

HUMAN RIGHTS COUNCIL IN 2009 – BETWEEN INERTIA AND ANOTHER REFORM

INTRODUCTION

In 2009, the Human Rights Council (the Council) held seven sessions including three regular sessions and four special sessions.

- 9th special session on ‘The Grave Violations of Human Rights in the Occupied Palestinian Territory including the recent aggression in the occupied Gaza Strip’, 9 January 2009
- 10th special session on ‘The Impact of the Global Economic and Financial Crises on the Universal Realization and Effective Enjoyment of Human Rights’, 20 February 2009
- 10th regular session, 2 to 27 March 2009
- 11th special session on ‘The human rights situation in Sri Lanka’, 26-27 May 2009
- 11th regular session, 2 to 19 June 2009
- 12th regular session, 14 September to 2 October 2009
- 12th special session on ‘The human rights situation in the Occupied Palestinian Territory and East Jerusalem’, 15-16 October 2009

In 2009, the Council’s work was characterised by well-known continuing political divisions between States often along regional and politi-

cal blocks. New controversies emerged on issues that have so far enjoyed broad agreement, such as combating torture and other cruel inhuman and degrading treatment or punishment, and freedom of religion or belief. At the same time a delicate consensus was restored on the right to freedom of opinion and expression, an issue that divided the Council in 2008.¹ This issue is closely connected to the debates on ‘defamation of religions’ and efforts to elaborate new international standards to combat contemporary forms of racism and religious intolerance, both of which continue to divide States.

In addition, new controversial topics were also introduced on the Council’s agenda, including a new resolution on traditional values and their contribution to human rights.

The Council continues to be reluctant to follow the advice and recommendations of independent human rights experts that report to it, including the High Commissioner for Human Rights (the High Commissioner) and the system of special procedures.² Some States continued to seek to limit the independence of the High Commissioner by calling for more State input into and influence over her work. The Council’s engagement with its special procedures was often tense. It erupted in verbal attacks on the

¹ See ISHR *Human Rights Monitor* 2008.

² The ‘special procedures’ is the system of independent experts mandated to examine and report on human rights themes and country situations. For more information, see www2.ohchr.org/english/bodies/chr/special/index.htm.

mandate holders' professionalism, integrity, and independence, with States alleging breaches of the *Code of Conduct for special procedures mandate holders* (the Code of Conduct). These attacks reached new levels of severity and frequency and were often directed at special procedures that were outspoken about violations of human rights in particular countries, examined sensitive human rights issues such as the death penalty, or disagreed with Council decisions, for example on 'defamation of religions'.

Addressing human rights violations in particular countries continues to be one of the most divisive aspects of the Council's work. The year was marked by the follow-up to the special session on Gaza in January that resulted in a high-level fact-finding mission led by Justice Richard Goldstone. The mission's report to the Council was one of the most important that it has received to-date. Its wide-ranging recommendations have raised questions about how the Council's work relates to that of other UN organs, in particular the General Assembly and the Security Council, but also the International Criminal Court (ICC).

While the Council often failed to respond to human rights situations that were brought to its attention by the High Commissioner, special procedures or non-governmental organisations (NGOs), it did take up two situations but with significantly different outcomes. The special session on Sri Lanka saw the re-emergence of anachronistic arguments about respect for State sovereignty, and the outcome failed to call for accountability for any human rights violations committed during the conflict in that country or establish any follow-up mechanism. It remains worrying that sovereignty arguments seem to be making their way into Council debates as some States continue to oppose the Council's legitimate role and clear mandate to address human rights violations. On the other hand, the Council responded in a timely manner to the coup d'état in Honduras during its regular session and requested follow-up reporting by the High Commissioner.

2009 also saw the beginning of informal discussions on the review of the 'work and functioning' of the Council. The review is supposed to be undertaken 'five years after [the Council's] establishment' in 2006, and the debate has been launched early although the formal process in the Council will only start after June 2010.

INSTITUTIONAL DEVELOPMENTS IN 2009

A slightly renewed membership

The May 2009 elections to the Council saw three regional groups presenting clean slates (Western European and Others Group, the Asian Group, and the Latin American and Caribbean Group) and thus effectively preventing competitive elections. The elections only led to minor renewal in the membership as 13 seats of the 18 seats to be filled were given to States that had already served one term.³ The new members took up their seats on 19 June 2009.

The use of clean slates was disappointing, particularly so from the Western Group which has strongly advocated for competitive elections and previously stated its own commitment to this. This was undoubtedly a result of their strong wish to ensure the election of the United States (US) that had put forward its candidature for the first time.⁴ Fears that the US would not get elected may however have been largely unfounded.⁵

In the Western Group, Canada, Germany and Switzerland left the Council. Belgium (which is currently also presiding over the Council) and Norway were elected. The election of Norway to the Council is expected to positively influence the Council's work with its strong commitment to multilateralism and genuine dialogue and its excellent diplomatic relations with a large number of countries. This was perhaps demonstrated by Norway receiving the highest number of votes (179) of all States contending for a seat in 2009.

In the Eastern European Group, Hungary (a member of the European Union) replaced Azerbaijan (a member of the Organization of the Islamic Conference), which stood for re-election but did not get enough votes (89, the lowest number of votes cast). Kyrgyzstan replaced Malaysia as a member of the Asian Group. Both of these States are members of the Organization of the Islamic Conference (OIC).⁶

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Cameroon, Nigeria, Senegal, Djibouti, Mauritius, the Russian Federation, Cuba, Mexico, Uruguay, China, Bangladesh, Jordan, and Saudi Arabia were re-elected. New members are: Norway, the US, Belgium, Kyrgyzstan, and Hungary.

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The US has re-engaged with the Council after deliberately keeping its distance since the Council's establishment in 2006. It has re-engaged with a clear overall policy that rests on three strategic elements for strengthening the Council: dialogue, principle and truth. See address by Ms Esther Brimmer, US Assistant Secretary of State, to the Council on 14 September 2009.

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Although the US got the least votes of the three candidates (US 167; Belgium 177; Norway 179) its candidature was broadly supported.

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The current number of OIC States that are members of the Council is 14.

Special procedures

As in previous years, the special procedures, the Council's independent experts and special rapporteurs, faced important challenges in effectively performing their independent mandates. The main obstacle to their effectiveness remains the serious lack of government cooperation with the special procedures, including lack of responses to communications and acceptance of requests for visits. Among the more egregious examples of non-cooperation were the arrest and deportation of the Special Rapporteur on the situation of human rights in the Occupied Palestinian Territories (OPT) by Israel,⁷ and the denial of entry into Zimbabwe of the Special Rapporteur on torture despite previous agreement on the visit.⁸

During the year, State criticism of individual mandate holders and of the system of special procedures as a whole grew both in frequency and severity.⁹ These verbal 'attacks' against the special procedures have particularly targeted mandate holders that raised human rights violations in a particularly frank and direct manner, and that raised sensitive issues.

The Council has never taken concerted action against the verbal attacks against mandate holders or addressed persistent cases of non-cooperation with special procedures.

The threat of the 'Code of Conduct'

Several mandate holders were accused of violating the *Code of Conduct for special procedures mandate holders*, which was adopted as part of the Council's institutional framework in 2007.¹⁰ At the time of negotiation of the Code of Conduct, many States and NGOs feared that it would be used to intimidate mandate holders into refraining from raising sensitive issues. Despite the fact that the stated purpose of the Code of Conduct was to 'enhance the effectiveness of the system of special procedures', the sometimes threatening references by States to the Code of Conduct when criticising special procedures proves otherwise. Mostly, these verbal attacks came from States that are opposed to strong and independent human rights mechanisms, including Egypt (on behalf of the African Group), Pakistan (on behalf of the OIC), Cuba

(on behalf of the Non-Aligned Movement), and Sri Lanka. However, during the 11th session, it also included States that are more supportive of the special procedures system, such as Brazil and Indonesia.

At the March session, the Special Rapporteur on torture, Mr Manfred Nowak, and the Working Group on arbitrary detention were accused of having violated the Code of Conduct. The 'attacks' on special procedures rose to unprecedented levels during the June session, with the heaviest criticisms levelled against the Special Rapporteur on the right to freedom of expression, Mr Franck La Rue, and the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr Philipp Alston. At the September session, the Special Rapporteur on racism, Mr Githu Muigai was also accused of violating the Code of Conduct.

Some allegations of violations of the Code of Conduct seemed to be based on some States' discomfort with the mandate holders' **interpretation of international law** in the area of their mandate. This was for instance the case with the criticism of Mr La Rue, as he was reproached for questioning the Council's decisions on the controversial issue of 'defamation of religions'.¹¹ His rejection of the concept of 'defamation of religions' was not well received.¹² Similar criticisms were mounted against the Special Rapporteur on racism, Mr Githu Muigai, who also expressed reservations about the concept.¹³ The criticism of the Special Rapporteur on torture concerned his analysis of the question of the 'compatibility of the death penalty with the prohibition of cruel, inhuman and degrading punishment'. States that disliked the report argued that Mr Nowak had exceeded his mandate and thus violated the Code of Conduct by examining this question. They expressed the view that capital punishment is a 'question of sovereignty', subject to regulation in domestic criminal law.

Other allegations of violations of the Code of Conduct concerned the special procedures' **visits to countries**. In these cases the country concerned accused the mandate holders of not having complied with the procedures for conducting their work.¹⁴ Some criticisms went much further and were personal and attempted to undermine the credibility of the special procedures. One example was Brazil's attack on Mr Alston, claim-

⁷ See www.unhcr.ch/hurricane/hurricane.nsf/view01/6AF7A972751DF2BAC125765100441AE3?opendocument.

⁸ <http://news.bbc.co.uk/2/hi/africa/8329984.stm>.

⁹ During the June session, China claimed that individual special procedures mandate holders had exceeded their mandates and politicised their work in 'violation of the purposes and objectives of the Code of Conduct'. During the September session, a number of States, including Azerbaijan, Tunisia, the Russian Federation, Pakistan (on behalf of the OIC), and Egypt (on behalf of the Non-Aligned Movement) raised the 'persistent trend of some mandate holders to ignore the Code of Conduct' in the dialogue with the High Commissioner for Human Rights.

¹⁰ Council *Resolution 5/1* and *5/2*.

¹¹ See ISHR's *Council Update* of 3 June 2009, available at www.ishr.ch/council_updates.

¹² Pakistan (on behalf of the OIC), Egypt (on behalf of the African Group), Sri Lanka, Indonesia, India, Qatar, and Malaysia all felt that the Special Rapporteur had exceeded his mandate.

¹³ See ISHR's *Council Update* of 30 September 2009.

¹⁴ The Working Group on arbitrary detention was accused by Colombia of violating the Code of Conduct by not annexing the State's comments to its report to the Council, despite having submitted its draft report to the Government and having incorporated some of the comments. Equatorial Guinea accused Mr Nowak of a violation of the Code of Conduct by presenting a preliminary note to the Council without giving the State a prior opportunity to comment.

ing he had questioned the credibility of official data on killings during a press conference after the Council's consideration of his report on the visit to the country. Brazil argued that the Special Rapporteur was prejudiced, and therefore had violated the Code of Conduct. Egypt (on behalf of the African Group) also accused Mr Alston of overstepping his mandate and violating the Code of Conduct by recommending that the Kenyan Attorney-General resign.¹⁵

Most allegations of violations of the Code of Conduct were raised by States that were directly concerned by the views of the mandate holders, either through a visit or a communication. It is worth noting that some States did express concerns about special procedures exceeding their mandates, but did not allege a violation of the Code of Conduct.¹⁶ An open and constructive dialogue between States and the special procedures is crucial to the effectiveness of the special procedures' work. States should therefore engage in an open debate with the special procedures about their findings and recommendations even when they do not agree with those. Accusing mandate holders of violating the Code of Conduct whenever there is such disagreement could lead to the kind of self-censorship that many feared the Code of Conduct would induce.

The attacks against the special procedures formed the backdrop for a draft resolution introduced by Cuba at the June session, on 'enhancing the system of special procedures'.¹⁷ While Cuba introduced the text on behalf of the Non-Aligned Movement (NAM), it transpired that not all of its members endorsed the initiative, with Chile openly disassociating itself. Although Cuba claimed that the purpose of its text was to 'strengthen the system of special procedures' and 'express confidence in the work of mandate holders', it appeared that the opposite was the case. By selectively quoting from the Code of Conduct and not making reference to the obligations of States to cooperate in good faith with the special procedures, the resolution had potential to restrain the work of mandate holders rather than enhancing the functioning of the system. On the last day of the session, Cuba introduced several key amendments requested during the negotiations by States that were opposed to the draft, including on the obligation of States to cooperate with mandate holders. These significant changes essentially altered the originally

very negative thrust of the draft, and enabled its consensual adoption. Nevertheless, several explanatory statements were made, expressing reservations about the resolution.¹⁸

INTERACTION WITH THE HIGH COMMISSIONER

In March 2009, the High Commissioner for Human Rights, Ms Navanethem Pillay, presented her annual report to the Council¹⁹ and at each session briefed the Council on critical human rights issues. Generally, the interaction between the High Commissioner, States, and NGOs was constructive and less confrontational than had been the case with the former High Commissioner. The main dialogue with the High Commissioner was also more interactive than many other debates in the Council as Ms Pillay responded to question from States and NGOs three times.

While States generally expressed appreciation for the High Commissioner's efforts at holding open and transparent consultations with all States throughout the year and commended her openness to dialogue, some States²⁰ were rather critical with regards to the establishment of **field presences of the Office of the High Commissioner for Human Rights (OHCHR) and the geographical composition of OHCHR's staff**. Although both the previous and current High Commissioner have recognised the lack of 'balanced geographical representation' in the staff of OHCHR, and have addressed it, the discussion seems also related to the desire of some States to exert more control over OHCHR activities through the Council. Some States criticised the High Commissioner for making insufficient progress in ensuring a more balanced representation among staff,²¹ and Cuba (on behalf of NAM) asked that Ms Pillay indicate a timeline for fixing 'the problem'. Egypt (on behalf of the African Group) claimed that the composition of OHCHR staff should reflect the ratio of the different regional groups within the UN system. In her response, the High Commissioner, while pointing to progress made, acknowledged the problem as a high priority.²²

Cuba was the main sponsor of a resolution on the composition of OHCHR staff aimed at

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See A/HRC/11/2/Add.6, mission report on Kenya. Interestingly, Kenya expressed the view that the recommendation on the resignation of a public official was beyond Mr Alston's mandate but did not accuse him of violating the Code of Conduct.

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The US, speaking to Mr Alston's report on Afghanistan, was of the view that 'military operations during armed conflict do not fall within the Special Rapporteur's mandate'.

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Council Resolution 11/11.

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Switzerland and Germany (on behalf of the EU) expressed some reservations while Canada distanced itself from the text.

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A/HRC/10/31.

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Pakistan (on behalf of the OIC), Egypt (on behalf of the African Group), Cuba (on behalf of the NAM), and many developing countries belonging to these groups.

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India and Sri Lanka were particularly critical.

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A/HRC/10/45, 'Report of the High Commissioner for Human Rights on the composition of the staff of the Office'.

increasing the representation of staff from developing countries.²³ The resolution was adopted after a vote called by Germany (on behalf of the European Union) by 33 in favour, 12 against, and two abstentions.²⁴ Canada, Germany (on behalf of the EU), and Switzerland spoke against the resolution before its adoption, explaining that the Council, in their view, has no competence to deal with this matter, which is exclusively under the purview of the Fifth Committee of the General Assembly.²⁵ They also objected to the introduction of a concept of regional balance in departure from agreed UN practice which focuses on geographical balance based on countries of nationality. The resolution also invites the High Commissioner to consider introducing a zero-growth cap on recruitment of staff from countries or regions that are already over-represented in OHCHR.

Turning to more substantive issues, the High Commissioner in June encouraged the Council to draw more attention to the situation of civilians in armed conflict. In this context she updated the Council on a number of relevant situations, including in Afghanistan, Chad, Colombia, the Democratic Republic of the Congo (DRC), Iraq, Nepal, the OPT, Pakistan, Sri Lanka, and the Sudan.

In September, the High Commissioner highlighted a number of ‘overarching concerns’ that affect many States and are often at the root of chronic human rights situations and emergencies.²⁶ She highlighted flagrant discrimination against indigenous peoples,²⁷ minorities,²⁸ and women;²⁹ lack of respect for international humanitarian and human rights law during armed conflicts;³⁰ the need for increased efforts to realise economic, social and cultural rights, including through the ratification of the optional protocol to the *International Covenant on Economic, Social and Cultural Rights*; the treatment of irregular migrants; and the suppression of free voices, including attacks on human rights defenders and journalists. It was notable that in addressing these issues the High Commissioner drew attention to concerns and positive developments in relation to more than 35 countries. The statement and approach was welcomed by most States, with the OIC and the African Group expressing appreciation for the objective and balanced approach she had taken by drawing on examples from all regions of the world.

However, Sri Lanka, the Sudan, and Zimbabwe refuted her comments as baseless and an expression of double standards. China argued that the comments on the tensions in two of its regions were ‘internal matters’ and had nothing to do with minority issues. Tunisia (on behalf of the Arab Group) argued that States have a sovereign right to enter reservations to treaties in response to Ms Pillay’s call for the lifting of reservations to the *Convention on the Elimination of Discrimination against Women*.

The High Commissioner’s attention to such a large number of country issues resulted in a rich debate and the engagement of many States that are often not active in the Council’s discussions. It should therefore be welcomed and repeated.

As some States continue to seek to limit the influence of independent voices in the Council, it is not surprising that some have argued that the High Commissioner should not use the opportunity to update the Council at each session to set out priority issues that she believes the Council should address.³¹ They argue that only the annual report should be used for that purpose and that the updates should merely provide information on recent developments.

While States seem to have generally given Ms Pillay a positive reception since she took up office in September 2008, her strong positions on some human rights issues and country situations and defence of the independence of her Office is starting to lead to more open tensions and some direct criticism. During 2009 the High Commissioner was criticised by some States for her strong call for accountability for human rights violations committed in Sri Lanka,³² and for her support for equal human rights protection for all regardless of sexual orientation.³³ OHCHR’s Strategic Management Plan for 2010-2011 also makes it clear that fighting discrimination, including on grounds of sexual orientation, is one of the High Commissioner’s six thematic priorities.³⁴ Her support for these issues has not diminished even in the face of strong opposition from some States.

The High Commissioner also continued to defend the independence of her mandate and that of her Office. Some States have argued that they should be consulted in the development of OHCHR’s Strategic Management Plan, relying on a recommendation made by the Joint Inspec-

23 Council Resolution 10/5.

24 Chile and the Republic of Korea abstained, while members of the EU together with Canada, Japan, and Switzerland voted against. For the full details of the vote, please visit the OHCHR extranet.

25 The Fifth Committee is the Committee of the General Assembly with responsibilities for administration and budgetary matters. For more information see www.un.org/ga/fifth/about.shtml.

26 These concerns largely coincide with the six thematic priorities the High Commissioner has set out in her Strategic Management Plan for the next biennium.

27 Ms Pillay drew on examples from Colombia and Bolivia and called on Canada, New Zealand, and the US to endorse the *Declaration on the Rights of Indigenous Peoples*.

28 She highlighted the treatment of minorities in China’s Xinjian and Tibet regions and the situation of Roma in a dozen European countries.

29 She particularly noted that the situation of women in the Gulf region falls short of international standards.

30 She drew attention to Afghanistan, Colombia, the eastern part of the DRC, the OPT, Somalia, Sri Lanka, the Sudan, and Yemen.

31 Pakistan (on behalf of the OIC).

32 India stated that it would be unfortunate if the High Commissioner or OHCHR were to ‘misinterpret or willfully supersede’ decisions by the Council at their ‘convenience or in accordance with the agenda of some States or unrepresentative or unaccountable organisations, or to pursue their own agenda’. This was in reference to the Council’s decision at its 11th special session to not address accountability issues in Sri Lanka, which the High Commissioner indirectly questioned when she subsequently called for an independent international inquiry.

33 Pakistan (on behalf of the OIC) regretted that the High Commissioner addressed an issue that ‘does not enjoy universal agreement’. In June she was a key note speaker at a high level panel discussion on human rights, sexual orientation and gender identity held in parallel to the Council’s session.

34 www.ohchr.org/EN/PublicationsResources/Pages/AnnualReportAppeal.aspx.

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The report of the Joint Inspection Unit is available at www.unju.org/data/reports/2007/en2007_08.pdf.

36

Cuba (on behalf of NAM), Egypt (on behalf of the African Group).

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A list of all the annual reports by Council session is available at www.ishr.ch/browse-documents-docman/doc_download/871-annex-to-hrm-2010-list-of-thematic-special-procedures-report-considered-in-2009.

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He concluded 'that the historic interpretation of the right to personal integrity and human dignity in relation to the death penalty is increasingly challenged by the dynamic interpretation of this right in relation to corporal punishment and the inconsistencies deriving from the distinction between corporal and capital punishment, as well as by the universal trend towards the abolition of capital punishment.' The Special Rapporteur invited 'the Council to request a comprehensive legal study on the compatibility of the death penalty with the right to personal integrity and human dignity.'

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Egypt, Pakistan (on behalf of the OIC), Saudi Arabia, China, Bangladesh, Yemen (on behalf of the Arab Group), Algeria, Iran, the Sudan, Botswana, Singapore, and Malaysia.

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Brazil, Spain, Switzerland, Luxembourg, Thailand, Slovenia, and New Zealand.

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Council Resolution 10/24.

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Egypt's position was even more remarkable in that it has traditionally co-sponsored the resolutions on torture.

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27 in favour, ten against, and ten abstentions. In favour: Angola, Argentina, Bolivia, Bosnia and Herzegovina, Brazil, Cameroon, Canada, Chile, France, Gabon, Germany, Italy, Japan, Madagascar, Mauritius, Mexico, the Netherlands, Nicaragua, Nigeria, the Republic of Korea, Slovakia, Slovenia, Switzerland, the United Kingdom (UK), Ukraine, Uruguay, and Zambia. Abstained: Azerbaijan, Burkina Faso, Cuba, Ghana, Indonesia, Jordan, the Philippines, the Russian Federation, Senegal, and South Africa. Against: Bahrain, Bangladesh, China, Djibouti, Egypt, India, Malaysia, Pakistan, Qatar, and Saudi Arabia.

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See also the section on special procedures and the chapter on the General Assembly, where the acknowledgement of a report by the Special Rapporteur on human rights and fundamental freedoms while countering terrorism was effectively 'deleted' from the relevant resolution.

tion Unit in 2007, in a report that was never presented to the Council.³⁵ However, the High Commissioner has insisted that this is an internal management tool and not a document that should be approved by States.

During the year some States also repeated calls for a formal debate in the Council on the relationship between OHCHR and the Council,³⁶ whereas others were firmly of the opinion that this relationship is sufficiently clearly defined. The Russian Federation suggested in June that this issue should be discussed in the context of the 2011 review of the Council. China argued that there should be 'greater supervision and guidance of the High Commissioner's work'.

THEMATIC WORK

In 2009, the Council's 31 thematic special procedures reported to it.³⁷ The following section examines in more detail some of the Council's key debates with the special procedures.

Torture and death penalty report

At its March session, the Council considered the annual report of the **Special Rapporteur on torture** and other cruel, inhuman or degrading treatment or punishment, Mr Manfred Nowak. It focused on the 'compatibility of the death penalty with the prohibition of cruel, inhuman and degrading punishment' and on a human rights based approach to drug policies. Mr Nowak explained that he had examined the death penalty in response to a question posed by France (on behalf of the EU) during the 63rd session of the General Assembly. Although he did not conclusively argue that the death penalty constitutes torture or cruel, inhuman or degrading treatment,³⁸ the report provoked a strong reaction from many States who rejected his analysis.³⁹ Other States encouraged further discussion of the issue,⁴⁰ though it was notable that neither France nor the EU as a whole commented, apparently not genuinely interested in the topic. This raised questions about the EU's intentions when posing the question in the General Assembly. The reactions of many States to the report on the

death penalty impacted the negotiations of the resolution on torture led by Denmark. Departing from previous practice of presenting an omnibus resolution on torture, it proposed a focused text dealing with 'the role and responsibility of medical and other health personnel', containing a set of ethical principles for medical and other health personnel.⁴¹ As is standard practice, the draft resolution welcomed the work of the Special Rapporteur, although his report focused on a different theme. This led to difficulties during the resolution's negotiations, as many States objected to positively acknowledging the report.

Egypt called for a vote on the paragraph, which had been watered down to merely 'take note' of the report.⁴² The Council decided by a relatively large majority to maintain the paragraph.⁴³ However, the attempt to 'ignore' a report presented to the Council because its content does not correspond to the interpretation of some States is worrying.⁴⁴ The resolution was then adopted by 34 in favour, none against, and 13 abstentions.⁴⁵ The majority of States that abstained on the vote on the paragraph voted in favour of the resolution as a whole. Those States that had voted against the paragraph abstained on the vote on the resolution as a whole and were joined by Ghana, Jordan, and Senegal that had abstained on the paragraph.

Racism and defamation of religions

The Council's discussions on racism were marked by the holding of the Durban Review Conference in April 2009.⁴⁶ The Council served as the preparatory committee for the Review Conference and negotiated the final outcome document.⁴⁷

While the Outcome Document of the Review Conference was eventually adopted by consensus, several States decided not to participate in the Conference itself.⁴⁸ The preparatory process reignited some of the controversies that surrounded the World Conference against Racism held in 2001 and these were used by some States as a reason to disengage from the process. The compromise agreed upon did not use the controversial concept of 'defamation of religions' but instead found new language that reaffirmed the international prohibition of hate speech and

incitement.⁴⁹ However, this did not prevent the main proponents of the concept, in particular Pakistan (on behalf of the OIC) from again presenting a resolution on the topic in March.⁵⁰ The resolution requests the High Commissioner to present a report on the 'possible correlation between defamation of religions and the upsurge in incitement, intolerance and hatred in many parts of the world' at the March 2010 session of the Council.

Notably, the resolution was adopted by a larger margin than in 2008.⁵¹ This was in part due to Bolivia and Gabon changing their vote from abstention to in favour. While Gabon is an OIC member and has realigned its position to that of the group, it is not clear what may have motivated Bolivia to support the resolution. The resolution calls on the Special Rapporteur on racism to report on defamation of religions and on the implications of Islamophobia on the enjoyment of human rights.

The new Special Rapporteur on racism, Mr Githu Muigai, presented his first report to the Council in June, which focused on the Durban Review Conference.⁵² His second report to the Council in September focused on 'defamation of religions' as requested by the above-mentioned resolution.⁵³

The Special Rapporteur suggested a renewed approach to 'defamation of religions' by focusing on existing human rights norms that offer protection to individuals. He stated further that the 'terminology controversy' regarding the concept of 'defamation of religions' has distracted the attention of the Council from real problems. While the report was an attempt at moving the debate forward on the issue, it was not successful. Several States⁵⁴ and regional groups, including the OIC, the African Group, the Arab Group, and NAM, criticised the Special Rapporteur for not adequately addressing manifestations of 'defamation of religions' with Nigeria (on behalf of the African Group) and Pakistan (on behalf of the OIC) claiming that the Special Rapporteur had overstepped his mandate and breached the Code of Conduct. They accused the Special Rapporteur of having 'dwelled extensively on the conceptual debate on the issue of defamation of religions and incitement to religious hatred, invariably redefining the mandate'. Nigeria (on behalf of the African Group) also expressed dis-

agreement with the Special Rapporteur's conclusion that the existing international legal framework is adequate for combating religious discrimination. The same conclusion has been drawn by several other experts before Mr Muigai but, regrettably, States supporting the development of new international standards are not open to the ample expert advice that has been provided on this issue.⁵⁵

Other States supported the Special Rapporteur's approach to move away from the sociological concept of 'defamation of religions' and to deal with the issues within the existing legal framework regarding incitement to hatred. They expressed concerns about the approach proposed by the resolution that focuses on Islamophobia and underlined that religious intolerance is a worldwide problem not limited to one region or religion. These views were also echoed by other States during their explanation of vote on the resolution on defamation of religions.⁵⁶

It can be expected that Pakistan will again present its resolution on defamation of religions at the Council in March 2010. While there seems to be a progressive drop in support for this resolution in the General Assembly, the same cannot yet be said about the Council.⁵⁷ The support for the resolution dropped from 2007 to 2008 but then rose again. The number of States squarely opposed to the initiative has dropped from 14 in 2007 to 11 in 2009 (and ten against in 2008). These votes continue to belong to the EU, the Western Group, and this year also included Chile, which became a Council member in June 2009. However, since Mexico and Uruguay, both current Council members, voted against the similar resolution in the General Assembly this year, an increase in opposition in the Council can be expected in 2010.⁵⁸

Freedom of expression

In June, the Special Rapporteur on freedom of opinion and expression, Mr Franck La Rue, presented his first report to the Council.⁵⁹ He outlined three areas that he would focus on in future reports: limitations on the right to freedom of expression; safety and protection of journalists in armed conflict; and the right to access to information in situations of armed conflict.

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The resolution was put to a vote despite procedural objections by Chile, Switzerland, Canada, Mexico, and the Netherlands. Egypt argued that if part of a resolution has been voted upon, the entire resolution must automatically be subject to a vote. The argument was regrettably left unresolved by the President. He simply stated that since there was no consensus on the text, the Council would proceed to a vote on the resolution as a whole. This allowed Egypt not to be seen to be calling for the vote on the resolution as a whole, an action that it was clearly keen to avoid.

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The Review Conference was held in follow-up to the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban, South Africa, in 2001.

47
The Outcome Document is available at www.un.org/durbanreview2009/.

48
The US, Israel, Germany, Italy, Australia, Canada, and New Zealand.

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See Paragraphs 13 and 68 of the Durban Review Conference Outcome Document.

50
Council Resolution 10/22.

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In 2009 the resolution was adopted by 23 votes in favour, 11 against, and 13 abstentions, compared to 2008 when the vote was 21 in favour, ten against, and 14 abstentions. Angola did not cast a vote in 2008 but voted in favour in 2009. Bosnia and Herzegovina did not cast a vote in 2008 but abstained in 2009.

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A/HRC/11/12.

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A/HRC/12/38.

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Iran, Iraq, Malaysia, Algeria, Tunisia, Pakistan, Syria, Qatar, Azerbaijan, and Indonesia.

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For a more detailed discussion on the debates surrounding the development of new international standards to combat contemporary forms of racism, please see the chapter on developments in international law, pp. 125-135.

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Germany (on behalf of the EU), Canada, Chile, India, and Angola.

57
Please see the chapter on the General Assembly, pp. 93-113.

58
Both abstained on the resolution in the Council.

59
A/HRC/11/4.

Despite making it clear that he would address limitations to freedom of expression, a controversial topic that was introduced into the mandate through a voted amendment to the main resolution in 2008,⁶⁰ several States criticised the Special Rapporteur for not having given sufficient attention to this aspect of his mandate.⁶¹ Many members of the OIC also questioned the Special Rapporteur's suitability for the mandate as he had issued a statement with several regional mechanisms on freedom of expression, questioning the use of the concept of 'defamation of religions'.⁶² They argued that Mr La Rue had violated the Code of Conduct by calling into question decisions by the Council and warned that they would continue to watch his behaviour closely and take action if he did not correct it. This was among the most explicit threats and acts of intimidation against mandate holders during the year.

⁶⁰ Council Resolution 7/36, adopted by 32 votes in favour and 15 abstentions. The amendment was passed by 29 votes in favour, 15 votes against, and three abstentions.

⁶¹ Egypt (on behalf of the African Group), Pakistan (on behalf of the OIC), Saudi Arabia, Azerbaijan, and the United Arab Emirates.

⁶² Following a meeting on 9 December 2008, as part of the Global Forum on World Media Development, the Special Rapporteur, along with the Organization for Security and Cooperation in Europe (OSCE) Representative on freedom of the media, Miklos Haraszti, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression, Catalina Botero, and the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information, Faith Pansy Tlakula, issued a joint declaration on defamation of religions, and anti-terrorism, and anti-extremism legislation

⁶³ See the Resolution's Paragraph 4: 'Also expresses its concern that incidents of racial and religious intolerance, discrimination and related violence, as well as of negative racial and religious stereotyping continue to rise around the world, and condemns, in this context, any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, and urges States to take effective measures, consistent with their obligations under international human rights law, to address and combat such incidents'.

⁶⁴ Council Resolution 12/16.

⁶⁵ A/HRC/10/8.

⁶⁶ Council Resolution 10/25.

The 2008 resolution on freedom of opinion and expression, that renewed the mandate of the Special Rapporteur, was adopted by a vote for the first time following the introduction of the controversial amendment mentioned above. Canada, the traditional main sponsor of the resolution, did not present a text in June as is usual practice to follow up the Special Rapporteur's report. Instead, the resolution was quietly passed to the unusual alliance of the US and Egypt, who jointly presented a new draft resolution in September with the aim of re-establishing consensus within the Council on this sensitive topic.

The US explained that it had been a main sponsor of the draft resolution as a demonstration of its stated commitment to multilateral engagement within the Council. Egypt acknowledged that the resolution may not satisfy the aspirations of all. Indeed, it was criticised by some for falling short. South Africa saw it as a 'major setback' as it did not adequately reflect Article 20 of the *International Covenant on Civil and Political Rights* (ICCPR) on the prohibition of incitement to discrimination, hostility or violence; did not reaffirm General Comment No. 15 of the Committee on the Elimination of Racial Discrimination on Article 4 of the Convention on prohibition of incitement to racial discrimination and hatred; nor was its content on stereotyping sufficiently clear. This latter element proved to be the resolution's most controversial provision.⁶³ The compromise that the paragraph strikes is

the subject of competing interpretations by the EU and the OIC. The EU reiterated its understanding that 'racial and religious stereotyping' only applies to individuals, whereas the OIC reaffirmed its view that stereotyping or defamation of religions results in stereotyping of and discrimination against the followers of religions. Chile made strong comments reaffirming that restrictions on freedom of expression must be in accordance with international law and that the concept of defamation of religions could lead to prohibition of opinions beyond those provided in human rights law and that such an expansion should be avoided.

Despite these differences of opinion, the resolution was adopted without a vote.⁶⁴ It will particularly interesting in the coming year to see how Egypt and the US will be able to build on this newfound consensus, that is still underpinned by significant differences of opinion on the scope of freedom of expression. It will also be worth watching whether the drafting by the Human Rights Committee of a general comment on Article 19 of the ICCPR, which is expected to progress in 2010, will impact these debates.

Freedom of religion or belief

The **Special Rapporteur on freedom of religion or belief**, Ms Asma Jahangir, presented her annual report, which focused on the link between discrimination on the basis of religion or belief and the enjoyment of economic, social and cultural rights.⁶⁵ The report was given follow-up through a **resolution on discrimination based on religion or belief and its impact on economic, social and cultural rights**, presented by the Czech Republic (on behalf of the EU).⁶⁶

For the first time in the Council the resolution on freedom of religion was adopted by vote: 22 in favour, one against, and 24 abstentions. The vote was called by Pakistan (on behalf of the OIC) explaining that it would abstain. It expressed concerns about 'imbalance' in the text and argued that distinctions between religious communities do not constitute discrimination. South Africa stated that it had major problems with the resolution and would vote against. It explained that the lack of reference in the text to the justiciability of economic, social and cultural

rights was ‘inconceivable’ and it also found the shift in focus from religious intolerance to discrimination based on religion or belief ‘problematic’. Indonesia, Malaysia, Cuba, and the Russian Federation also expressed concerns.

New independent expert in the field of cultural rights

At its March session, the Council created a new special procedures mandate on cultural rights. The initiative was led by Cuba and initially faced some opposition because of its focus on ‘respect for cultural diversity’.⁶⁷ Several States felt that the resolution should have a more solid focus on human rights, and were wary of the introduction of the vague notion of ‘cultural diversity’. While the adopted resolution still recognises ‘that cultural diversity and the pursuit of cultural development by all peoples and nations are a source of mutual enrichment for the cultural life of humankind’, it reaffirms the duty of States to protect all human rights and fundamental freedoms. Among the first tasks for the new independent expert will be to ‘study the relationship between cultural rights and cultural diversity’. At its September session, the President appointed Ms Farida Shaheed from Pakistan as the first Independent Expert in the field of cultural rights. Many NGOs supported her candidature because of her extensive work on the intersections of culture, gender, and human rights.

Traditional values

The Russian Federation presented a new and controversial resolution in September on ‘promoting human rights through a better understanding of traditional values’. It sought to introduce this new initiative already in June but in the face of significant reservations and opposition it delayed it.

The negotiations at the September session only began late in the session and the Russian Federation had not taken on board any of the suggestions made during the earlier discussions of the draft in June. Several States expressed strong opposition to the draft and argued that the term ‘traditional values’ is far too vague and open to

abuse, including as a pretext to derogate from established human rights norms.⁶⁸ Other States argued that there was indeed a need to better define ‘traditional values’ and hence the need for the workshop that the resolution calls for.⁶⁹ Despite pressure from a number of States urging a greater recognition in the text of universal human rights standards, the Russian Federation refused to take on board any suggestions.

Before the resolution’s adoption by a vote of 26 in favour, 15 against, and six abstentions, several States again expressed their reservations explaining that the resolution had the potential to undermine human rights norms and the protection of groups at particular risk such as women, children, and minorities.⁷⁰ China, Indonesia, and Senegal all expressed their support for the resolution. Interestingly, Senegal explained that traditional values in no way should be allowed to impinge on human rights and that it was a ‘challenge for the Council that it will in no way be fooled’. The workshop is to be convened in 2010 and it remains to be seen whether it will make a positive contribution as claimed by the Russian Federation, or whether some of the Council’s members may have been ‘fooled’ by what was presented as a well-intended initiative.⁷¹

Cooperation with the UN, its representatives and mechanisms

For the first time in the Council, Hungary presented a draft resolution on ‘cooperation with the UN, its representatives and mechanisms’ to the September session. This resolution was passed on a yearly basis at the time of the former Commission on Human Rights, and its introduction and updating at the Council is welcome. The resolution, commonly referred to as the ‘reprisals resolution’, addresses the responsibility to protect people that cooperate or seek cooperation with the UN system from all acts of intimidation or reprisal. Hungary highlighted the importance of this resolution referring to recent statements directly threatening human rights defenders. In fact, the Council has so far done very little to follow-up on acts of intimidation or reprisals brought to its attention.

Hungary explained that the resolution’s scope had been expanded to all UN human rights

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The original title of the draft resolution was ‘promotion and protection of cultural rights and respect for cultural diversity’.

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The EU, the US, Japan, Australia, Switzerland, the Republic of Korea, Argentina, Brazil, and Canada.

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Cuba, Belarus, Malaysia, Indonesia, China, Bangladesh, and Egypt.

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The EU, Chile, Mexico, Japan, the US, Argentina, and the Republic of Korea.

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The following States abstained on the vote, seemingly not convinced by the initiative but not opposed to it either: Argentina, Bosnia and Herzegovina, Brazil, Ghana, Ukraine, and Uruguay.

representatives and mechanisms, including for example field presences of the OHCHR, the human rights components of peacekeeping missions, and human rights advisors to UN country teams. In addition, the resolution recognises efforts by States to investigate allegations of intimidations and reprisals, which according to Hungary was based on specific incidents earlier in the year. However, while initial drafts had welcomed the measures taken by some governments to keep the Council informed of their actions, the adopted version is silent on this issue. The resolution asks the Secretary-General to collect information on cases of reprisals, and present them to the Council at the June 2010 session. It is hoped that this report will receive more attention and lead to a more substantive reaction of the Council to the serious issue of reprisals.

KEY THEMATIC DEBATES

International crises: food, climate change, and finances

In February the Council convened its 10th special session, at the initiative of Brazil and Egypt (on behalf of the African Group) with a focus on the impact of the global financial and economic crisis on the enjoyment of human rights.⁷² Despite the expressed wish by many delegations that the Council send a strong and unified message on the topic, and the efforts of the main sponsors to reach an agreement, the Council failed to reach a consensual outcome.⁷³ Instead, it remained divided between developed and developing countries. Most developing countries underlined the need for international assistance in addressing the crisis and argued that international financial institutions should be reformed. Developed countries on the other hand highlighted the role and responsibility of governments in protecting and respecting human rights and that the crisis only made this responsibility more acute.

Despite these divisions, the Council was able in September to adopt a follow-up resolution without a vote.⁷⁴ The resolution calls for the holding of a high-level panel discussion in March

2010. Despite the EU's view that the Council has no mandate to discuss State financial obligations, international trade or development and that there is no need for such a panel discussion, it joined consensus.

The Council also followed up on its 7th special session on the world food crisis adopting a resolution requesting the Special Rapporteur on the right to food to continue to report to the Council on that issue.⁷⁵ The US, as it did in the General Assembly, joined consensus although it explained that its support for the resolution in no way changed its position on economic, social and cultural rights.⁷⁶

Discrimination against women

The panel discussion on 'laws that discriminate against women' held at the June session at the initiative of Chile exposed different State positions on gender equality. The High Commissioner, several panellists, and many States and NGOs favoured the establishment of a new special procedures mandate to address laws that discriminate against women.⁷⁷ Other States were open to further discussing the idea.⁷⁸ However, several States expressed deep reservations bordering on outright opposition.⁷⁹ They presented rather unconvincing arguments against a new mandate, such as an overlap with the mandate of the Committee on the Elimination of Discrimination against Women, and the fact that the mandate could be perceived as an 'attack on certain cultures' and would be a 'waste of resources'. Egypt suggested that it would be impossible to find a mandate holder that would be knowledgeable about the laws of all countries in the world, which unintentionally seemed to acknowledge that laws that discriminate against women are a vast problem that would merit being studied and addressed by an expert.

Maternal mortality and human rights

The issue of maternal mortality, and in particular its human rights dimension as well as the Council's response, has been patiently advanced by a cross-regional coalition of States under the leadership of New Zealand and Colombia, and with broad civil society support.⁸⁰ At the March session, New Zealand delivered a joint state-

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For a full overview, see ISHR's report on the session, available at www.ishr.ch/council-monitor/special-sessions.

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Council Resolution S-10/1. The resolution was adopted by a vote called for by Germany (on behalf of the EU). 34 States voted in favour, while 14 States abstained, (EU members and aligned countries, Canada, Switzerland, the Republic of Korea, Japan, and Mexico).

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Council Resolution 12/28.

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Council Resolution 12/10.

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Indeed, the US is still not a party to the *International Covenant on Economic, Social and Cultural Rights*.

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Austria, Congo, Tunisia, Nigeria, Slovenia, Luxembourg, Iceland, and Germany.

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Norway, Switzerland, and the Czech Republic (on behalf of the EU).

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Pakistan (on behalf of the OIC), Egypt, Pakistan, and the Russian Federation.

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At the 8th session in June 2008, the Council held an initial panel discussion on the topic. For more information see ISHR's *Analytical overview of the 8th session of the Human Rights Council*, available at www.ishr.ch/publications.

ment on behalf of more than 80 States. It highlighted that 500,000 women die each year as a result of pregnancy or childbirth – most deaths being preventable – and stated that such failures in prevention constituted serious human rights violations. It noted that the decrease in global figures was far below those needed to reach the Millennium Development Goals, and stressed the need for both increased partnerships as well as individual States' respect for their human rights obligations. The joint statement paved the way for a resolution on 'preventable maternal mortality and morbidity and human rights' adopted without a vote at the June session.⁸¹

While seemingly uncontroversial at first, the negotiations quickly showed widely differing State views on maternal mortality as a human rights issue and as a 'potential human rights violation'.⁸² The adopted resolution is regrettably weaker than the initial draft. While it recognises 'preventable maternal mortality and morbidity [as] a health, development and human rights challenge', it does not establish that it can also amount to a human rights violation. The resolution requests OHCHR 'to prepare a thematic study on preventable maternal mortality and morbidity and human rights' which will be discussed at the Council's 14th session in June 2010.

Violence against women

The Special Rapporteur on violence against women, Ms Yakin Erturk, presented her final report to the June session of the Council. She has completed her six years as mandate holder and will be succeeded by Ms Rashida Manjoo, who was appointed in June. Ms Erturk's study on the achievements and challenges of the mandate over the last 15 years was criticised by some States that argued that she had exceeded her mandate by addressing sexual orientation, same sex relations, safe abortions, and by extending the definition of 'family'.⁸³ Although the resolution on accelerating efforts to eliminate all forms of violence against women was adopted without a vote, the negotiations were not without difficulties.⁸⁴

Similar to the arguments against acknowledging the Special Rapporteur on torture's report on the death penalty, Egypt, Pakistan, and Singapore opposed a reference in the report to the

15-year review of the mandate as it had highlighted issues that remain controversial in many societies. Egypt specifically opposed the inclusion of references to multiple forms of discrimination as the concept could include discrimination on the basis of sexual orientation, an issue that it strongly opposes.

The adopted text only 'notes with appreciation' the work of the Special Rapporteur, and the reference in the resolution to the 15-year review of the mandate of the Special Rapporteur was deleted. Egypt made an explanatory statement that multiple forms of discrimination in its view does not include 'non-universally agreed forms of discrimination', implicitly referring to sexual orientation.

The right to health, access to medicine, and HIV/AIDS and human rights

For the first time since its establishment, the Council took up the issue of human rights protection in the context of HIV/AIDS. The former Commission on Human Rights adopted biennial resolutions on this topic, most recently in 2005.⁸⁵

The initiative led by Brazil initially received broad support from a number of States including Norway, Argentina, Ethiopia, Lithuania, Egypt, Lichtenstein, Canada, and the US. However, Ethiopia early on expressed its disappointment that the Council was not playing the leadership role expected of it on this topic as it was falling below statements already made by other bodies. During the negotiations, the US sought to weaken the text by replacing the 'goal of universal access to medicine' with a simple affirmation of the 'commitment to scale up efforts towards universal access'. The adopted resolution requests the Secretary-General to elaborate an analytical study to be presented to the Council at its 16th session in March 2011.

Brazil also presented a somewhat related resolution on access to medicine in the context of the right to health.⁸⁶ The latest Council decision from 2006 on this issue focused on access to medicines in the context of pandemics such as HIV/AIDS, tuberculosis, and malaria.⁸⁷ Dur-

⁸¹ Council Resolution 11/8.

⁸² In particular Pakistan, Egypt, China, South Africa, and Indonesia argued that maternal morbidity and mortality is not a 'human rights issue' but only a development issue.

⁸³ Pakistan (on behalf of the OIC), Egypt, Algeria, and the Holy See.

⁸⁴ Council Resolution 11/2.

⁸⁵ E/CN.4/RES/2005/84.

⁸⁶ Council Resolution 12/24.

⁸⁷ Council Decision 2/107.

ing the negotiations the EU (led by Austria on this topic) sought to weaken the text and in this regard suggested that the draft resolution should be limited to 'essential' medicines and that the need to ensure the affordability of medicines should not be addressed. The US refused to recognise that there is a right to medicines as a component of the right to health. Nevertheless, the resolution affirms the responsibility of States to ensure access to affordable essential medicines although it falls short of recognising a right to essential medicines.⁸⁸ It is worth highlighting that the resolution also calls on States to take into account the right to health in their actions as members of international organisations. Despite opposition from the EU and the US, the resolution invites the High Commissioner to convene an expert consultation on human rights and access to essential medicines.

Migration

The human rights of migrants received increasing attention during the year. While the Council has a Special Rapporteur on this topic,⁸⁹ several States have called for more discussion of the human rights of migrants.⁹⁰ The High Commissioner has also identified migration as one of the thematic priorities for OHCHR over the next biennium.

Egypt (on behalf of the African Group) presented a resolution on the situation of migrants in detention centres at the June session,⁹¹ which laid the basis for a panel discussion on this topic at the September session.⁹² Interestingly, the resolution was presented under agenda Item 4 on 'situations that require the Council's attention'. Item 4 has so far mainly been used to discuss situations of human rights violations in particular countries, although some States have used it to raise thematic 'situations'.⁹³

At the September session, Nigeria made the first African Group statement under Item 4, highlighting a 'consistent pattern of human rights violations linked to interception, detention and expulsion by States of foreign nationals' and racism more broadly. While it refrained from mentioning specific States, the African Group's statement was a welcome and positive contribution to the Council's debate on human rights violations.

The panel discussion on the human rights of migrants in detention centres in September was quite substantive and many States shared their national experiences. Although many of the statements were critical of the practice and conditions of detention of irregular migrants, the tone of the debate was constructive. It was also very welcome that there was no clear divide in positions between sending and receiving States, nor between developing and developed countries.

Rights of indigenous peoples

At its 6th session, the Council established an 'Expert mechanism on the rights of indigenous peoples' (the Expert Mechanism) to replace the Working Group on Indigenous Populations of the former Sub-Commission on the promotion and protection of human rights (the Sub-Commission) and its working groups.⁹⁴ It held its first session in October 2008 and presented its first report focusing on the right of indigenous peoples to education to the Council in March 2009. Although few States commented, the report was broadly welcomed by all stakeholders.⁹⁵ Several comments focused on the need for better coordination among bodies dealing with indigenous issues, a need acknowledged by the Expert Mechanism itself.⁹⁶

In March, Switzerland proposed the consideration of all relevant reports on indigenous peoples at the same time. This useful proposal was taken up by the Council, which requested that all reports on indigenous peoples be discussed at its September session.⁹⁷

However, in June Canada and the US expressed concerns about the advancing work of the Expert Mechanism and the fact that the Council had not had an opportunity to discuss and approve the focus of its work. They both objected to the proposed discussion on the UN *Declaration on the Rights of Indigenous Peoples* (the Declaration) scheduled for the 2nd session of the Expert Mechanism in August 2010. Both States felt that proposing this point for discussion would be contrary to the Expert Mechanism's mandate, which is to provide advice 'in the manner and form requested for the Council'. They stressed that the Council should first 'examine

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The resolution merely recognises 'access to medicines as one of the fundamental elements in achieving progressively the full realization of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'.

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The Special Rapporteur on the human rights of migrants, Mr Jorge Bustamante, presented his annual report to the Council in June, see *A/HRC/11/7*.

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For instance during debates at the 9th session, when some States raised concern about the migration policy of the European Union. See ISHR's *Analytical overview of the 9th session*, available at www.ishr.ch/publications.

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Council Resolution 11/9.

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Côte d'Ivoire already in March had suggested that the Council take up the topic, and that proposal became an African Group initiative.

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See the section below on Item 4 under 'country situations'.

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Council Resolution 6/36.

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See ISHR's *Council Update of 17 and 23 March 2009* at www.ishr.ch/council-monitor/council-updates.

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Canada, Mexico, the Czech Republic (on behalf of the EU).

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Council Resolution 12/13.

and approve' the agenda of the Expert Mechanism, and even suggested postponing its 2nd session. Despite these concerns, at its 2nd session the Expert Mechanism held a discussion on the implementation of the Declaration at the regional and national levels, and specific provisions in the Declaration identifying remedies for violations of rights.⁹⁸

In September, the Council considered both the report of the Special Rapporteur on the situation of human rights of indigenous peoples (under Item 3) and the report of the Expert Mechanism (Item 5) together, a move that was welcomed by States and indigenous representatives as facilitating synergies among these mandates, and making it easier for persons to be present for both discussions.⁹⁹ The Expert Mechanism's report was warmly welcomed by all delegations and NGOs that spoke, as was its proposal that it next take up the study of the participation of indigenous peoples in decision-making. Through its *Resolution 12/13*, the Council formally followed up on this suggestion and requested a progress report be submitted to its 15th session in 2010, and a final study to the 18th session in 2011. The resolution also introduces 'staggered' terms of membership for the Expert Mechanism, which seems to correct an omission in the original mandate of the body.

Protection of civilians in armed conflict

As discussed above, the High Commissioner has called the Council's attention to situations of armed conflict where human rights are often violated. Ms Pillay has also identified human rights protection in times of armed conflict as one her Office's six thematic priorities for the next biennium, underlining the importance she attaches to the issue.

Egypt was the main sponsor of the resolution on the protection of civilians in armed conflict.¹⁰⁰ The resolution was adopted without a vote despite difficult negotiations in which a number of States, in particular the US, expressed reservations about the Council working on issues related to international humanitarian law. The resolution calls for the holding of an expert consultation, which took place in Geneva in April

2009.¹⁰¹ The outcome of the consultation was submitted to the June session and followed up through a new resolution that requests the holding of a second expert consultation to complete the work on this issue.¹⁰² The outcome of that consultation is to be presented to the Council's June 2010 session. As the Council will consider the appropriate follow-up to the expert consultations, it may return to the suggestion to entrust the Advisory Committee with elaborating a study on this topic.¹⁰³ It can be expected that this issue will come up again in 2010 as the Council will consider the appropriate follow-up to the expert consultations.

COUNTRY FOCUS

Some prominent voices in the Council, including Egypt (on behalf of the African Group), Pakistan (on behalf of the OIC), China, the Russian Federation, and Cuba, have repeatedly underlined their principled opposition to country-specific mandates in general. Since the Council was established these States and others have sought to limit its country focused discussions and actions, and in particular reduce its country mandates.

In 2007, the mandates on Belarus and Cuba were eliminated. This was followed in March 2008 with the abolition of the mandate on the Democratic Republic of the Congo (DRC) despite evidence of continuing and severe human rights violations, which were the subject of a special session focusing on the situation in the east of the country in November 2008. In September 2008, the mandate on Liberia was discontinued and the mandate on Burundi was only renewed until the establishment of an independent national human rights institution. At the same session, the Special Rapporteur on the Sudan was renewed for six months despite the requirement in the Council's rules that all country-specific mandates are set up for one year. It is against this background that we must look at the Council's country focused work in 2009.

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The US welcomed the work of the Expert Mechanism and said it was impressed by the 'cooperative tone and rich discussion' of the last session. See report of the 2nd session, A/HRC/12/32, available at <http://www2.ohchr.org/english/bodies/hrcouncil/12session/reports.htm>.

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The Special Rapporteur, Mr James Anaya, presented his annual report, while the Expert Mechanism submitted a 'study on lessons learned and challenges to achieve implementation of the right of indigenous peoples to education'.

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Council *Resolution 9/9*. The issue was addressed by the former Commission on Human Rights, most recently in its *Resolution 2005/63*. The resolution on civilians in armed conflict was first presented to the Council in 2008.

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For more information about the background of the consultation, please see www2.ohchr.org/english/events/HR_civilians_aconflict/.

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Council *Resolution 12/5*.

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The former Sub-Commission studied this issue in 2004 and two of its experts submitted a working paper in 2005, E/CN.4/Sub.2/2005/14, which was not given any follow-up as the process to reform the former Commission on Human Rights began and led to suspension of the work of its subsidiary organs. The Advisory Committee, the Sub-Commission's successor body, has started consideration of this issue, and decided at its 4th session to ask one of its members to attend the second expert consultation.

Country missions by special procedures

In 2009, the special procedures presented 67 reports on country missions to the Council.¹⁰⁴ Regrettably, the Council largely failed to make use of the country-specific analysis provided by its thematic special procedures and it did not give specific follow-up to these mission reports. It seems that this is partly due to the general reluctance of the Council to address specific country situations, as this is often perceived as a 'selective' approach or as lacking objectivity.

At the same time, only in exceptional cases have special procedures mandate holders directed recommendations squarely at the Council. Most recommendations contained in mission reports are addressed to the country concerned. In 2009, none of the thematic special procedures made recommendations specifically directed at the Council. However, many recommendations were addressed to other UN bodies or to the 'international community' as a whole. It would therefore be useful if the special procedures would address more specific recommendations to the Council. This would also help highlight the responsibility of the Council in following up to the reports of the special procedures.

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A full list of the reports by region is available at www.ishr.ch/browse-documents-docman/doc_download/869-annex-to-hrm-2010-list-of-country-visits-by-thematic-special-procedures.

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A/HRC/9/14.

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Council Resolution 9/19. In a departure from usual practice, the mandate was extended until such an institution is established.

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The report is contained in A/HRC/12/43.

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A/HRC/12/40.

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The previous mandate holder, Yash Ghai, resigned because of the lack of cooperation by the Government, and repeated verbal attacks on his person. See ISHR's *Overview of the 9th session*, available at www.ishr.ch/publications.

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Council Resolution 12/25.

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A/HRC/10/18.

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Chile, Japan, Canada, Australia, the Czech Republic (on behalf of the EU), the Republic of Korea, the UK, Sweden, the US, New Zealand, Switzerland.

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Cuba, China, Syria, Laos, Thailand, Sri Lanka, the Sudan, Timor Leste, the Russian Federation.

Country mandates and resolutions

Burundi

The Independent Expert on the human rights situation in Burundi, Mr Akich Okola, has not reported to the Council since September 2008.¹⁰⁵ Despite the extension of the Independent Expert's mandate to monitor the situation, the Council in 2008 only asked the Independent Expert to report to it after the establishment of the independent national human rights institution.¹⁰⁶ The Council also asked the High Commissioner to report on progress made in Burundi at the session in September 2009. That report recommends that 'Burundi adopt a clear, time-bound plan to ensure that a law will be enacted expeditiously establishing a national human rights commission in full conformity with the Paris Principles'.¹⁰⁷ So far it seems that little progress has been made toward that and the High Commis-

sioner's report also expresses concerns about a range of human rights issues in the country. It is therefore even more regrettable that the Council has undermined the central role of its own Independent Expert. It remains to be seen how the Council will take up the situation in 2010 when it will not receive any expert reports.

Cambodia

The **Special Rapporteur on the situation of human rights in Cambodia**, Mr Surya Prasad Subedi, presented his first report to the Council at the September session.¹⁰⁸ All States that spoke showed general support for the progress being made in Cambodia, but both States and NGOs also voiced concerns including regarding freedom of expression, the independence of the judiciary, land and housing rights, impunity, and prison reforms. While the cooperation between the Government and the Special Rapporteur seems to have improved dramatically since the appointment of a new mandate holder following the resignation of the previous one,¹⁰⁹ Cambodia nevertheless noted that there had been 'some discrepancies of views on certain issues'. At the September session, the Council also adopted a resolution to extend the mandate of the Special Rapporteur for one year.¹¹⁰ While Cambodia welcomed the constructive approach of Japan, the main sponsor of the resolution, to the negotiations, it requested that the Special Rapporteur focus on 'advisory services' to the Government in the coming year.

The Democratic People's Republic of Korea

The **Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea (DPRK)**, Mr Vitit Muntarbhorn, presented his annual report.¹¹¹ The Special Rapporteur once again highlighted the lack of cooperation by the Government with his mandate and drew attention to a number of concerns, including access to food and basic necessities, personal security, enjoyment of fundamental freedoms, and asylum and immigration. During the interactive debate, States were divided between those supporting the mandate¹¹² and those opposing all country mandates, including this one.¹¹³ A **resolution on the situation of**

human rights in the DPRK,¹¹⁴ co-sponsored by the Czech Republic (on behalf of the EU) and Japan and proposing the extension of the Special Rapporteur's mandate for one year, was adopted by a vote.¹¹⁵ Only China, Cuba, Egypt, Indonesia, Nigeria, and the Russian Federation voted against the continuation of the mandate.

Haiti

In June, the Council discussed the annual report of the Independent Expert on the situation of human rights in **Haiti**, Mr Michel Forst.¹¹⁶ The interactive dialogue showed that the relations between the Independent Expert and the Government are very positive and that the Government is willing to cooperate. Already in 2008, the Council had extended the mandate of the Independent Expert until September 2010, and it seemed that States did not see a need for specific follow-up to the report of the Independent Expert in 2009.¹¹⁷

Honduras

The human rights situation in Honduras was brought to the attention of the Council by the Group of Latin American and Caribbean States (GRULAC), following the coup d'état in that country in June. At the opening of the September session they expressed concerns about the delegation of Honduras, which did not represent the constitutional Government of President Zelaya, following what the President ruled that the delegation could not attend the session. Concerns about the broader human rights situation following the coup were shared by the High Commissioner, the EU, and the US.

At the initiative of GRULAC the Council adopted without a vote a resolution on the 'situation of human rights in Honduras since the coup d'état of 28 June 2009'.¹¹⁸ The resolution strongly condemns the human rights violations following the coup d'état and calls for the restoration of democracy. It also requests the High Commissioner to present a report to the Council in March 2010 on human rights violations since the coup d'état. This outcome was a positive demonstration of the Council's capacity to address an emerging human rights situation in a timely manner.

Myanmar

The report of the **Special Rapporteur on the situation of human rights in Myanmar**, Mr Tomas Ojea Quintana, mainly focused on the Special Rapporteur's findings during his last country visit in February 2009 and the developments since his visit in August 2008.¹¹⁹ The Special Rapporteur described both the visits and dialogue with the Government of Myanmar as constructive. However, he identified various areas of serious human rights violations such as the detention of prisoners of conscience, the conditions in prisons, the use of anti-personnel landmines, the recruitment of child soldiers, discrimination against minorities, forced labour, and the shortage of food supply in certain regions. Myanmar partly accepted the Special Rapporteur's report, but rejected specific findings and claimed that the report 'fails to reflect the true situation on the ground.' During the interactive dialogue all States that spoke welcomed the report. Several members of the Association of Southeast Asian Nations (ASEAN) and neighbouring countries only highlighted positive developments and did not refer to the human rights violations highlighted in the report.

In March, the mandate of the Special Rapporteur was extended for one year in a **resolution on the situation of human rights in Myanmar**¹²⁰ sponsored by the Czech Republic and adopted without a vote.

The situation in Myanmar received considerable attention from States and NGOs at the June and September sessions as well. In September, concerns about the continued detention of Ms Aung San Suu Kyi and other political prisoners culminated in a short **resolution on Aung San Suu Kyi and other political prisoners**. While the resolution calling for the release of political prisoners was adopted without a vote, many States distanced themselves from the text.¹²¹ China, Cuba, Pakistan (on behalf of the OIC), and Vietnam expressed concerns that the resolution could impinge on Myanmar's sovereignty. Cuba argued that the resolution was politically motivated and that the term 'political prisoners' was recognised in the UN. Thailand, in a carefully balanced statement, still expressed concern about the detention of Aung San Suu Kyi.

¹¹⁴ Council *Resolution 10/16*. In favour: Argentina, Bahrain, Bosnia and Herzegovina, Burkina Faso, Cameroon, Canada, Chile, France, Germany, Ghana, Italy, Japan, Jordan, Madagascar, Mauritius, Mexico, the Netherlands, the Republic of Korea, Saudi Arabia, Slovakia, Slovenia, Switzerland, the UK, Ukraine, Uruguay, Zambia; against: China, Cuba, Egypt, Indonesia, Nigeria, the Russian Federation; abstained: Angola, Azerbaijan, Bangladesh, Bolivia, Brazil, Djibouti, Gabon, India, Malaysia, Nicaragua, Pakistan, the Philippines, Qatar, Senegal, South Africa.

¹¹⁵ 26 in favour, six against, and 15 abstentions.

¹¹⁶ A/HRC/11/5.

¹¹⁷ Presidential Statement A/HRC/PRST/9/1.

¹¹⁸ Council *Resolution 12/14*.

¹¹⁹ A/HRC/10/19.

¹²⁰ Council *Resolution 10/27*.

¹²¹ China, Cuba, Pakistan (on behalf of the OIC), the Philippines, the Russian Federation, and Indonesia. India welcomed the statements opposing the resolution.

Occupied Palestinian territories

The discussion of the situation in the occupied Palestinian and other Arab territories under Item 7 is one of the most controversial on the Council's agenda. The issue significantly influences the political dynamics within the Council, and no other topic attracts the same level of attention outside the Council's hall, including in the media. This year's discussions were marked by the Council's response to the Israeli military operations in Gaza in December 2008 and the 'Goldstone report', which was submitted by the high-level fact-finding mission that was dispatched by the Council.

Following the Israeli military operations, the Council held a special session in January 2009. The resolution, adopted by a vote, created 'an urgent, independent international fact-finding mission, to be appointed by the President of the Council, to investigate all violations of international human rights law and international humanitarian law by the occupying Power, Israel, against the Palestinian people throughout the Occupied Palestinian Territory'.¹²² However, by the March session, then President of Council Ambassador Uhomobhi of Nigeria had been unable to appoint the members of high-level mission, which naturally led to disappointment among the supporters of an investigation.¹²³ On 3 April 2009, President Uhomobhi finally appointed the members of the fact-finding mission, to be headed by Justice Richard Goldstone, former member of the South African Constitutional Court and former Chief Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda.¹²⁴ It was notable that Justice Goldstone accepted the appointment on the understanding expressed by President Uhomobhi that the fact-finding mission would investigate violations of human rights committed by *all parties* to the conflict, thereby implicitly enlarging the mandate given by the Council. The Council implicitly endorsed this expansion by no members raising any objections.

The fact-finding mission adopted an innovative approach to its work. Because it was unable to hold consultations inside Israel, the fact-finding mission held two sets of public hearings in Gaza and in Geneva. The hearings allowed victims to testify before the members of the fact-finding mission, and were webcast.¹²⁵

The presentation of the 575-page 'Goldstone report' was the highlight of the Council's September session. Although the report held that both Israel and Hamas had committed war crimes and possibly crimes against humanity, Israel rejected the report wholesale as 'shameful'. Equally, the US expressed the strongest reservations stating that the report was 'tainted' by 'unbalanced recommendations'. Many other States also had concerns about the report.¹²⁶

The Goldstone report contains a series of recommendations directed at all parts of the UN system, including to the General Assembly, the Security Council, the Prosecutor of the International Criminal Court (ICC), and of course the Human Rights Council. In particular, the report recommended that the Council 'request the UN Secretary-General to bring [the] report to the attention of the Security Council' and that it submit the report to the prosecutor of the ICC. While many States felt that the report was fairly balanced in its consideration of the situation, it was obvious that many were not ready to accept the far-reaching recommendations.

In parallel to the discussions in the Council plenary, the negotiations on a draft resolution, which would follow up the report and at least some of its recommendations proved to be arduous, and reportedly overshadowed other negotiations during the September session. Despite the immense attention given to the 'Goldstone report' in and outside of the Council, States were unable to bridge their differences of opinion. As a consequence, the Council postponed consideration of the resolution. It is likely that the intransigent stance of the US and key European States during the September session contributed to the Council's failure to act on the report in September.

Despite this decision by the co-sponsors to postpone consideration of the resolution, the Council held another special session on Gaza within a few days of the September session's conclusion.¹²⁷ On 16 October 2009, it adopted a complex resolution endorsing the 'Goldstone report'.¹²⁸ The resolution was adopted by 25 votes in favour, 6 votes against, and 11 abstentions.¹²⁹ Five States did not vote at all on the controversial resolution.¹³⁰ The debate during the special session saw all States but Israel and the US express the view that the Goldstone report was 'serious'

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The vote was adopted by 33 in favour, 1 against, and 13 abstentions. In favour: Angola, Argentina, Azerbaijan, Bahrain, Bangladesh, Bolivia, Brazil, Burkina Faso, Chile, China, Cuba, Djibouti, Egypt, Gabon, Ghana, India, Indonesia, Jordan, Madagascar, Malaysia, Mauritius, Mexico, Nicaragua, Nigeria, Pakistan, the Philippines, Qatar, the Russian Federation, Saudi Arabia, Senegal, South Africa, Uruguay, Zambia. Against: Canada. Abstentions: Bosnia and Herzegovina, Cameroon, France, Germany, Italy, Japan, the Netherlands, the Republic of Korea, Slovakia, Slovenia, Switzerland, Ukraine, the UK.

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See ISHR's *Council Update* of 23 and 24 March 2009, available at www.ishr.ch/council_updates.

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The three other members were Professor Christine Chinkin, Ms Hina Jilani, the former Special Representative of the Secretary-General on human rights defenders, and Colonel Desmond Travers. See for instance the OHCHR press release on the appointment of fact-finding mission, available at www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=8469&LangID=E.

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See www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/FactFindingMission.htm.

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For more details, see www.ishr.ch/browse-documents-docman/doc_download/810-report-on-councils-debate-of-goldstone-report.

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The decision to not wait until the March 2010 session to follow up on the 'Goldstone report' seemed largely linked to domestic pressure on the authorities in the occupied Palestinian territories to not agree to such a delay.

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Council *Resolution S-12/1*. The resolution has a curious format, as it is split in three parts which resemble three distinct resolutions adopted as a package. Part A addresses Israel's violations and asks that the High Commissioner report on the situation. Part B addresses the 'Goldstone report' by calling on all parties to implement the recommendations within it as well as recommending that the General Assembly consider the report at its 64th session, and requesting that the Secretary-General report on the implementation of the recommendations from the report at the Council's 13th session in March 2010. Part C addresses the periodic report by the High Commissioner and welcomes the recommendations within it.

and merited careful consideration by the Council. The vast majority of States also underlined the need for independent investigations by Israel and the Palestinians into the allegations of serious violations of human rights law and international humanitarian law committed during the Gaza conflict.

The resolution also condemned Israeli practices in the occupied Palestinian territories, in particular in East Jerusalem. While some observers expressed the view that this detracted from the focus on the 'Goldstone report', others seem to have endorsed the resolution as a result. China and the Russian Federation noted that they would have abstained had the resolution only focused on the 'Goldstone report' as they had serious reservations about its recommendations regarding referral to the Security Council and the International Criminal Court.

The resolution invites the General Assembly to consider the 'Goldstone report' during its 64th session.¹³¹ At the same time, the Secretary-General has been asked to report back to the Council on the implementation of the Goldstone report's recommendations at its March 2010 session. In addition, the High Commissioner will report on the implementation of the resolution endorsing that same report. This should provide the Council with a sufficient basis for substantive follow-up to the most significant report the Council has considered to-date.

Somalia

In March 2009, the Council extended the mandate of the **Independent Expert on Somalia**, Mr Shamsul Bari, for only six months, in departure from its own institutional rules, and asked the Independent Expert to update the Council on his work in September.¹³²

The Council's debates on the human rights situation and dialogue with the Independent Expert in both March and September were constructive. States welcomed the Independent Expert's work and agreed on the gravity of the situation in Somalia and the need for international action and support. Some diverging viewpoints were expressed about the type of intervention needed to improve the situation, the appropriateness of setting up an international commission of inquiry for human

rights violations in Somalia, and the need to hold a special session or a panel discussion on the situation. In March, Mr Bari repeated his recommendation, first made in 2008, that the Council hold a special session on Somalia.

The Council also adopted without a vote a resolution renewing the mandate of the Independent Expert for one year.¹³³ The resolution re-established the Council's compliance with its own rules on country mandates by extending the mandate for one year. It also requests the Independent Expert to report on a biannual basis to the Council (at its 13th and 15th sessions in 2010), which testifies to the importance the Council attaches to closely monitoring the situation. However, it did not give suite to proposals made for greater Council engagement through a panel discussion or a special session.

The Sudan

In her address to the Council in March, the High Commissioner expressed 'pressing concern' about the human rights situation in the Sudan.

The mandate of the **Special Rapporteur on the Sudan** and the situation in the Sudan has in the past divided States within the African Group, which otherwise is often united in opposing country mandates.¹³⁴ It was expected that the Sudan and Egypt, with the support of a large part of the African Group, would seek to end the mandate when it was to be extended in March. Egypt (on behalf of the African Group) and the Czech Republic (on behalf of the EU) submitted competing draft resolutions on the mandate.¹³⁵ Expectedly, the two drafts were miles apart and it proved impossible to bridge the differences through negotiations. The African Group draft did not extend the mandate of the Special Rapporteur and instead suggested that national institutions could monitor the human rights situation.¹³⁶ It was also rather complimentary of the Government's efforts to guarantee human rights for its population. The EU draft, by contrast, in an attempt to reach a compromise, suggested replacing the 'Special Rapporteur' on the Sudan with an 'Independent Expert' tasked with the same monitoring and reporting functions.

Interestingly, it became apparent that the African Group was not in fact united in support of

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In favour: Argentina, Bahrain, Bangladesh, Bolivia, Brazil, Chile, China, Cuba, Djibouti, Egypt, Ghana, India, Indonesia, Jordan, Mauritius, Nicaragua, Nigeria, Pakistan, the Philippines, Qatar, the Russian Federation, Saudi Arabia, Senegal, South Africa, and Zambia. Against: Hungary, Italy, the Netherlands, Slovakia, Ukraine, the US. Abstentions: Belgium, Bosnia and Herzegovina, Burkina Faso, Cameroon, Gabon, Japan, Mexico, Norway, the Republic of Korea, Slovenia, and Uruguay.

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Angola, France, Kyrgyzstan, Madagascar, the UK. Since all of these States were in the room when the vote took place, it would seem that their 'boycott' was deliberate.

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For further details, see the chapter on the General Assembly in the present edition, pp. 93-113.

132

Council *Resolution 10/32*. Egypt (on behalf of the Africa Group) was the main sponsor of the resolution which was passed without a vote.

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Council *Resolution 12/26*.

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At the 4th special session on the situation of human rights in Darfur in 2006, many sub-Saharan African States expressed their concern about the human rights violations taking place in the country, while others resisted debate and action on this situation.

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L.17 (African Group draft) and L.18 (EU draft) where both tabled at 6 p.m on 16 June 2009, which was the deadline for tabling proposals at the 11th session.

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It was interesting that the Sudan argued in indirect reference to the renewal of the Independent Expert on Burundi, which was extended until the establishment of a national human rights institution, that since it already has such an institution, a special procedure mandate was not justified. In fact the Sudan does not have an independent national human rights institution.

the text presented by Egypt, which had to explain that 'some within the [African] Group had dissociated themselves from the text, and others had reserved their position'. As could be expected, other States were also divided on whether the mandate should be extended. Egypt, the Sudan, the Russian Federation, Pakistan (on behalf of the OIC), and Cuba opposed an extension, while the EU, the US, Norway, Switzerland, Canada, and Chile supported it. These divisions persisted and eventually led the EU to present significant amendments to the draft by the African Group, which while maintaining the positive tone of the African Group draft, provided for the creation of an **Independent Expert on the Sudan**.¹³⁷ In a suspense-filled vote, the amendment was passed by a majority of one vote and the amended resolution by a majority of two votes.¹³⁸ Among the most notable positions of States was that of Brazil, which voted in favour of the creation of an Independent Expert, despite often opposing country mandates. Some African States, including Uganda, Ghana, Mauritius, Senegal, and Zambia, also openly defied the position of the African Group stated by Egypt by supporting or abstaining on the amendments rather than opposing them. The Ugandan representative, at the end of the session, even openly criticised the Egyptian coordination of the African Group, expressing his hope for a more faithful reflection of the African Group's position by the future coordinator of the group. Interestingly, the coordinator role was passed to Nigeria in June.

Despite the apparent downgrading in the title of the mandate, and the heavy focus on cooperation between the Independent Expert and the Government of the Sudan, the continuation for one year of a country-specific mandate was one of the positive results of 2009. In September the President of the Council appointed Mr Mohamed Chande Othman of Tanzania as the **new Independent Expert on the situation of human rights in the Sudan**, replacing Ms Sima Samar who had served as the Special Rapporteur from 2005. The Independent Expert will present his first report to the Council in June 2010. The Government of the Sudan has claimed that it will cooperate with the new mandate holder.

Special sessions on country situations

Sri Lanka

Since 2007 there have been calls for the Council to address the situation in Sri Lanka without this leading to any action. In 2009, these calls were again made and finally resulted in the holding of a special session.

In March, the Czech Republic (on behalf of the EU) invited the High Commissioner to brief the Council on the situation in **Sri Lanka**. A number of States and NGOs expressed serious concern about the situation there, and particularly the situation of civilians in the conflict area.¹³⁹ A number of NGOs urged the Council to urgently hold a special session to address the 'desperate situation'. In May several of the Council's special procedures expressed deep concern at the 'current humanitarian crisis' and situation of displaced persons¹⁴⁰ and called for urgent international scrutiny and the establishment of an international commission of inquiry.¹⁴¹

The special session was convened in late May at the request of 17 Council members.¹⁴² Sri Lanka presented its own draft resolution on the situation in the country, which was overly congratulatory, and refused to accept proposals made by other States. The EU therefore tabled nine amendments to that text. For the first time, the Council was faced with a no-action motion proposed by Cuba to suspend debate and action on these amendments. The Council proceeded to vote on the no-action motion, which was passed by 22 votes in favour, seven abstentions, and 17 votes against. The amendments were dismissed as a result. The use of the no-action motion brings back memories of the political manipulations in the former Commission on Human Rights and is a highly regrettable precedent that should not be repeated.

The Council then voted on the resolution proposed by Sri Lanka. It was adopted by 29 votes in favour, 12 votes against, and six abstentions. The Council thereby failed to establish any follow-up mechanism to the special session, or call for accountability, respect for the rights of internally displaced persons (IDPs) and unimpeded humanitarian access; all issues that had been highlighted

¹³⁷
A/HRC/11/L.19.

¹³⁸
Council Resolution 11/10 was adopted by 20 in favour, 18 against, and nine abstentions. In favour: Argentina, Bosnia and Herzegovina, Brazil, Canada, Chile, France, Germany, Italy, Japan, Mauritius, Mexico, the Netherlands, the Republic of Korea, Slovakia, Slovenia, Switzerland, Ukraine, the UK, Uruguay, Zambia. Against: Azerbaijan, Bahrain, Bangladesh, Cameroon, China, Cuba, Djibouti, Egypt, Indonesia, Jordan, Malaysia, Nigeria, Pakistan, the Philippines, Qatar, the Russian Federation, Saudi Arabia, South Africa. Abstained: Angola, Bolivia, Burkina Faso, Gabon, Ghana, India, Madagascar, Nicaragua, and Senegal.

¹³⁹
Canada, Australia, France, Switzerland, Germany, Japan, the Netherlands.

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See www.unhcr.ch/hurricane/hurricane.nsf/view01/A91C45932E6E436DC12575B70028D7D2?opendocument.

¹⁴¹
See www.unhcr.ch/hurricane/hurricane.nsf/view01/57D5CC3A9B1271B2C12575B000492130?opendocument.

¹⁴²
EU countries, Argentina, Canada, Chile, Mauritius, Mexico, the Republic of Korea, and Uruguay.

by the High Commissioner, special procedures, many States, and NGOs. The High Commissioner has since repeated her calls for an independent investigation. Others, including the US, the EU, and several NGOs, have also renewed their calls for international monitoring and accountability.

The Democratic Republic of the Congo

In March, the Council held a follow-up discussion to its 8th special session on the human rights situation in the east of the **Democratic Republic of the Congo** (DRC), which took place in November 2008, based on a report from the High Commissioner¹⁴³ and a report by seven thematic special procedures on technical assistance to the Government of the DRC and urgent examination of the situation in the east of the country.¹⁴⁴ The special procedures called upon the Council to establish a special procedure mechanism on the human rights situation in the DRC and set up benchmarks to measure human rights progress in the country, in consultation with the Government, civil society, and donors.

The debate that followed was marked by polarisation and divisions along regional lines. While most African States focused on the DRC's positive achievements and the need for greater technical assistance from the international community, States from the Western European and Others Group and a few other States¹⁴⁵ expressed deep concerns about the deteriorating human rights situation and the need for serious judicial and legislative reforms. These latter States also voiced strong support for the creation of a special procedures mandate. The DRC also opposed a special procedures mandate arguing, rather unconvincingly, that it could only be established in cooperation with the concerned State and that it is a tool better suited to large-scale violations of human rights.

Two competing **resolutions on the DRC** were tabled by the EU and Egypt (on behalf of the African Group) respectively. While the EU text had been tabled first and normally should be considered for adoption first, Egypt invoked the rules of procedure arguing that the Council should decide to consider the African text first. Although Germany opposed this motion calling it 'hostile', the Council by a significant majority decided to consider Egypt's proposal first.¹⁴⁶

Egypt in introducing its resolution explained that it was not shying away from acknowledging the 'difficult situation' in the DRC but underlined that it was not necessary to condemn the country. The resolution requests a further report by the group of seven special procedures to be presented to the March 2010 session and also calls on OHCHR to enhance its technical assistance activities in the DRC.

Germany introduced four amendments from the floor to be considered as a package, which would express alarm at the situation; condemn the acts of violence; request the thematic special procedures to form a coordinated group to provide monitoring and reporting by making visits and establishing benchmarks and evaluate progress made; and ask them to report and provide recommendations to the Council at its September 2009 session and a full report to the 13th session in March 2010. Egypt called on the Council to reject the package of amendments. Conversely, Chile in a strong and emotionally charged statement underlined that the Council was faced with a serious human rights situation and that it would be difficult for any member not to condemn continuing violations against civilians, the recruitment of child soldiers, and sexual violence. Nevertheless, the amendments were rejected by 18 votes in favour, 21 against, and eight abstentions. It was notable that several African States that supposedly endorsed the resolution presented by Egypt abstained on the amendments, including Burkina Faso, Ghana, Jordan, Mauritius, Senegal and Zambia. The resolution was then adopted by 33 votes in favour and with 14 abstentions.¹⁴⁷

Other debates on country situations

The High Commissioner's country activities

Under Item 2, 'Reports of the High Commissioner and the Secretary-General', the High Commissioner reported on OHCHR technical assistance activities in several countries, including reports on the deteriorating conditions in **Afghanistan**,¹⁴⁸ **Bolivia**,¹⁴⁹ **Colombia**,¹⁵⁰ **Guatemala**,¹⁵¹ **Nepal**¹⁵² and **Sierra Leone**.¹⁵³ The concerned countries generally commented on their

143
A/HRC/10/58.

144
A/HRC/10/59.

145
Japan, Chile.

146
30 in favour, 15 against, and two abstentions.

147
Abstentions came from EU countries, as well as Canada, Japan, Nicaragua, Switzerland, and the Republic of Korea.

148
A/HRC/10/23.

149
A/HRC/10/31/Add.2.

150
A/HRC/10/31/Add.2.

151
A/HRC/10/31/Add.1.

152
A/HRC/10/53.

153
A/HRC/10/52.

efforts to advance human rights with the exception of Sierra Leone, which did not comment at all. Most of these reports attracted little interest from States although the Czech Republic (on behalf of the EU) commented on all reports except the one on Bolivia. The report on Nepal received some attention and several States called for the extension of OHCHR's mandate in Nepal.¹⁵⁴

In June the Czech Republic (on behalf of the EU) and the US underlined the important work done by OHCHR field presences. The US highlighted OHCHR's contributions in Burundi, Ethiopia, Mexico, Cambodia, Kyrgyzstan, Uganda, Colombia, and the DRC. Much of this work is not being presented to the Council and that seems to be a lost opportunity.

Item 4

At each session the Council discussed **human rights situations that require its attention**. Only a small number of States, primarily from the Western European and Others Group, participated in the debate indicating that this part of the Council's mandate remains somewhat controversial.¹⁵⁵ Several States commented on the consideration of country situations by the Council in general. Many insisted that the legitimacy and credibility of the Council rests on its ability to address serious human rights violations.

Other States have claimed that the discussion of country situations would lead to 'politicisation', and that naming States that violate human rights undermines the spirit of cooperation and dialogue the Council is supposed to be built on. Instead, they argued that 'cooperation and technical assistance' is the best way to promote and protect human rights. However, these same States generally did not take part in the Council's debates on technical assistance and advisory services (under its Item 10).

Large numbers of NGOs used these debates to call on the Council to address situations of concern to them. In June some NGOs expressed regret at the reduction of their speaking time due to poor time management earlier in the session, a problem that has arisen a number of times and which should be resolved.

States focused their comments and expressions of concern on a small and recurring number of country situations, many of which are already on the Council's agenda. These included the DPRK, the DRC, Myanmar, Somalia, and the Sudan but attention was also given to Iran, Sri Lanka, and Zimbabwe. NGOs also drew attention to a broader range of situations including in Cameroon, China/Tibet, Iraq, Kashmir, Libya, Thailand, Turkey, the US, Vietnam, Belarus, China (mainland), Colombia, Cuba, the DRC, Fiji, Guinea, Honduras, Kenya, Madagascar, the Russian Federation, and Zimbabwe. However, none of these were followed up in a substantive way.

Cuba, unsurprisingly, argued that Item 4 should not only be used to discuss country-specific situations, but also thematic 'situations' such as the world financial crisis. Interestingly, the US followed a more thematic approach in June in addressing the plight of prisoners of conscience with examples from Zimbabwe, China, Cuba, Myanmar, the DPRK, Azerbaijan, Sri Lanka, and Iran. A similar approach was used by the EU and the US when in September they condemned situations of 'disruption of constitutional order', specifically mentioning Honduras, Fiji, Guinea, Madagascar, and Niger. It was also noteworthy that China and the US both raised concerns about the situation of the Roma in 'European countries'. In the same statement, the US also commented on the situation in the Chinese region of Xinjiang, together with a large number of other situations.

It was also notable that Nigeria delivered a statement on behalf of the African Group under Item 4 for the first time in September. Making reference to the Council's mandate, Nigeria highlighted human rights violations against migrants and foreign nationals, and racism more broadly. While it refrained from mentioning specific States, the African Group's statement is a welcome and positive addition to the Council's debate on human rights violations.

Item 10

The Council's debates on **technical assistance and advisory services** (Item 10) generally drew little interest from States and NGOs. At the June session for example only the Czech Republic (on

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The Czech Republic (on behalf of the EU), Canada, Switzerland, Finland, Ireland and Denmark.

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Only around 20 States took part in the debates in March and June.

behalf of the EU), Brazil, and the US took part in the discussion.

During the year, Brazil argued that Item 10 on technical cooperation and advisory services is often perceived negatively. It proposed that States move away from the ‘exercise of finger-pointing and bashing’ and use Item 10 to create a positive agenda by focusing more on providing assistance to countries and less on identifying human rights challenges or condemning violations. This was very much in line with Brazil’s principled position that the Council should focus on cooperation and dialogue – an approach that many NGOs sees as inadequate for dealing with certain situations where the Government is unwilling to protect human rights.

The general debate on Item 10 in March covered the situation in **Somalia** and the need for special procedures mandates, intervention, and assistance in the **DRC, Sri Lanka, and Iraq**. As mentioned above, the attempts by some States to establish monitoring mechanisms for the DRC and Sri Lanka failed and the Council has yet to discuss the situation in Iraq.

Sovereignty arguments

A disturbing new development in the Council’s work is the resurfacing of old and anachronistic arguments based on non-interference in the sovereign affairs of States. At the special session on Sri Lanka and at the regular session in June, some States claimed that action on or even discussion of a particular situation of human rights violations by the Council would infringe upon the sovereignty of the State concerned.

Although some States have continuously attempted to block discussions on issues touching their sensitivities, including China in relation to Tibet and the DPRK and Myanmar in relation to special procedures mandates on their own countries, these arguments were primarily mounted by the States concerned and were limited to these cases. It is worrying that these arguments are now brought forward by other States as well. Nevertheless it remains firmly established that human rights violations are a legitimate concern of the international community wherever they occur. The *Vienna Declaration and Programme of Action* affirms that ‘the promo-

tion and protection of human rights is a legitimate concern of the international community’. The Council in particular has a responsibility to discuss and react to human rights violations wherever they occur.

DECISION-MAKING PATTERNS

In 2009 the Council adopted a total of 81 resolutions and decisions (outside the UPR) during its regular sessions as well as four resolutions after its special sessions.¹⁵⁶ Of the 81 resolutions, 21 (or 26%) were adopted by a vote. Interestingly, the outcomes of all of the special sessions were adopted by vote.

The Council adopted one resolution more than in 2008. The number of those that are controversial and passed by vote increased slightly this year.¹⁵⁷

Cuba was again the author of six controversial resolutions, many of which are traditional initiatives that it presents each year.¹⁵⁸ This year it introduced two new controversial initiatives: one on the system of special procedures (discussed above) and one on the right to peace. As Egypt took over from Cuba the coordination role of the Non-Aligned Movement it presented two of those traditional initiatives (on unilateral coercive measures, and on the right to development).

Other new controversial initiatives included the Russian Federation’s resolution on traditional values and human rights, discussed above. At the same time, consensus was lost for the first time on the resolutions on torture and on freedom of religion, both topics that have until now enjoyed broad support.

Most resolutions were individual State initiatives or sponsored by groups within the Council such as the EU, the OIC, the African Group or the Non-Aligned Movement.¹⁵⁹

Ten resolutions were presented by cross-regional groupings: Costa Rica, Switzerland, Italy, and Morocco on human rights education and training; New Zealand and Mexico on the rights of persons with disabilities; the EU and GRULAC on the rights of the child; Germany and the Phil-

¹⁵⁶ A full list of these decisions and resolutions is available at www.ishr.ch/browse-documents-docman/doc_download/870-annex-to-hrm-2010-list-of-resolutions-passed-by-the-human-rights-council-in-2009.

¹⁵⁷ 18 resolutions (or 22%) were passed by a vote in 2008.

¹⁵⁸ Composition of the staff of OHCHR (Council *Resolution 10/5*); the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination (Council *Resolution 10/16*); promotion of the right of people to peace (Council *Resolution 11/4*); the effects of foreign debt and other related financial obligations of States on the full enjoyment of human rights, particularly economic, social and cultural rights (Council *Resolution 11/5* and *Decision 12/119*); the system of special procedures (Council *Resolution 11/11*); human rights and international solidarity (Council *Resolution 12/9*).

¹⁵⁹ The African Group and the OIC each presented six resolutions, the Non-Aligned Movement and the EU were each the author of four. However, individual EU countries presented a total of 12 resolutions to the Council.

ippines on trafficking in persons; Colombia and New Zealand on maternal mortality; Egypt and the US on freedom of expression; and Brazil and Egypt on the global financial crises. Other joint initiatives included Germany and Spain on the right to water, and Mexico and Colombia on elimination of discrimination against women.

Almost half of the Council's country-focused resolutions were adopted by a vote (9 out of 17), a clear indication that these continue to be divisive issues for the Council.

2011 REVIEW

The General Assembly resolution that established the Council provides that the Council's work and functioning should be reviewed five years after its establishment.¹⁶⁰ Although that would mean 2011, debates have already begun in many quarters on what the review process should focus on. In September, the Council decided, at the initiative of the Russian Federation, to set up an open-ended intergovernmental working group to review the Council's work and functioning.¹⁶¹ The working group is to begin its work after June but some States, in particular the EU, Switzerland, the US, and Mexico, have argued that it should not start until after September.

There are likely to be very differing views on what the review process should focus on and accomplish. While positions have not yet been expressed, some States that advocated a 'negative reform agenda' during the establishment of the Council may see it as an opportunity to ensure greater State control over the Council's mechanisms and OHCHR.

Importantly, the High Commissioner emphasised that 'the upcoming review of the Council will offer a forum to evaluate achievements, to identify challenges and address shortcomings.' The High Commissioner's statements to the Council are instructive on what she may consider its main challenges as well as what should be some of the key issues for the review process. In June Ms Pillay stated that the Council should 'more consistently direct its attention to alleviating chronic human rights conditions' and has

suggested some new working methods in this regard.¹⁶² The High Commissioner also called on the Council 'to confront violations wherever and whenever they take place.' She noted that a failure to do so would 'constitute a betrayal of the victims of human rights violations all over the world' and would jeopardise the Council's credibility. At the September session Ms Pillay called on the Council to ensure that through the review process it firmly maintains a focus on 'pressing human rights issues and specific situations' as this is its core responsibility. She has also invited a reflection on whether inclusion of independent expertise in the UPR process after its first cycle could further strengthen that mechanism.

Her concluding remarks on the topic, sets out what should be the goal of the review process: 'meaningful improvements in the lives of victims worldwide.'

LOOKING AHEAD

14 States will complete their term as members of the Council in June 2010.¹⁶³ It will be interesting to see to what extent a change in the membership may affect the Council's work and political dynamics. At the time of writing, GRULAC, the Eastern European Group, and the Western European and Others Group have all presented the same number of candidates as the number of seats available for the elections taking place in May at the General Assembly.¹⁶⁴ No State from the African Group has so far presented its candidature to the UN officially, but the African Union Summit has 'endorsed' the candidatures of Libya and Mauritania so far. Only the Asian Group has presented more candidates than the seats to be filled as five States are competing for four vacancies.¹⁶⁵ It is to be hoped that more States will present their candidature in the coming month to allow for competitive elections.

Looking to 2010 and as the Council begins its review process, attention will be on how the Council has and continues to perform. Some NGOs have already expressed the view that the review process must be based on a proper assessment of how the Council has implemented the mandate given to it by the General Assembly.

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General Assembly Resolution 60/251.

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Council Resolution 12/1.

¹⁶²

The Council could hold informal briefings on issues of specific concern during the intersessional periods. It could also have resort to other informal tools, such as presidential statements or declarations by the President, which would capture the 'sense of the Council' without the complicated and lengthy negotiations that resolutions entail.

¹⁶³

African Group: Angola, Egypt, Madagascar, South Africa; Asian Group: India, Indonesia, the Philippines, Qatar; Eastern European Group: Bosnia Herzegovina, Slovenia; Latin American and Caribbean Group: Bolivia, Nicaragua; Western European and Others Group: Italy, the Netherlands.

¹⁶⁴

<http://www.un.org/ga/64/elections/hrc/index.shtml>.

¹⁶⁵

Iran, Malaysia, Qatar, Maldives and Thailand are candidates, while India, Indonesia, Philippines and Qatar end their terms. Qatar has decided to run again.

While a comprehensive assessment has yet to be carried out, many NGO observers have already concluded that the Council has not performed well in addressing human rights violations. They have argued that the Council's members must not wait for the review to improve the Council's response to human rights violations. It will be interesting to see whether they will make efforts in this regard, which would ensure a more positive overall assessment of the Council's performance. As many States have resisted addressing human rights violations, there remains a real risk that the Council will continue to be stuck in the inertia of politics and group positions and that the review will not strengthen its response to the needs and demands of human rights defenders.

HALFWAY TO WHERE? THE UPR IN 2009

INTRODUCTION

The second year of the universal periodic review (UPR) mechanism of the Human Rights Council (the Council) saw a broad consolidation of practices from 2008, to the point that the UPR process is now reasonably well-defined. There was an emergence of good practice in 2009, including an increase in specific and realistic recommendations, increased cross-referencing of treaty body recommendations and calls for ratifications of international instruments, as well as submissions of overdue reports, a number of innovative approaches by States under review (SuRs) to reporting back to the Council on pending recommendations, and the use, although limited, of the Council's general debate on the UPR to report back to the Council on steps taken to implement UPR recommendations.

Not all embedded practices have been positive, however, and many continue to impact negatively on the ability of the UPR to meet its own objectives. These include continued attempts to fill the speakers list with 'friendly States'; rejections of recommendations that should not have been rejected on the grounds of treaty or customary international legal obligations; attempts to position national sovereignty or national law as a grounds for justifying non-adherence to interna-

tional standards; and an increase in recommendations that bear little or no relevance to human rights law or that seek to introduce relativist views into a universal review mechanism. 2009 also witnessed heightened challenges for civil society, where a small number of States have appeared to sponsor organisations to fill the speakers list at the stage of adoption at the Human Rights Council, and at the same time have pursued a policy of sidelining or attacking genuine non-governmental organisations (NGOs) that are critical of States' human rights records.

It was also clear that the outcomes of a number of reviews in 2009 did not reflect the reality of the human rights situation on the ground, due in part to those tactics described above, coupled with a political unwillingness to cooperate. At the halfway point of the UPR, this raises the question of whether the UPR can be considered to be working sufficiently well if the mechanism is relatively successful in a number of possibly less 'significant' reviews but fails in the more critical cases. In other cases we will have to wait for the second cycle of the UPR to assess its effectiveness in improving the human rights situation on the ground.

Finally, any assessment of the UPR needs to take into account financial and human resources. It appears that the UPR has placed a huge strain