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Quaker United Nations Office

*Human Rights
& Refugees
Publications*



A Curate's Egg

UN Human Rights Council:

Year 3

19 June 2008 to 18 June 2009

by Rachel Brett

English Français Español

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Why 'A Curate's Egg'? The phrase 'good in parts like the curate's egg' derives from a cartoon by George du Maurier published in *Punch* magazine, 9 November 1895. Although the original meaning was condemnatory but in circumstances in which the individual cannot say so, it has evolved to mean something which is partly good and partly not. It is in this latter sense that it is used for the title of this report.

The Quaker United Nations Office

The Quaker United Nations Offices located in Geneva and New York represents Friends World Committee for Consultation (Quakers), an international non-governmental organisation with General Consultative Status at the UN. QUNO works to promote the peace and justice concerns of Friends (Quakers) from around the world at the United Nations and other global institutions. It is supported by the American Friends Service Committee, Britain Yearly Meeting, the worldwide community of Friends, other groups and individuals.

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I. Introduction

The Human Rights Council is the main intergovernmental human rights body of the United Nations (UN). It has 47 members elected by the UN General Assembly. All other States can attend and participate in its proceedings, but not vote. Similarly, other observers, including National Human Rights Institutions (NHRIs) and Non Governmental Organisations (NGOs) can participate, submit written and make oral statements. The Council succeeded the UN Commission on Human Rights in 2007.

This was the first ‘normal’ operational year of the Human Rights Council, in which a more regular and predictable programme of work and pattern of meetings took place, and less time was spent on procedural and institutional issues (although these were not altogether absent)¹. For the first time it is, therefore, possible to look more generally at the Council’s substantive work. This report will focus in particular on the Universal Periodic Review (UPR), since over a third of the UN membership has now been reviewed, and there is enough experience on which to base a preliminary analysis, to identify some patterns and to make some observations. However, much of the Council’s work could be summarised as ‘business as usual’, with debates and resolutions that it would be hard to distinguish from those of its predecessor. When this allegation is made by States, it is usually about country-specific resolutions or statements about human rights violations, but in fact, much more common are the thematic resolutions with little variation. This report leaves most of these aside in

order to focus, in addition to the UPR, on new or significant developments, and those in which the Quaker UN Office has a particular interest.

At the same time as being a more settled year for the Council, there was a new High Commissioner for Human Rights, Navi Pillay of South Africa,² working alongside the new Council President, Ambassador Martin Ihoeghian Uhomobhi of Nigeria, who was an activist president. He repeatedly insisted on the broadest scope for debate, that no human rights issues are off limits, while insisting on a tone of dignity and respect. In this context, he resisted many challenges by States to statements by NGOs provided that they were indeed addressing the issue and agenda item, by, for example, referring to the report of the Special Procedure³ in inter-active dialogues with them. He applied the same principles to States, calling them to order if they used inappropriate language or addressed issues not within the scope of the particular agenda item. His initiative of a ‘panel on panels’⁴ sought to bring some order to the proliferating practice of panels – to date the experience has been mixed, ranging from productive, through mediocre and boring to retrogressive or counterproductive. He also intervened to resolve some specific problems, such as the Israeli UPR report and the mandate for the investigation into Human Rights and International Humanitarian Law violations in the context of the military operations in Gaza between 27 December 2008 and 18 January 2009,⁵ and reminded the Consultative Group that their role was

1 For more detailed information see the reports produced by the International Service for Human Rights – www.ishr.ch and, for information on the UPR www.UPR-info.org. The Council’s regular sessions were: HRC9 (8-24 September 2008), HRC10 (2-27 March 2009) and HRC11 (2-28 June 2009).

2 From 1 September 2008, succeeding Louise Arbour of Canada.

3 ‘Special Procedures’ is the generic name for the thematic and country Special Rapporteurs, Representatives, Independent Experts and Working Groups of the Human Rights Council.

4 In fact it was not a panel but this was the catchphrase used about his initiative to discuss the question of panels, which have become a – possibly excessive - feature of the HRC.

5 See below for more information on these.

to provide him with options and sufficient information on which he, as President, could decide on the Special Procedures mandate holders to be proposed to the Council for approval, and one name per vacancy was not, therefore, sufficient.

Finally, during this Council 'year' there was also a new US Administration under a very different President, which led to a welcome re-engagement of the USA with the Council, and its election to membership for three years starting in Year 4 (19 June 2009).

2. Universal Periodic Review (UPR)

2.1 Background

The UPR⁶ seeks, over a four year cycle, to review the fulfilment of human rights obligations and commitments in all 192 UN Member States. It is based on a national report⁷ prepared by the State under Review (SuR), which it is recommended be prepared after 'broad national consultations',⁸ and two other documents prepared by the Office of the UN High Commissioner for Human Rights (OHCHR) – a compilation of UN information (in particular, Concluding Observations of Human Rights Treaty Bodies and recommendations of Special Procedures), and a summary of information from 'other stakeholders' (NHRIs, NGOs and regional human rights bodies).⁹ The SuR attends a meeting of the UPR Working Group (WG) which comprises all members of the Council but with the participation of observer States also, and attendance but not participation by other observers. During the WG the SuR presents their national report or an update on it, receives and responds to questions and recommendations of the States participating in the WG, and, at the end, accepts, does not accept, or reserves its position on the recommendations made by the WG participants. Questions (but not

Recommendations) can also be submitted in advance in writing, and the SuR may respond to (some or all of) these during its presentation to the WG.

The report of the WG is prepared and presented by three State rapporteurs ('troika') from different regional groups whose names were previously drawn by lot. The report contains a summary of the SuR contributions, a paragraph for each oral statement by WG participants, and a section listing the Recommendations made and the SuR position in relation to them – either generically or specifically. Different formats have been used for this final section. This report is presented to the Plenary of the Human Rights Council for adoption following a presentation by the SuR and a period for statements by States, observers and NGOs and NHRIs. The SuR may use this occasion to respond to recommendations if they have not already done so, and/or to provide information about action already taken in response to the UPR. This is the only time during the entire process when NHRIs and NGOs have an opportunity to speak, and the time and scope of such comments are limited. The actual adoption of the report is a formality: the WG report is not changed and adoption does not

6 See UN General Assembly resolution A/RES/60/251, OP5(e) and HRC Resolution 5/1, and earlier QUNO reports for more background on the UPR.

7 To date only Cape Verde and the Comoros have not produced written reports, although South Africa only presented theirs on the day of their appearance in the UPR Working Group.

8 HRC Resolution 5/1 – this was included learning from the positive experience of the greatest national engagement in the reporting to the Human Rights Treaty Bodies.

9 The information provided by the various European human rights bodies adds significantly to the depth and scope of the information in relation to these countries. Unfortunately, no other regional human rights bodies have yet contributed.

change the status of the recommendations – they remain recommendations from the individual States. Each part of the process has strict time limits – 3 hours per country in the WG, one hour in the Plenary (divided into thirds – SuR, States, other stakeholders). More demand to speak does not lead to more time being allocated either in the WG or in the Plenary: this is part of the equal treatment principle of the UPR, although in practice, less interest/participation may mean that not all of the allocated time is used. Summaries of all the statements (not just a list of speakers) in the Plenary are included in the report of the Council session.

2.2 UPR and Treaty Bodies:

The UPR differs from the Treaty Body consideration of State reports in a number of respects. First, it is an inter-state process, without the involvement of independent experts.¹⁰ Secondly, the recommendations are made and ascribed individually to the State making them, without any attempt to produce agreed recommendations,¹¹ and without any ‘quality control’ on wording or substance, including compatibility with international human rights standards. Finally, the SuR can choose which recommendations to accept, which to give further consideration to, and which to reject.

Another difference is that only two or three minutes are permitted for questions and recommendations by each State. The questions are not posed first, and then a recommendation formulated later taking account of the response. In practice this tends to mean that if a State wishes to make one or more recommendation(s), the question is minimal or *pro forma* to allow time for the recommendation(s). This is where submitting

written questions in advance is an advantage since there is no word limit on these, and no recommendations are included. The fact that the SuR may not respond is no different, since they do not always respond to oral questions, even if they have enough time to do so. Although the written questions are not included in the report of the WG,¹² any response to them is. Advance written questions also give the SuR time to find the information and formulate a response if they wish to do so. Encouraging greater use of written questions would make sense in order to enhance the substance of the review. One way of doing this could be to have them distributed in written form, at least in the room, but preferably also as part of the documentation, for example, as an annex to the WG report so that it is clear what the question was to which the SuR responded as well as which questions were posed to which the SuR did not respond.

In contrast to the Treaty Bodies, all the UPR proceedings are webcast (both in the WG and the Plenary). This not only means that they can be watched by people outside Geneva (including in the SuR) but that the archived footage can be accessed subsequently and used, for example, as a basis for awareness-raising and other activities in country.

The broad scope of the review – in essence covering all human rights rather than being limited to those in one treaty – and the number of (potential) participants combined with the strict three hour time allocation for the process in the WG and one hour in Plenary, are other differences, and have potential contradictory implications – superficiality, but also sometimes, a particular focus on a few areas of special concern, for example, Canada and New Zealand received many

10 Except insofar as Treaty Body Concluding Observations and Special Procedure recommendations are sources of information in the background documents such as the compilation of UN information.

11 Although near identical/similar recommendations may be clustered together or consolidated into one recommendation in the WG report.

12 They are, however, posted on the OHCHR and UPR-info websites.

recommendations about indigenous peoples; Canada was specifically recommended to accept the Indigenous Declaration and the Durban Review Conference Outcome; migrants and asylum-seekers have been a focus in relation to a number of European States, including Malta and Germany; and for Afghanistan it was the rights of women and girls and the re-establishment of the moratorium on the death penalty. The sharpness of focus is reinforced by the documentary basis with page limits of 20 pages for the national report and 10 pages each for the compilation of UN information and summary of other stakeholders' information. Again, this means that nothing may be covered in depth, but that the main issues of concern tend to be clearly identified and highlighted.

Often concerns/recommendations about key issues are made by many States and from different regions, for example, in relation to Monaco, recommendations along similar lines to abolish discrimination against women in relation to acquisition and transmission of nationality were made by Sweden, Republic of Congo, and Azerbaijan, and the issue was also raised by India, Slovenia, Turkey and the UK.

2.3 Recommendations and Responses

The quality of recommendations varies enormously. Some are unexceptionable but vague, for example, to Vietnam, 'Continue fulfilling its obligations under international treaties to which it is a party (Algeria)'.¹³

Some recommendations are clear, specific and evidently in line with human rights standards, for example, to Chile 'ensure

that the law adopted to define torture is in accordance with article I of the Convention against Torture (Uzbekistan)';¹⁴ and to Congo 'Consider non-custodial measures for offenders, particularly for women, as a means of reducing overcrowding in prisons and the pressure on reintegration efforts (Ghana).'¹⁵

Standing invitations to the Council's Special Procedures, ratification of human rights treaties and reporting to Treaty Bodies, as well as issues relating to the compatibility of national human rights institutions with the Paris Principles are some of the 'procedural' recommendations that are often made and often (though not always) accepted.

Some recommendations explicitly reinforce Concluding Observations of Treaty Bodies or recommendations of Special Procedures, either in general terms, or specifically, for example, to the Central African Republic 'give specific follow-up to the recommendation of the Committee on the Rights of the Child concerning availability of free medical assistance to pregnant women (Netherlands)'.¹⁶

Particularly contentious issues include abortion, the death penalty and discrimination on the grounds of sexual orientation (including criminalisation of consensual same sex activity by adults). The Holy See¹⁷ seeks to promote a total prohibition of abortion in all circumstances,¹⁸ as well as the prohibition of the death penalty (joined in the latter case by a broad range of States reflecting the global movement in this direction), while Egypt (in particular) seeks to promote continued use of the death penalty and to resist any mention of sexual orientation.¹⁹ For example, Chile

13 Report of the WG on the UPR: Viet Nam (A/HRC/12/11), 5 June 2009, para.99(1)

14 Report of the WG on the UPR: Chile (A/HRC/12/10), 4 June 2009, para.96(33)

15 Report of the WG on the UPR: Congo (A/HRC/12/6), 5 June 2009, para.79(16)

16 Report of the WG on the UPR: Central African Republic (A/HRC/12/2), 4 June 2009, para.74(49)

17 The position of the Holy See is anomalous since it participates in the UPRWG along with other observer States, including making recommendations, but unlike the others is not included amongst those to be reviewed. This (and the similar situation of Palestine) is an issue that should be resolved before the second cycle of the UPR begins by either excluding them from participation in the WG or also subjecting them to review. The Holy See is a party to a number of human rights treaties and reports under them.

18 Usually phrased in terms of 'the right to life from natural conception to natural death'.

19 Egypt uses a phrase about resisting attempts to enforce any values or standards beyond the universally agreed ones.

rejected²⁰ Sweden's recommendation to 'further efforts to ensure that the abortion laws are brought in line with Chile's human rights obligations'²¹ and Finland's to 'review its legislation criminalizing the termination of pregnancies in all circumstances, including in cases of rape, incest and situations where the life of the mother is at risk.'²² The total prohibition of abortion and criminalisation of it is considered by the relevant Treaty Bodies to be contrary to the Convention against Torture, the International Covenants on Civil and Political and Economic, Social and Cultural Rights and the Convention on the Elimination of All Forms of Discrimination against Women.²³

A number of States have rejected recommendations explicitly citing their domestic law as the reason. For example, 'Following the concern expressed by the Human Rights Committee in 2004 that Colombia does not allow conscientious objection to military service, Slovenia recommended that Colombia (a) recognize this right in law and practice and ensure that recruitment methods allow it. The State should guarantee that conscientious objectors are able to opt for alternative service, the duration of which would not have punitive effects.'²⁴ To which Colombia responded: '37 (a) Non acceptance. The Colombian Constitution and the legal framework establish that all citizens have the obligation to enrol in the military service when the circumstances so require to defend the National sovereignty and the public institutions and to provide security conditions for all citizens. This obligation has been upheld on several occasions by the jurisprudence of the

Constitutional Court.'²⁵ States should be reminded that in accordance with Article 27 of the Vienna Convention on the Law of Treaties, they cannot invoke provisions of domestic law as justification for failure to comply with international obligations. The rejection of recommendations which reflect such human rights obligations on the basis of domestic law, is, therefore, invalid. At the same time, when a State clearly rejects the treaty provisions or interpretation of them by the Treaty Body, this should be taken up by the Treaty Body the next time the State reports to it.

The format and responses to recommendations vary. In some cases, all recommendations are listed at the end of the report, including those rejected and those that the SuR will consider further, rather than 'burying' rejected ones by only referring to paragraphs in the body of the text. Other States have listed all recommendations and reserve their position on them until the report comes to Plenary. Failing to respond clearly to all recommendations either at the time of the WG or by or at the Plenary is problematic since this raises difficulties in assessing whether the SuR is fulfilling its obligations in respect of accepted recommendations. If the SuR has not set out its position on the recommendations at the time of the WG, providing this information in advance of the consideration in Plenary enables better-informed responses by those participating at that stage. When this information is provided in a document, it becomes an Addendum to the WG report, and thus a useful and accessible reference tool for follow up both in country and at the Human Rights Council.

20 Technically, these recommendations 'did not enjoy the support of Chile', Report of the WG on the UPR: Chile (A/HRC/12/10), 4 June 2009, para.98

21 Report of the WG on the UPR: Chile (A/HRC/12/10), 4 June 2009, para.24(b)

22 Report of the WG on the UPR: Chile (A/HRC/12/10), 4 June 2009, para.37(a)

23 For example, most recently by CAT in its Concluding Observations on Nicaragua (CAT/C/NIC/CO/1), 14 May 2009, para.16. Nicaragua is scheduled for the UPR in 2010.

24 A/HRC/10/82, para.37

25 A/HRC/10/82/Add.1

Apart from simply accepting or rejecting recommendations, some SuRs provide detailed responses. For example, Germany rejected the recommendation (from Brazil) that it withdraw its reservations and declarations to the Convention on the Rights of the Child²⁶ explaining that it cannot withdraw these because they were conditions for ratification imposed by the Länder in relation to matters within their exclusive jurisdiction, but it committed to continue its repeated attempts to try to convince them.²⁷

Uruguay deserves a particular mention because it immediately accepted all 88 recommendations made to it (with one caveat that they thought, but had been unable to confirm, that they had already ratified the UNESCO Convention against Discrimination in Education).²⁸

2.4 Achievements

One of the remarkable features about the UPR to date is that all States have attended the WG and on time, and almost all have prepared a written report for it. This contrasts with the experience of the Treaty Bodies. For example, Malta, which appeared in UPR5, is 12 years overdue to report on its implementation of the International Covenant on Civil and Political Rights. Amongst the factors influencing this universal participation may be: (i) it is a *new* procedure – it will be important to monitor whether the 100 percent record continues once the second and subsequent rounds of reporting occur; (ii) it is a political process and thus there is peer group pressure from within the regional or sub-regional group; (iii) there is active engagement of the OHCHR in encouraging and facilitating participation for those States with few resources and, in particular, those without diplomatic representation in Geneva, as well as more generally in providing

technical assistance in preparing reports. Algeria specifically asked Comoros (who did not produce a written report although they appeared for the WG) whether they had sought technical assistance – no response was provided.

Apart from judging the UPR by means of physical reporting and participation in the process, there may be some other quantifiable measures to see whether it is having a positive impact, although a qualitative assessment of actual improvements of the human rights situation in individual countries is always harder to gauge. Some of the recommendations that are regularly made concern what might be termed 'institutional' issues, ratification of treaties, withdrawal of reservations, submission of overdue reports, issuance of standing invitations to Special Procedures, and creation or improvement of national human rights institutions. Some of these are quantifiable as to whether they appear to be having results (although direct cause and effect are always debatable). For example, of the 70 States who have so far been through the UPR, 36 have ratified at least one of the older human rights treaties (excluding those adopted in or after 2006) and a further three signed in the period from 2007 (that is, since the time of knowing that they would be an early participant in the UPR), adding 51 new ratifications and 13 new signatures to human rights treaties. By comparison, of the 112 States who have not yet been through the UPR, 34 have ratified one or more treaties since 2007 and one more has signed one, with a total of 49 new ratifications and three signatures. However, seven of these ratifications and all three signatures are from States who will be reviewed in the next session (UPR6, scheduled for December 2009). In addition, of the six new standing invitations since 2007, four were from States who have been reviewed.

26 Report of the WG on the UPR: Germany (A/HRC/11/15), 4 March 2009, para.81(4)

27 Report of the WG on the UPR: Germany; Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the SuR (A/HRC/11/15/Add.1), 20 May 2009

28 Report of the WG on the UPR: Uruguay (A/HRC/12/12), 4 June 2009, para. 78

In contrast to the general, and institutional, recommendations, other recommendations are specific to the SuR. For example, to Djibouti ‘Consider instituting measures to strengthen its institutional and operational capacity in the administration of justice, including the establishment of a juvenile justice system, training of judicial and law enforcement officers who deal with juvenile cases, as well as the development and strengthening of legislative measures to ensure prompt investigation and prosecution of sexual offences against children (South Africa)²⁹. To Luxembourg, ‘Adopt provisions regarding alternatives to custody (Slovenia); look into measures to protect the best interests, needs and physical, social and psychological development of babies and children affected by parental detention or imprisonment (Slovenia); in addition to building new prisons and holding centres, consider non-custodial ways of addressing the issue of mothers in detention or imprisonment, during both pre-trial and post-sentence periods, particularly when mothers are foreigners or illegal residents (Ghana).³⁰

In at least some cases, specific action is reported as a direct outcome of the UPR. For example, Barbados responded in the HRC Plenary at the time of the adoption of its UPR report, ‘Subsequent to the review of Barbados under the UPR, the Cabinet of Ministers in Barbados has agreed to the abolition of the mandatory death penalty and is in the process of amending the relevant laws.’³¹ This responded to part of a number of recommendations by various States on the death penalty. Tunisia, reported in March 2007, under the item 6 general debate, that it had submitted its overdue reports to CAT, CEDAW and Human Rights Committee, and Cuba announced that it had invited the Special Rapporteur on Torture to visit.

Even when a State announces an action as being a result of the UPR, this may not be conclusive, for example, the UK announced that it had withdrawn its reservations to the Convention on the Rights of the Child. This had indeed been a UPR recommendation, but in the meanwhile the UK had reported to the Committee on the Rights of the Child and it was on that occasion that it announced that it would be withdrawing its reservations.

As always, it is important to consider that what happens in Geneva is of less importance than the effect in the country concerned. Some national NGOs have found this a valuable process in particular the explicit call for broad national consultations are both an opportunity (if they occur) to engage with the government on human rights issues and also a validation of the role of national human rights NGOs. Where States are recommended to continue the process as part of the follow-up, this reinforces the likelihood of domestic action. Similarly, the engagement of NHRIs has led to specific commitments from some of them to work on and monitor follow up. Perhaps they could also consider submitting annual updates to the Human Rights Council.

2.5 Particular Problems

It was inevitable in the political environment of the Human Rights Council and the situation on the ground, that the UPR of Israel would not be straightforward. However, it is important to note that this is the first time that the human rights situation *in Israel* (which deserves as much attention as that in any other country) was considered by the Council. Not surprisingly, in both the WG and the Plenary the human rights situation in the Occupied Territories was a major focus. The fact that Israel only accepted recommendations relating

29 Report of the WG on the UPR: Djibouti (A/HRC/11/16), 29 May 2009, para. 67 (11)

30 Report of the WG on the UPR: Luxembourg (A/HRC/10/72), 8 January 2009, para.53(14)

31 Report of the WG on the UPR Barbados Addendum Views on conclusions and/or recommendations, voluntary commitments and replies presented by the SuR (A/HRC/10/73/Add.1), 16 March 2009, para.11

to human rights in Israel, while within the general rule that the SuR can accept or reject any recommendation, was challenged. In the first instance Israel was not clear and specific about its position on each recommendation. The wish for such clarity has been espoused by NGOs in relation to all States and remains their position – a SuR cannot be forced to accept a recommendation, but it should make its position clear, and preferably give reasons for rejecting recommendations. Egypt chose to take up the cause in relation to Israel. It would be useful if Egypt were to continue to espouse it with equal persistence and vehemence in relation to all other States, thus demonstrating that this was not a case of selectivity and double-standards.

It is perhaps not surprising that too great a demand to speak in the WG only arose in UPR4 when China, Cuba and the Russian Federation were all under review. Whether or not as a spill-over effect, oversubscription affected a number of other States in this WG, although none in the previous WG and only one in the following one. Clearly, there are a number of different factors at play, not all of which have to do with human rights. Some States may wish to try to avoid critical questions and recommendations and thus encourage 'friendly' States to sign up. In other cases, it is more a question of the degree of interest by many States. Although it is clear that there need to be clear and transparent rules if more States wish to take the floor than time permits, it is important to keep this in proportion. During this Council year, the minimum number of speakers was 20;³² in UPR3 the range was between 23 and 57, with an average of 37.75. In UPR5 the minimum was 20, the maximum (including undelivered

statements) was 66, and the average 43. This suggests that UPR4 with its minimum of 43, maximum (including undelivered statements) of 115,³³ and average of 77 was an aberration rather than a new trend.

The problem of too many speakers is not only delegations not getting to speak, nor that the WG report becomes overlong,³⁴ but also what happens about recommendations that are not delivered due to lack of time? To date, the only agreement is that these statements are posted on the OHCHR Human Rights Council extranet but the SuR is not required to take any notice of them; however some have indicated that they will, for example, Canada.³⁵ Since only the time allotted precluded their consideration, the SuR should be encouraged to respond to them, they should be included in the report of the WG or as an annex to it (or at least distributed in the room at the time of the consideration in Plenary), and be one of the bases for the 2nd round of the UPR. In addition, those States unable to speak in the WG should be given priority in the Plenary if they wish to speak.

The time problem is compounded if the meeting does not start on time: in particular the members of the Council should be reminded that one of their duties as members is to attend meetings of the Council and its UPR WG in order to ensure a quorum. Council members who fail to appear on time and thus delay the start, and hence prevent the use of the full time allocated to each SuR are demonstrating selectivity and double standards.

A particular question arose as to whether the situation in Kosovo should be reviewed and, if so, who would be responsible

32 The fact that less than half the number of members of the Council are participating – and not all of these were Council members – raises questions about the commitment of Council members to the process.

33 China

34 Since each speaker gets a separate paragraph, the agreed word lengths for translation are exceeded. One interim solution was to omit from the body of the text any recommendations included in the final section.

35 Marius Grinius, Ambassador and Permanent Representative of Canada, UN HRC UPR Opening Statement, 9 June 2009

for preparing and presenting the report. Serbia asked UNMIK for information to be considered during Serbia's review, but the Council President, with the agreement of the Bureau, did not endorse this, in particular given that the International Court of Justice has been asked for an advisory opinion on the legality of Kosovo's declaration of independence.³⁶

2.6 UPR General Debate

Initially there had been some reluctance to have an Item 6 general debate as there were fears that it might be used to continue or reopen the Review. However, a number of States have used this standing item on the Council agenda to provide updates on action taken since being reviewed, including Tunisia who at the time had seemed particularly apprehensive about the UPR process.

Some States have chosen to present a progress report on implementation of UPR recommendations. Bahrain (one of the very first states to be reviewed) presented its Action Plan one year after going through the process (HRC11), in fulfilment of one of its voluntary commitments to provide an annual update so that the 4 years between UPR reviews could be seen as a continuous process. One of their most significant responses to the UPR recommendations has been to change the sponsorship system for migrant workers, so that the employer is no longer the sponsor

and, therefore, the employer's permission is no longer required to change employment. From 1 August 2009, when the new law came into effect, the Government's Labour Market Regulatory Authority will be the sponsor and thus able to authorise change of employment. It would be useful if Bahrain reported on the experience from this innovation as a feature of their next annual update, as it could make an important contribution towards improving the situation of migrant workers and encouraging positive changes in other countries in the region.

Two notable reflections on the experience of undergoing the UPR were given by the United Arab Emirates and Malaysia. The UAE not only thanked participants for their commendations but also specifically thanked them for their criticisms since, as the Minister of State for Foreign Affairs pointed out, at the end of the day they come to this process to improve.³⁷ Similarly, *Malaysia* commented, "In order for the UPR to be effective and meaningful, we believe that countries participating in the process must approach this important exercise in a spirit of sincerity, openness and transparency. We are of the view that observations and recommendations, raised during the session, no matter how difficult should be addressed and dealt with in a constructive manner. If we choose to be defensive, in denial, cynical and not wanting to engage with others in good faith, we will render the whole process meaningless."³⁸

36 Minutes of the Bureau meeting, 19-11-2008

37 Concluding statement by HE Dr Anwar Mohammad Gargash, Minister of State for Foreign Affairs of the UAE, Geneva, 19 March 2009

38 Statement by Malaysia, 20 March 2009, agenda item 6, 10th regular session of the HRC

3. Thematic Special Procedures and Issues

The Council completed the 'review, rationalisation and improvement' of the previous Commission on Human Rights mandates, renewing the Special Rapporteur on *toxic waste*, and Working Group of *Experts on People of African Descent*. It created a second new mandate, an Independent Expert in the field of *cultural rights* (10/23)³⁹, to identify best practices and possible obstacles in promotion and protection of cultural rights at local, national, regional and international levels, to study the relation between cultural rights and cultural diversity (in conjunction with UNESCO and others) and to submit proposals and/or recommendations to the Human Rights Council.

The new mandate holders are bringing a new challenge to the Council and its members, and sometimes also *vice versa*. In some cases, this is because of new mandates, such as the first report by Independent Expert on the issue of human rights obligations related to *Safe Drinking Water and Sanitation* (Catarina de Albuquerque) and the insistence on talking about things not normally discussed such as toilets. Sometimes it is because of new vigour and rigour, and even a willingness to question some of the dubious propositions made by States and in Council resolutions. Not surprisingly, the latter in particular evoked some sharp reactions. Notable in this was the inter-active dialogue with the Special Rapporteur on *Freedom of Expression* – perhaps we need a Special Rapporteur to protect the right to freedom of expression of the Special Rapporteur on the Right to Freedom of Expression! Frank La Rue's criticism (A/HRC/11/4) of the concept and resolutions on 'defamation of religions' were not well received by their proponents.

The new Special Rapporteur on the *Right to Health*, Anand Grover, plans to bring his experience from the HIV/AIDS field into his future work, in particular, the importance of involving the rights-holders themselves in the process. The focus on the strengths and weaknesses of cash transfer schemes by the Independent Expert on *Extreme Poverty*, Magdalena Sepulveda, is valuable since some of these schemes have shown a significant impact in breaking the inter-generational cycle of poverty while others have not, and in any case they cannot be a substitute for broader social security provision. A welcome innovation was the joint visit to Togo by the Special Rapporteur on *Human Rights Defenders* with the Special Rapporteur on human rights defenders of the African Commission on Human and Peoples' Rights (July/August 2008).

The Special Rapporteur on *Violence against Women* presented her final thematic report (A/HRC/11/6) on completing two terms in the mandate. It focusses on the political economy of women's human rights identifying how structural the issue of violence against women is, grounded in particular economic interests and power dynamics and inextricably linked with the distribution and use of resources and entitlements. She also produced '15 years of the UN Special Rapporteur on Violence Against Women, its causes and consequences (1994-2009)– A critical review' (A/HRC/11/6/Add.5).

The Special Representative of the Secretary-General on *business and human rights* is now applying his 'protect, respect and remedy' framework for governments and businesses (A/HRC/11/13).

³⁹ Resolutions are referenced only by session and number. All resolutions are adopted without a vote unless indicated to the contrary, in which case the voting result is given in the order: yes–no–abstention.

The resolution on Protection of human rights and fundamental freedoms while *Countering Terrorism* (10/15) includes not only the obligation to protect human rights (including economic and social ones) whilst countering terrorism but also access to effective remedies for anyone whose rights are violated. The Special Rapporteur recommended (A/HRC/10/3) that intelligence agencies should develop internal and international training programmes on how to comply with human rights in their operations, and the resolution requests him to prepare a compilation of good practice in this respect, including oversight of such agencies.

There was controversy around the Special Rapporteur on *Torture's* consideration (A/HRC/10/44) of the death penalty as a form of cruel, inhuman and degrading treatment, with some States (who maintain the use of the death penalty) stating that this was outside his mandate. This led to a vote on the resolution (10/24; 34-0-13)⁴⁰ on torture although it focussed substantively on the role and responsibility of medical and other health personnel.

Another controversial resolution was *Discrimination based on religion or belief* and its impact on the enjoyment of economic, social and cultural rights (10/25; 22-1-24). Pakistan called for the vote (on behalf of the Organisation of the Islamic Conference) but it was South Africa who voted against indicating that they were unhappy about the shift in focus from religious intolerance to discrimination based on religion or belief. The negative effects of such discrimination can be severe and long-lasting. For example, those who refuse to undertake compulsory military service on religious or conscientious grounds may be unable to graduate from university or debarred from certain professions.

Of course, one of the functions of thematic procedures is also to undertake country missions and to report. The Special Rapporteur on *Extrajudicial Executions* visited Kenya and reported on the post-election violence, in particular, and summary executions more generally. His report (A/HRC/11/2/Add.6) was welcomed as an accurate reflection of the situation by the Kenyan Human Rights Commission, which did not prevent some States objecting to it on the grounds that it drew so heavily on the reports of that body. His proposals that the Police Commissioner should be dismissed and the Attorney-General resign if there was to be any hope of establishing a credible law enforcement system in Kenya were considered to be beyond the scope of his mandate. However, the response of the Kenyan delegation (representing the Grand Coalition Government) was more muted than might have been predicted.

The use of Special Sessions of the Council to address thematic as well as country specific human rights 'crises' is welcome: the first was on the global food crisis in May 2008. The second (10th Special Session) was on 'the impact of the global economic and financial crises on the universal realisation and effective enjoyment of human rights' (20 and 23 February 2009). Less positive was the inability to reach a consensus outcome (SS-10/1; 31-0-14) amidst disagreements as to the role of the Council in addressing the macro-economic issues, rather than remaining focussed on the human rights aspects.

A groundbreaking resolution (11/8) was adopted on *preventable maternal mortality and morbidity* recognising that this is a human rights issue and needs to be addressed as such, as well as a health issue. This followed on from a panel discussion at the 8th session of the Council and significant attention to the issue by Paul Hunt,

40 After a separate vote to delete the paragraph taking note of the Special Rapporteur's report had been defeated (27-10-10).

the former Special Rapporteur on the Right to Health. More than half a million women and girls die in pregnancy and childbirth every year.

The resolution (10/13) on *Arbitrary deprivation of nationality*, presented by the Russian Federation, includes statelessness and urges all States to adopt and implement nationality legislation with a view to avoiding statelessness. Although the Russians have a vested interest in the subject of arbitrary deprivation of nationality, this is equally true of many of the countries which take up thematic human rights issues, and does not alter the value of giving greater attention to the under-considered issue of statelessness.

Pakistan, supported by Algeria, continues to complain that the right of peoples to *self-determination* no longer figures as a separate agenda item as it did for the Commission on Human Rights.

The adoption by consensus of the Outcome of the *Durban Review Conference* was not a foregone conclusion and much credit in this achievement is due to a lot of people, including, in particular, the High Commissioner for Human Rights and Yury Boychenko, the Chairman-Rapporteur of the WG negotiating and drafting the Outcome Document. Although a few States chose not to participate in the process, it is to

be hoped that controversy can now be put aside in favour of addressing racism, racial discrimination, xenophobia and related forms of intolerance. The new Special Rapporteur on Racism, Githu Muigai, will be using the Outcome Document as the framework for his mandate.

There was a panel on equality before the law during which the High Commissioner for Human Rights, States and members of civil society called for the establishment of a new Special Procedure mechanism to address laws that discriminate against women, strengthen States' actions in this area and promote best practices across societies.

In addition to the Council President reminding the Consultative Group that their task is to propose options (with justifications) to the President, who then selects the 'slate' to be presented to the Council, India rightly recalled the principles of non-proliferation of functions, and thus objected to a member of a treaty body being proposed for the Working Group on African Descent. They were persuaded not to oppose the specific individual once the Council had been informed that he had in fact submitted a letter of resignation which would take effect before the first meeting of the WG occurred, but India was correct that this situation should not have arisen.

4. Country Mandates and Action

There had been deep concern about the human rights situation in *Sri Lanka* for a long time, and an increasing sense of urgency, as the conflict between the government and the LTTE reached its climax, about the situation of civilians and displaced people in the conflict areas. However, by the time the 11th Special Session took place (May 26-27 2009), the government had won a military victory and was thus able to present its 'successful' strategy as a justification and to deny the need for scrutiny or further attention to

the affected population. The resolution it proposed explicitly referred to "the principle of non-interference in matters which are essentially within the domestic jurisdiction of States" – a doctrine that does not apply to human rights since they are accepted as being a legitimate matter of international concern. Cuba (Sri Lanka not being a member of the Council and, therefore, unable to act in the voting process), proposed a "no action motion" in relation to the amendments tabled to this draft (the first time this has happened in the

Council, though a ploy which had been used in the Commission on Human Rights). This was carried (22-17-7), thus the amendments were not considered on their merits, and the resolution was adopted (S-11/1; 29-12-6) albeit with oral amendments which redressed some of the elements of concern.

In September 2008 (HRC9), the mandate of the expert group on Darfur was laid down and that of the Special Rapporteur on Sudan was extended only until June 2009. Despite efforts by Sudan, supported by Egypt (supposedly on behalf of the African Group), to terminate the mandate of the Special Rapporteur, the resolution (11/10; 20-18-9) substituted an Independent Expert. This new mandate was supported by some members of the African Group, a number of Latin American countries (including, unusually, Brazil), as well as some Asian ones and all Council members from the European Union and the Western European and Other Group. The Independent Expert's mandate covers both the mandate of the former Special Rapporteur on Sudan and follow-up to the Group of Experts on Darfur, and is for the standard one year duration.

The mandate of the Special Rapporteur on DPRK was extended for one year (10/16; 26-6-15). Cuba called a vote and voted against but, similarly to the vote on Sudan, all regional groups were split (right across the board – with yes, no and abstentions) except the Western European and Other Group who all voted in favour.

Barely had the country specific mandate on the Democratic Republic of Congo been abolished (at HRC7) than a Special Session had to be called to address the situation in Eastern DRC (SS8; 1 December 2008). Part of the 'balance' in dropping the mandate was to request a group of seven thematic Special Procedures to visit and advise the government on how to improve the human rights situation in the country. Their main finding was lack of

action amounting to abdication of responsibility by the government, combined with impunity and the need to reform the army, police and intelligence services to remove human rights violators and establish discipline in the chain of command. 'Technical assistance cannot replace government inaction'.⁴¹ In addition, although a group of thematic experts can do valuable work, by definition they are not in a position to give consistent attention to one country, and, therefore, it would be better to have a country specific mandate to follow-up on the situation and the recommendations made with both the government and the UN. However, the resolution (10/33; 33-0-14) gave a continued role to thematic Special Procedures, including reporting to HRC13, and to the OHCHR but no country mandate; the EU amendments to the resolution were defeated (18-21-8).

The mandate of the Independent Expert on *Haiti* was extended via a Presidential Statement (PRST/9/1) but not the one for *Liberia* (9/16) - OHCHR is to report to the Council instead. Resolution (10/31) extended the mandate of the Independent Expert on *Somalia* for 6 months only (until the end of September 2009), and asked OHCHR to engage more with that country. Although the mandate of the Independent Expert on *Burundi* was continued in September 2008 (9/19), this was only until the creation of an independent national human rights commission, with a report to the Council when this had happened. However, no provision was made to report if, as is so far the case, it does *not* happen, leaving the situation in limbo. The mandate of Special Rapporteur on *Myanmar* was extended (10/27) for one year, without a vote despite some reservations being expressed by China, Russia and India; and a new mandate of Special Rapporteur for *Cambodia* (replacing the Special Representative of the Secretary-General) was created (9/15).

41 Statement by Mr Walter Kälin, Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, on behalf of seven thematic Special Procedures mandates reporting under resolutions 7/20 & S-8/1, 10th session of the Human Rights Council, Geneva, 17 March 2009

Israel/Palestine: at HRC10 there were resolutions on the Occupied Syrian Golan (10/17; 33-I-13), and Israeli settlements (10/18; 46-I-0) in all instances where a single negative vote was cast it was that of Canada but in this instance even Canada stated that the settlements are contrary to international law. The resolution on human rights violations emanating from the Israeli military attacks and operations in the OPT (10/19; 25-4-8) created an EU split with some voting against while others abstained and Switzerland voted in favour. The right of Palestinian people to self-determination (10/20; adopted without vote but Canada 'dissociated itself from the consensus'). At the Council's 9th Special Session (9 and 12 January 2009) on 'the grave violations of human rights in the Occupied Palestinian Territory, including the recent aggression of the occupied Gaza Strip', the resolution mandated a fact-finding mission (S-9/1; 33-I-13). The President of the Council

appointed 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 to head the mission. The three other members are Professor Christine Chinkin, the former Special Representative of the Secretary-General on human rights defenders Ms Hina Jilani, and Colonel Desmond Travers. The mission's mandate is 'to investigate all violations of international human rights law and international humanitarian law that might have been committed at any time in the context of the military operations that were conducted in Gaza during the period from 27 December 2008 and 18 January 2009, whether before, during or after'.⁴² At the 10th regular session, there was a resolution on Follow up to the 9th Special Session on grave violations of human rights in the OPT, particularly occupied Gaza Strip (10/21; 33-I-13).

5. Standard Setting

The draft *guidelines for alternative care of children* (11/7) were forwarded to the UN General Assembly for consideration with a view to their adoption on the 20th anniversary of the Convention on the Rights of the Child. In addition to addressing forms of alternative care and relevant principles and safeguards, they cover preventing the need for alternative care, including the use of non-custodial remand and sentencing options when dealing with a child's sole or main carer who comes into the criminal justice system, and the issues about separating child from parent when the parent is in custody.

The working group on mercenaries is proposing the drafting of a convention to

regulate the activities of *Private Military and Security Companies* (10/11; 32-12-3).

Complaints mechanisms: With the UN General Assembly's adoption (on the 60th anniversary of the Universal Declaration of Human Rights) of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child is now the only international human rights treaty that makes no provision for complaints to be considered about alleged violations. Under pressure from child rights NGOs, it was agreed (11/1) to establish an open-ended working group of the Council to explore the possibility of elaborating an optional protocol to the Convention to provide a communications procedure.

42 The original mandate in resolution S-9/1 of 12 January 2009 had been 'to investigate all violations ... by the occupying Power'.

6. Other Council Mechanisms

The *Confidential Complaints Procedure*: consideration of the situation in the Maldives was discontinued at HRC9, while Turkmenistan was kept under review until HRC11 when it also was discontinued.

The *Human Rights Council Advisory Committee* is drafting a declaration on human rights education and training. In accordance with the terms of its rotating membership, four of its original members' terms ended, but the 'election' was in fact a reappointment (without a contest) of the same members, Halima Warzazi, Shiqui Chen, Miguel Alfonso Martinez and Jean Ziegler, thus continuing the old bad practice of not having actual elections as well as perpetuating what India described as career human rights function holders.⁴³ The publication as UN documents of completed reports of the former Sub-Commission was agreed (10/117; 29-3-15), though not without controversy. It is possible that India's objection was not unrelated to the fact that

one of these reports concerns discrimination based on work or descent.

The *Forum on Minority Issues* held its first annual session in December 2008, with the theme of 'Minorities and the Right to Education', chaired by a Roma woman from Hungary. Following the Forum's discussions, a set of recommendations were included in an annex to the report (A/HRC/10/011/Add.1) of the Independent Expert on minority issues. The second session is planned for 12 and 13 November 2009, with the theme of 'Minorities and Effective Political Participation'. The *Expert Mechanism on the Rights of Indigenous Peoples* held its first session from 1-3 October 2008, with its second scheduled for 10 to 14 August 2009. It has been working on the right to education for indigenous peoples. The *Social Forum* held its first meeting (as a subsidiary body of the Council) in 2008, and will meet again from 31 August to 2 September 2009.

7. Conscientious Objection to Military Service

Reports on this issue had been presented to the former UN Commission on Human Rights every second year and this periodicity is being continued in the Human Rights Council. The OHCHR's first report to the Council (A/HRC/9/24) provides an update of the significant developments on conscientious objection at the international, regional and national levels. In particular, it highlights the groundbreaking decision of the Human Rights Committee (*Mr Myung-Jin Choi and Mr Yeobum Yoon*, Communications Nos. 1321/2004 and 1322/2004), that made clear that conscientious objection to military service is

protected by the International Covenant on Civil and Political Rights' Article 18 (right to freedom of thought, conscience and religion), and the Committee's General Comment No. 32 that repeated punishment of conscientious objectors for their continued refusal is contrary to Article 14 of the Covenant (*ne bis in idem* principle).

The Special Rapporteur on Freedom of Religion and Belief and the Working Group on Arbitrary Detention are also active in addressing conscientious objection issues. For example, in the report⁴⁴ of her Mission to Turkmenistan, the Special Rapporteur

⁴³ Statement by India, HRC11, item 11, Appointment of Mandate-Holders, 18 June 2009

⁴⁴ A/HRC/10/8/Add.4

highlights that conscientious objection to military service remains a criminal offence in that country and such objectors may be repeatedly punished contrary to the *ne bis in idem* principle.

The Working Group on Arbitrary Detention has taken up individual cases in Colombia, Israel and Turkey. The Working Group, which had already identified repeated imprisonment of conscientious objectors as being a form of arbitrary detention, following the Human Rights Committee's decision now considers that the initial detention of a conscientious objector can be 'arbitrary'.⁴⁵ In the report⁴⁶ on its Mission to Colombia, the Working Group raises the issue of forced recruitment into the military by means of *batidas* as well as the lack of recognition of conscientious objection to military service. Both of these issues were also addressed in their *Opinion No. 8 (Colombia)*.⁴⁷ The issue was also raised in the UPR on Colombia, with an excellent recommendation from Slovenia, which, however, Colombia rejected on the basis that their Constitutional Court had given precedence to the obligation to do national service over the right to freedom of thought, conscience and religion which is also enshrined in the Constitution. However, this fails to take account of the evolution at the international level and, in particular, the Human Rights Committee's clear position that conscientious objection to military service is protected under Article 18 of the Covenant. For Colombia, this should have more than usual significance since ratified human rights treaties have status in Colombia. There is currently a challenge in the Constitutional Court on this precise issue, and it will be interesting to see whether the Court now aligns itself with the recognised interpretation of international

human rights standards to which Colombia is a party. If not, this is a point which should be taken up by the Human Rights Committee when considering Colombia's next report under the Covenant.

Furthermore, the Independent Expert on Minority Issues' report⁴⁸ on her Mission to Greece refers to the excessive duration of alternative service compared with the military service (with particular reference to Jehovah's Witnesses).

Under the UPR, the subject of conscientious objection to military service has come up a number of times, including in the form of specific recommendations. Chile, a country in which there is no general provision for conscientious objection to military service, reported that 'The objection of conscience to military service is available to relatives of the victims of human rights violation of the past.'⁴⁹ Serbia was recommended 'To reinstate civilian control of decision-making in relation to applications for conscientious objection to military service, to extend the time during which applications can be made, to remove the exclusion of all those who have ever held a firearms license from being recognized as conscientious objectors, and to equalize the length of alternative and military service (Slovenia)⁵⁰ Serbia accepted some but not all of this recommendation, stating 'civil control has been established both when it comes to decisions during the procedure of submitting conscientious objection and the realization of forms of military service on the basis of the said right. Certain proposals and recommendations of the Republic of Slovenia have already been incorporated into the Draft Law on Civilian Service, which is in parliamentary procedure. ... The equalization of military and civilian service is *not possible*,

45 WG on Arbitrary Detention (A/HRC/10/21/Add.1) Opinion No.16/2008 (Turkey), 9 May 2008

46 A/HRC/10/21/Add.3, para. 66

47 WG on Arbitrary Detention (A/HRC/10/21/Add.1) Opinion No.8/2008 (Colombia) ,8 May 2008

48 A/HRC/10/11/Add.3 of 18 February 2009, para. 34

49 Report of the Working Group the WG on the UPR: Chile (A/HRC/12/10), 4 June 2009, para. 53

50 Report of the WG of the UPR: Serbia (A/HRC/10/78), 8 January 2009, para.57(16)

because a soldier serving armed military duty spends an uninterrupted six months in his unit, while a person in civilian service spends eight hours in his assigned organization or institution, is free on weekends and has the right to regular and awarded leave. The proposal “to invalidate the exception of those who have held weapon permits from the right to conscientious objection” is in absolute collision with the arguments of the institution of conscientious objection and, thus, *cannot be accepted*.⁵¹ On the latter point, the Human Rights Committee has made clear that a person may be willing to shoot say rabbits, while not being willing to shoot people. The Russian Federation had also asked Serbia about the provision of alternative civil service.⁵² Turkmenistan was recommended

‘To recognize conscientious objection to military service in law and practice and stop prosecuting, imprisoning and repeatedly punishing conscientious objectors (Slovenia).’⁵³ Turkmenistan stated that it was preparing legislation to enable unarmed military service as an alternative for conscientious objectors to military service, but this fails to take into account that the international standards require that the alternative must be compatible with the reasons for the objection, and many conscientious objectors will only accept a fully civilian alternative service under civilian control. As a result of the UPR, Israel committed to promote “granting the right to those who object to serve in the army on conscientious grounds to serve instead with a civilian body independent of the military”.⁵⁴

8. Detention/Prisoners

The Special Rapporteur on the Right to Education devoted his report (A/HRC/11/8) to the subject of the *right to education of persons in detention*. Although his original intention had been to cover all persons in detention, in fact he limited this report to those detained through the criminal justice system. His next report will focus on the right to education of migrants, refugees and asylum-seekers. The report’s recommendations are picked up in the resolution (11/6) and set out a good agenda for a coherent policy to improve the access to and scope of education for detainees, including recognising that this is an imperative in its own right as well as being a tool to foster reintegration and reduce recidivism, the need to ensure that women and men have equal access and that curricula and education practices are gender sensitive but not

gender-stereotypical, to remove barriers to education (including possible negative impact on opportunities for remuneration in prison), to make available comprehensive education programmes aimed at the development of the full potential of each detainee, and to develop individual education plans with the full participation of the detainee taking into account the diverse backgrounds and needs of persons in detention, including women, persons belonging to minority and indigenous groups, persons of foreign origin and persons with physical, learning and psychosocial disabilities, while noting that a detainee may belong to more than one of these groups, and to ensure that primary education is compulsory, accessible and available free to all, including to all children in detention or living in prisons.

51 Report of the WG of the UPR: Serbia Views on conclusions and/or recommendations, voluntary commitments and replies presented by the SuR (A/HRC/10/78/Add.1), 18 March 2009), paras.29 and 30

52 Report of the WG of the UPR: Serbia (A/HRC/10/78), 8 January 2009, para.30

53 Report of the WG of the UPR: Turkmenistan (A/HRC/10/79), 6 January 2009, para.70(12)

54 Statement by H.E. Aharon Leshno Yaar, Permanent Representative of Israel to the UN, Geneva, UPR, Human Rights Council, 19 March 2009

The Special Rapporteur on the *Right to health* sent communications to a number of governments concerning the health of individual detainees and of policies relating to health and penal policy (for example, the harm reduction approach to drug use).⁵⁵

The resolution (10/2) on *Human rights in the administration of justice* goes beyond its traditional focus on juvenile justice to recall that the best interests of the child should be a primary consideration in relation to the question of whether and how long children of imprisoned mothers should stay with them in prison, and emphasizes the responsibility of the State to provide adequate care for women in prison and their children; emphasizes that, when sentencing or deciding on pretrial measures for a pregnant woman or a child's sole or primary carer, priority should be given to non-custodial measures, bearing in mind the gravity of the offence and after taking into account the best interest of the child; and requests the UN Secretary-General to submit a report to the 13th session of the Council on the latest developments, challenges and good practices in human rights in the administration of justice, including juvenile justice and conditions for women and children in detention, as well as in activities undertaken by the UN system as a whole.

During its review under the UPR, New Zealand reported 'progress in respect of infant children of prisoners through the enactment of the Corrections (Mothers with Babies) Amendment Act. This allows a child up to the age of two years to remain with its mother, provided it is in the best interests of the child.'⁵⁶

The Special Rapporteur on the Right to Education also took up with France (on behalf of the EU), the question of the EU return directive and the possible duration of detention under it, including of children and vulnerable groups.⁵⁷ On the initiative of Côte d'Ivoire, the HRC12 (September 2009) is to include (11/9) a *panel about detention of migrants* and others who enter or remain in a country in an irregular manner, in particular alternatives to detention, reducing the duration of detention, access to due legal process, and ways to promote and protect the human rights of those detained. This draws on a proposal by the Working Group on Arbitrary Detention⁵⁸ for a seminar involving all stakeholders to consider, in particular, how to reduce the overuse and duration of detention for persons who enter or remain in a country in an irregular manner, to identify alternatives to detention and effective access to judicial review of detention. This is not a new problem; nearly ten years ago the Working Group had adopted Deliberation No. 5 on 'the Situation regarding immigrants and asylum seekers'.⁵⁹ Interestingly enough, in 2008 the World Health Assembly considered the health of migrants but without specifically mentioning those in detention (WHA61.17), with a report to be submitted in 2010.

The Working Group on Arbitrary Detention⁶⁰ proposed that there should be a mechanism on the rights of detainees, and suggested that their mandate should be extended to cover this, and not only *arbitrary* detention. Clearly at present there is no UN mandate that encompasses all human rights of persons deprived of their liberty,⁶¹ and, given

55 A/HRC/11/12/Add.1

56 Report of the WG on the UPR: New Zealand (A/HRC/12/8), 4 June 2009, para. 57

57 A/HRC/11/8/Add.1, paras. 25-76

58 A/HRC/7/4 of 10 January 2008

59 E/CN.4/2000/4 of 28 December 1999

60 A/HRC/10/21

61 By contrast there are Special Rapporteurs under both the African and Inter-American human rights systems.

the particular situation and vulnerability of such persons, there is a good case for a mandate to identify how best to promote and protect their human rights, and the legitimate restrictions that may be imposed when deprivation of liberty is applied according to national and international law. However, at present there is no agreement on expanding the mandate

of the Working Group to cover this area in its entirety. One reason for hesitation is the value of the Working Group's distinct methodology in relation to individual cases by adopting quasi-judicial 'opinions' about arbitrary detention. This has proved important both for the individual's themselves and also for developing the legal interpretation of standards in this area.

9. Conclusion

The UPR is generally a positive aspect of the Council, though its value depends on the commitment of the individual State being reviewed to the process, as well as of the other States. There is a need to consider the basis and procedure for the second and subsequent rounds of the UPR, including what to do about the Holy See and Palestine, the WG reports and Recommendations (accepted and rejected), the list of speakers and giving greater scope to NHRIs and NGOs for participation in the Plenary consideration.

However, even before then, there is scope for improvement, in particular building on examples of good practice. States should make greater use of written questions in advance in order to pose actual questions, and the SuR should be encouraged to respond to them. These questions should be made available in the room at the time of the WG consideration. Where there are more States wishing to speak in the WG than time permits, States unable to take the floor in the WG should have priority speaking slots for the Plenary instead, and undelivered recommendations should be distributed in the room at the time of the Plenary consideration. The SuR should be encouraged to respond to these recommendations as well as to the ones listed in the WG report. All States should be encouraged to respond specifically, and in writing in advance of the Plenary, to each

recommendation making clear whether or not they accept it, and should be encouraged to give reasons for not accepting recommendations. States making recommendations should consider seriously how to make them as clear and specific as possible – vague recommendations are unhelpful in that the SuR may not know what they are being asked to commit to, or how to measure their fulfilment. In any case they have little value. The question of recommendations which are incompatible with the SuR's international legal human rights obligations needs attention, as does rejection of recommendations that are in line with the SuR's legal human rights obligations. States should be encouraged to follow the example of Bahrain in providing an annual update to the Council on implementation of UPR recommendations, and NHRIs might also wish to consider this possibility. Finally, regional human rights bodies should be encouraged to provide information for inclusion in the 'other stakeholders' report.

More generally, the regular practice of the Council needs to be consolidated by enforcing the transparent and consistent assignment of regular reports to the different sessions to enable those preparing and presenting the reports to know when they will be considered, and those wishing to be there for their consideration to plan their participation in the Council sessions. In addition, reinforcing

the early practice of the Council of listing when Inter-Active Dialogues with Special Procedures would be taking place and sticking to those times, dates and time allocations is in

the interest of all involved. Enough practice should now be available to the secretariat to base time allocations for agenda items on previous experience.

As an overall assessment, the picture is definitely mixed – a veritable ‘Curate’s Egg.

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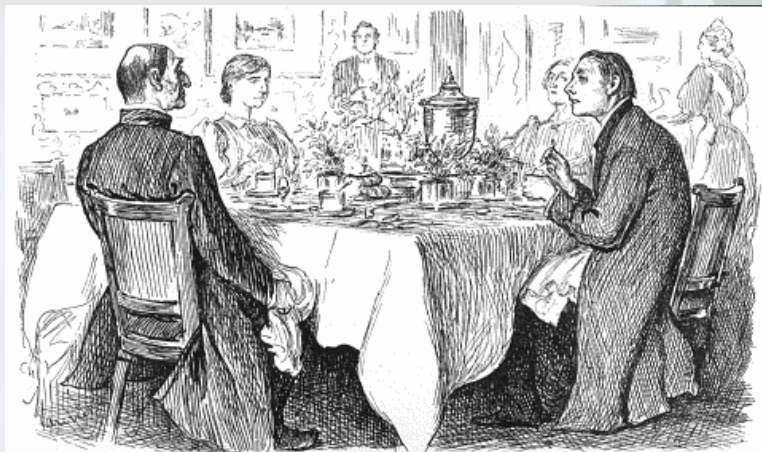
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The origin of the phrase 'a curate's egg' is the cartoon by George du Maurier which was printed in *Punch* (the British satirical magazine) of 9 November 1895



TRUE HUMILITY

Right Reverend Host: "I'm afraid you've got a bad Egg, Mr. Jones!"

The Curate: "Oh no, my Lord, I assure you! Parts of it are excellent!"

