>148</sup> registered their long-standing concerns with the criteria developed by the Working Group on the right to development that may form the basis for a legally-binding international standard. Most of these States felt such an instrument was undesirable, or at best, premature. They also objected to the incorporation of language from the most recent NAM Summit, which did not reflect the views of all member States. On a procedural front, they were critical of the absence of a transparent and inclusive approach to the negotiations, and Cuba’s unwillingness to address any of their concerns. Sweden (on behalf of the EU) suggested that Cuba should bring a procedural text on this topic to future sessions of the General Assembly so that the substantive work could remain the responsibility of the Council. At the request of the US, the resolution was put to a vote and adopted by a significant majority, but not nearly as strong as last year’s vote, suggesting a possible return to more entrenched divisions on this issue.<sup>149</sup>

## HUMAN RIGHTS DEFENDERS

The increased targeting of human rights defenders and the grave violations committed against them around the world did not go unnoticed at the General Assembly this year. During the general discussion on country situations, the need for States to take action to prevent attacks against human rights defenders, and properly

investigate and prosecute the perpetrators was emphasised by Sweden (on behalf of the EU), Canada, Norway, and the US. The country resolutions on Iran and Myanmar also drew attention to the grave violations that have been committed against human rights defenders in those countries, and the obligation of each State to ensure their safety, security, and ability to conduct their work unhindered.

This year’s report by the **Special Rapporteur on human rights defenders**, Ms Margaret Sekagya, analysed the right to freedom of association and how it applied to human rights defenders. As she explained to the Third Committee, the adoption of increasingly restrictive national laws in all regions of the world was adversely impacting on the ability of civil society to function. She expressed ‘serious concern’ about the level of restrictions applied to, and direct State interference in the operation of, NGOs that were monitoring and speaking out about human rights violations or otherwise taking a critical stance on government actions and policies.

In a departure from the common practice among UN special procedures, the Special Rapporteur chose not to refer to any countries by name in her report or her comments to the Third Committee. Whilst this very diplomatic approach might have found favour with States who do not wish to be publicly ‘named and shamed’, and may encourage others to be more open to cooperation with the mandate holder, some States were clearly not convinced of its merits. For example, during the interactive dialogue, several Western States pressed the Special Rapporteur to provide details about which States imposed the greatest obstacles to human rights defenders and which provided best practice models.<sup>150</sup> In response, the Special Rapporteur encouraged States to use the UPR process to identify model practices, given that all States were required to participate in it. She did not believe referring to offending States by name would encourage them to take up her recommendations or otherwise improve the situation for human rights defenders.

Although this non-controversial approach might have helped the General Assembly to revert to its old practice of ‘welcoming’ the Special Rapporteur’s report in Norway’s biennial **resolution on human rights defenders**, and contributed to its

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The vote was 122 in favour, 50 against, and 4 abstentions (Armenia, Fiji, Japan, Timor-Leste). In the General Assembly, the vote was 126 in favour, 52 against, and 5 abstentions.

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A/C.3/64/L.47.

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Council *Resolution 12/23*.

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Canada, New Zealand, Sweden (on behalf of the EU), Switzerland, the US. Note that New Zealand and Switzerland had voted in favour of the text in the past, but this year switched to opposing it.

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The vote in the Third Committee was 130 in favour, 22 against, and 30 abstentions, and 133 in favour, 23 against, and 30 abstentions in the General Assembly. The EU vote was split between ‘no’ and abstention. In 2008, the vote in the Third Committee was 177 in favour, one against (US), and 2 abstentions (Canada, Israel). In 2007 the vote in the Third Committee was 121 in favour, 52 against, and one abstention.

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The UK, the US, Sweden (on behalf of the EU), Norway, and Australia.

consensus adoption, it did *not* assure the resolution an easy passage.<sup>151</sup> For example, China, Egypt, Pakistan, the Russian Federation, and Syria fought hard to retain the reference to the Code of Conduct in the preliminary paragraphs. Egypt went further and advocated for the additional incorporation of a reference to General Assembly *Resolution 62/219* (by which the General Assembly endorsed the Code of Conduct), or as a compromise, controversial Council *Resolution 11/11* (which reminded special procedures that they must 'comply fully' with the Code). These moves were effectively blocked by a number of Western and Latin American States, which in turn, had to make concessions in other parts of the text.<sup>152</sup>

Nonetheless, some of the key recommendations from the Special Rapporteur's report were incorporated this year. Whilst it was considered too ambitious to try to incorporate the Special Rapporteur's recommendation that all States abolish NGO registration requirements, the existing paragraph dealing with this aspect of freedom of association was significantly strengthened. In addition to States ensuring that registration processes are 'transparent, non-discriminatory, expeditious and inexpensive' this year's text also provided that States must 'allow for the possibility to appeal and avoid requiring re-registration.'<sup>153</sup> In order to achieve consensus, the sponsors had to bend to demands from Egypt, the Russian Federation, Singapore, and Venezuela that registration requirements should be 'in accordance with national legislation', but this language was off-set to some degree by the counter proposal that registration processes 'are also in conformity with international human rights law'.

Adding to the controversy this year was Norway's decision to 'streamline' the text, which Venezuela and others interpreted as a veiled attempt to remove language that had been incorporated in 2007, but which the co-sponsors were uncomfortable with. This was likely a factor in Venezuela's decision to submit a substantially amended text towards the end of the negotiation period, which effectively restarted the negotiations. One of Venezuela's ambitions was to retain the reference to the 'rights and responsibilities' of human rights defenders in the preamble, which it succeeded in doing, despite the best efforts of Switzerland and others to argue that defenders do not have additional responsibilities as compared to other people.

The resolution was taken up by the Third Committee late on a Friday afternoon, which proved highly advantageous when the DPRK sought to request a recorded vote, much to the surprise of all present. The Secretary of the Committee was embarrassed to advise that the voting technician had left the room, however after Norway called for a suspension of the meeting, the DPRK advised it intended only to abstain in any case, and could withdraw the request. Although the resolution was then adopted by consensus in the Third Committee, several delegations drew attention to their concerns with the text. Cuba regretted the omission of the Code of Conduct, a concern that was shared by the Russian Federation. Syria and Venezuela regretted the omission of violations of the rights of defenders under foreign occupation. Venezuela added that the text should have referred in greater detail to the rights and responsibilities of civil society, and in future, it would insist on both of these issues being included in a more comprehensive text. The General Assembly also adopted the resolution by consensus.

## LOOKING FORWARD

Looking to the next Council session in March 2010, it is likely that there will be a strong backlash against all special procedures in an effort to further restrict their interpretation of their mandates and strengthen the application of the Code of Conduct. Although this may not necessarily result in formal action being taken under the Code, those on the Council who would like to see more compliant mandate holders appointed will have a significant opportunity later in the year as several strong mandate holders reach the end of their maximum six-year term.<sup>154</sup> How these processes unfold and impact on the already fraught politics of the Council will feed into other major undertakings by the Council, particularly the first meeting of its open-ended working group on the review, which is set to get underway in the second half of the year.

The next session of the General Assembly is likely to be an explosive one due to the return of the resolution on the death penalty, coupled with the resolution on extrajudicial executions (and the associated vote on language regarding

<sup>151</sup> A/C.3/64/L.38/Rev.1, OP.2.

<sup>152</sup> Argentina, Chile, Canada, Colombia, the EU, Guatemala, Mexico, and Switzerland.

<sup>153</sup> OP5 of the 2007 text (General Assembly *Resolution 62/152*), and OP5 of this year's text (A/C.3/64/L.38/Rev.1).

<sup>154</sup> Among those whose large shoes will have to be filled are the Special Rapporteurs on extrajudicial executions (Alston), torture (Nowak), freedom of religion (Jahangir), DPRK (Muntarbhorn), internally displaced persons (Kalin).

sexual orientation), and the General Assembly's consideration of OHCHR's Strategic Plan for 2012-13 (Programme 19). The broad parameters of the review of the Council should also be more defined by this stage, enabling States to turn their minds to the question of how the General Assembly will approach the review of the status of the Council, and how this process will mesh (or not) with the Council's own review of its work and functions. How well these challenging and, in some cases, sensitive issues are handled at the General Assembly will depend to a large extent on developments at the Council over the course of the year. But equally important will be the extent to which States are able to use the interim period to conduct their own consultations and develop innovative, constructive, and progressive game plans that advance the protection and promotion of human rights.