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**DAILY UPDATE
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Overview

Day three of the 8th session saw the completion of Item 3 of the agenda on the promotion and protection of all human rights. The morning meeting of the Human Rights Council (Council) concluded three interactive dialogues carried over from the previous afternoon on the right to education, extreme poverty, and independence of judges and lawyers. The remainder of the day was filled with the following issues:

- Discussions on an optional protocol to the *International Covenant on Economic, Social and Cultural Rights* (OPICESCR) proved divisive. Most States acknowledged that the current draft text represented the best possible compromise (albeit a 'delicate' one) and urged its speedy adoption, while others (including Pakistan, Algeria, and Syria) continued to press for further consideration of the text, with the aim of including Part I of the ICESCR on the right to self-determination in the scope of the optional protocol.
- Continuation of the review, rationalisation and improvement of special procedures mandates. The mandates reviewed were that of the Special Rapporteur on the independence of judges and lawyers, and of the Special Rapporteur on torture, Mr Manfred Nowak, who was attacked openly for allegedly violating the Code of Conduct for special procedures.
- The issue of reappointment of special procedures mandate holders upon completion of their first three-year term, as requested by a number of States, has come up on various occasions. The issue was also indirectly raised in the informal consultations on business and human rights.
- Other informal consultations that took place, but are not covered in this Daily Update, dealt with the right to education, torture, human rights of migrants and leprosy.

Item 3 – promotion and protection of all human rights

Right to education

Continuing the interactive dialogue on the presentation made by the Special Rapporteur on the right to education, Mr Vernor Munoz, on 3 June, Costa Rica and Sri Lanka expressed particular interest in the report on 'Right to Education in Emergency Situations'. Costa Rica requested further elaboration on concrete measures to reduce restrictions on access to education in emergency situations. It also sought further information on what role could be played by intergovernmental organisations to diminish the impact of natural disasters on access to education.

World Vision International thanked the Special Rapporteur for bringing attention to minimum standards on emergency education and asked how he intended to follow up on the application of these standards. Union de l'Action Feminine stressed the need to improve quality and infrastructure in education, to increase the rate of

enrolment of rural girls in schools, to eradicate illiteracy of women, and to meet the needs of children with special needs.

Mr Munoz expressed appreciation for the commitment of Morocco, Malaysia, and Bosnia Herzegovina to the realisation of the right to education. On further practical measures to ensure education in emergency situations, he cited the need for developing disaggregated indicators linked to the nature of disasters; elaborating education plans for emergency situations; establishing an emergency fund for education; and applying standards set by intergovernmental organisations. He also highlighted the need to increase protection of girls from violence in educational institutions, and to meet the needs of disabled children.

Extreme poverty

Continuing the interactive dialogue following the 3 June presentation by the new Independent Expert on the question of human rights and extreme poverty, Ms Magdalena Sepulveda, South Africa stated that the mandate of the Independent Expert should be strengthened. Azerbaijan expressed the view that extreme poverty posed a threat to national security. The NGO International Movement ATD Fourth World noted with concern that extreme poverty was not only an economic issue but also a question of social exclusion; people living in extreme poverty were often not reached by poverty reduction strategies. It highlighted the importance of including poor segments of the population in policy formulation and decision-making mechanisms.

Ms Sepulveda noted with satisfaction that there was a commitment by the Council to deal with the issue. She agreed that popular participation in decision-making was key in combating poverty, and added that people living in poverty were not passive recipients, but strategic partners. She clarified that popular participation did not mean taking part in all technical considerations, but having a voice during the process of setting priorities and benchmarks, and ensuring follow-up. Finally, Ms Sepulveda agreed with France on the need to focus on women and children, who suffer disproportionately from poverty. She welcomed the interest of several delegations in establishing guidelines on human rights and poverty.

Business and human rights

Continuing the interactive dialogue following the presentation made on 3 June by Mr John Ruggie, South Africa noted with concern that serious abuses were committed by transnational corporations (TNCs) in conflict areas due to a 'governance gap' which allowed them to act with impunity. It noted that the Special Representative's policy framework proposal establishing duties for States, responsibilities for TNCs, and remedies for victims, was a solid foundation and should be implemented. It stressed, however, that any intervention should involve the participation of affected communities. Brazil expressed concern with the assessment made by the Special Representative that companies from developing countries were the most under-represented in the mapping of international standards for corporate responsibility.

A number of NGOs expressed concern with the lack of mechanisms available to hold TNCs accountable for human rights violations. Amnesty International advocated that States should strengthen their judicial capacity, and sought Mr Ruggie's analysis on gaps he had encountered in ensuring accountability. The International NGO Forum on Indonesian Development focused on the environmental impacts of transnational extractive industries in the country, and the Indonesian Government's inadequate action in response. International Cooperation for Development and Solidarity stressed the need to eliminate 'governance deficits', and highlighted the importance of enhancing the participation of concerned communities in proposing solutions. The International Indian Treaty Council shed light on the effect that TNCs' activities had on the rights of indigenous peoples and on climate change.

On next steps regarding corporate responsibility, Mr Ruggie highlighted what he called a 'due diligence process', meaning that corporations needed to be aware of their duty so as to prevent and address harmful

human rights impacts. He stressed that several operational elements needed to be developed through consultation, given the sectoral and regional specificities of corporations. He continued that innovative policies should be developed to address the special needs of countries in conflict, and encouraged the issuing of an invitation for his visit by the Democratic Republic of the Congo. Mr Ruggie highlighted that respect, protection and remedy were interdependent and mutually reinforcing elements of the issue covered by his mandate, and thus needed to be developed together. He welcomed the participation of NGOs in the detailed mapping of impediments in access to justice, and expressed satisfaction that a large group of ‘socially responsive investors’ had endorsed the framework he had suggested as a useful tool to screen companies.

Optional protocol to the *International Covenant on Economic, Social and Cultural Rights*

Under Item 3, the Chair of the Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (the Working Group), Ms Catarina de Albuquerque presented her final report. She reiterated that, while not all delegations had been entirely satisfied with the latest version of the draft optional protocol, no delegation had opposed the forwarding of the text to the current session of the Council for its consideration. She noted that some delegations had, at the last Working Group session, reserved their positions on the text. Ms Albuquerque stressed that the Working Group had, through years of negotiations, done its utmost to achieve as widely acceptable a text as possible.

Ms Albuquerque noted that the draft optional protocol contained some innovative elements that were not standard among human rights instruments, including: new admissibility criteria; the flexibility for the Committee on Economic, Social and Cultural Rights receiving communications to make available its good offices to assist parties, with a view to reaching a final settlement; express consideration of the ‘reasonableness’ of States’ policy measures; and the provision for a trust fund.

Following Ms Albuquerque’s report, delegations took part in an interactive dialogue. Some of the more notable arguments presented therein are elaborated below.

Most delegations noted the indivisibility and interrelatedness of all human rights, and many suggested that the optional protocol would signal the end of any artificial division between civil and political rights, on the one hand, and economic, social, and cultural rights on the other. Egypt (on behalf of the African Group) expressed its overall satisfaction with the text, but joined Cuba in encouraging a resolution of the ‘outstanding issues’ in informal consultations.

Many delegations noted that the current text represented a delicate compromise, and expressed support for it.¹ Italy and Mexico announced that they had already co-sponsored Portugal’s draft resolution, while India warned that amendments at this stage would risk unravelling the entire package.

The United Kingdom recalled that it had favoured an ‘a la carte’ (rather than comprehensive) approach to the draft optional protocol, and was not convinced of the benefits of a complaints mechanism. It reasoned that economic, social, and cultural rights were progressively realisable, and did not lend themselves to third party adjudication in the same way as civil and political rights did. In contrast, Bangladesh and Brazil argued that an ‘a la carte’ approach to the draft optional protocol would have contradicted the principle of universality of all rights. The African Group and South Africa welcomed the provision for a trust fund.

Pakistan recalled that 21 countries had reserved their positions on the text at the conclusion of the last Working Group session. It stressed that there was one outstanding issue (the non-inclusion in the scope of the draft optional protocol of Part I of ICESCR on the right to self-determination). Pakistan emphasised that the

¹ Chile on behalf of the Latin American and Caribbean Group (GRULAC), India, the Russian Federation, and some NGOs.

draft optional protocol should cover the entire ICESCR rather than be limited to Parts II and III. It considered that all economic, social, and cultural rights ‘flowed from’ Part I of ICESCR, and thus leaving it out would consign other rights to a ‘legal vacuum’. Pakistan suggested that adopting the current version of the draft optional protocol would first require amendment of the Covenant itself. It considered the text open until a satisfactory solution could be found to this dilemma, and urged States not to ‘blow this issue out of proportion’. In support of Pakistan, Algeria made the point that the right to self-determination was a sacrosanct principle, well established in international law. Syria made similar arguments, and expressed concern about the ‘selective’ nature of Article 2 of the optional protocol, requesting that this ‘defect’ be rectified. This would ‘save the optional protocol from being born with one leg.’ Qatar (on behalf of the Arab Group) and Iran also urged that concerns regarding this issue be addressed.

Mexico stressed the fundamental point that States should bear in mind that the nature of the instrument was procedural, and could not be interpreted as amending or transforming the obligations of States under the base instrument, the ICESCR. Finland recalled that the text had been open to all governments for five years, during which they had had ample time to present their concerns.

Some NGOs welcomed the draft optional protocol and urged its adoption by consensus at the current Council session, while others expressed concern about the non-coverage in the current version of the draft of the right to self-determination, which they considered to be well-entrenched in international human rights law.

In closing the morning’s discussion, the President urged all parties to find the best possible solution, in order to ensure that several years of effort were not in vain.

At the afternoon’s general debate under Item 3, some positions had clearly been consolidated. Notably Slovenia (on behalf of the EU) reaffirmed a common EU position, arguing that the Council should adopt the draft optional protocol as received from the Working Group. Pakistan, speaking in its national capacity, gave a detailed account of its views on the importance of the right to self-determination. Interestingly, Morocco, who is a member of both the African Group and the Organization of the Islamic Conference (OIC), felt that the draft optional protocol was satisfactory, and should be adopted by consensus.

Reports of the High Commissioner and the Secretary-General

Under this Item, a representative of the High Commissioner for Human Rights (Mr Bacre Ndiaye, Director of the Human Rights and Treaties Division) presented four reports: a consolidated report of the Secretary-General and of OHCHR on ‘The right to development’ (A/HRC/8/9); the High Commissioner’s report on ‘The protection of human rights and fundamental freedoms while countering terrorism’ (A/HRC/8/13); the Secretary-General’s report on the ‘Question of the death penalty’ (A/HRC/8/11); and the Secretary-General’s report on ‘Fundamental standards of humanity’ (A/HRC/8/14).

General debate

As was to be expected from a general debate, a large list of different issues were discussed. These included respect for human rights while countering terrorism,² rule of law,³ the right to food, particularly in the context of the recent hunger crisis,⁴ the death penalty,⁵ the right to development,⁶ eliminating the stigma of leprosy,⁷

² Slovenia (on behalf of the EU), Pakistan (on behalf of the OIC), Switzerland.

³ Slovenia (on behalf of the EU).

⁴ Slovenia (on behalf of the EU) and Japan.

⁵ Italy and Indonesia.

⁶ Indonesia and Malaysia.

eradicating extreme poverty, and the right to education.⁸ Among the institutional issues that were discussed were the system of special procedures,⁹ and again the adoption of the optional protocol on ICESCR¹⁰ and, in this context, the right to self-determination.¹¹

In response to the report of the High Commissioner on the protection of **human rights and fundamental freedoms while countering terrorism**, Switzerland, in a joint statement with other States, expressed concern about the ‘listing and de-listing’ of individuals in the context of UN targeted sanctions to combat terrorism.¹² The group of States argued that the regime of targeted sanctions would risk losing its credibility if the authority of the Security Council to put names on these lists was not balanced with essential procedural guarantees. Commenting on a number of country situations, Slovenia (speaking on behalf of the EU) expressed concern regarding the situation in Sri Lanka and disappointment at the lack of follow-up on the last set of recommendations of the Special Rapporteur on extrajudicial executions. It also raised concern about the situation in Zimbabwe.

Among the more contentious issues discussed during the general debate was the draft optional protocol to the ICESCR, which had been already been discussed at length during the morning session (see above). Slovenia (on behalf of the EU) called attention to the crucial role the **system of special procedures** plays within the Council’s machinery, and reiterated the standing invitation of all EU members to all special procedures. The Russian Federation said that one of the achievements of the Council in its first cycle was the ‘strengthening of the system of special procedures’ through the adoption of the Code of Conduct. This remark reminded of the Russian position during the institution-building phase, when that State was at the forefront of the push for a stronger Code of Conduct limiting the independence of special procedures further. It was compounded by the attempt, later in the afternoon, to call into question the continuation of Mr Manfred Nowak’s term as Special Rapporteur on torture, based on allegations of the Special Rapporteur violating the Code of Conduct. The system of special procedures is certainly not ‘strengthened’ by establishing a Code of Conduct that is then used to try to intimidate mandate holders.

A fairly large number of NGOs took the floor. However, constructive and focused statements were rare. Of interest was a statement by the Society for Threatened People, supporting the recommendation by the Special Rapporteur on extrajudicial, summary or arbitrary executions who had called for the establishment of a **Special Rapporteur on the rights of detainees**.¹³

Review, rationalisation and improvement of special procedures mandates

Following established practice, the original main sponsor of the resolution creating the mandate under review introduces each mandate. This is followed by the views of the current mandate holder, States and NGOs on the achievements and the future focus of the mandate.

Independence of judges and lawyers

⁷ Japan.

⁸ Oman.

⁹ Slovenia (on behalf of the EU) and the Russian Federation.

¹⁰ Slovenia (on behalf of the EU) and Morocco

¹¹ Pakistan (in its national capacity)

¹² Germany, Sweden, Lichtenstein, Denmark and Netherlands joined the statement. See the report by the High Commissioner available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/8session/A.HRC.8.13.pdf>.

¹³ See Daily Update of Monday 2 June 2008, available at www.ishr.ch

Hungary as the main co-sponsor of the resolution creating the mandate in 1994 introduced it. Mr Leandro Despouy, the current mandate holder, stated that while the mandate had initially focused on direct protection of judges and lawyers, it had evolved to also encompass a preventive aspect, and opportunities to advise and assist States in strengthening their judiciary and react to crisis situations. He suggested that the Council consider broadening the scope of the mandate, without detailing what such an expanded scope would encompass.

All States and NGOs that took the floor supported the extension of the mandate.¹⁴ Pakistan (on behalf of the OIC) called on the Special Rapporteur to carry out his mandate in accordance with the Code of Conduct for special procedures mandate holders. Of particular interest was Ecuador's description of the concrete and practical help the Special Rapporteur had provided to overcome the judicial crisis in the country through his 'active presence and constructive suggestions' and to assist in consolidating the democratic process. The International Commission of Jurists (ICJ) suggested that the mandate should in the future specifically look at the role of judges and lawyers in ensuring the rule of law during states of emergency.

In his concluding remarks, Mr Despouy underscored the need for continued close collaboration with NGOs, as this has been of great benefit to the mandate. He also highlighted the need for an 'organic dialogue' between special procedures and the Bureau of the Council and the Council as a whole. He added that the universal periodic review could benefit from the work of the system of special procedures and should be seen as complementary.

Torture

The review of the mandate of the Special Rapporteur on torture was more controversial with several States voicing strong criticism of the mandate holder, Mr Manfred Nowak. Again, the main sponsor, Denmark, introduced the mandate, pointing out that 'it is not the responsibility of the Special Rapporteur to eradicate torture, but the responsibility of States'. Among the main achievements of the mandate, Denmark noted the support given to State in this effort, the ability to rapidly response to imminent threats to people being tortured and the protection thus afforded to 'thousands of people', and the Special Rapporteur's fact-finding missions.

Mr Nowak highlighted the discrepancy between the universally agreed prohibition of torture and the continued practices by States. He noted that the 'most disturbing' part of the phenomenon of torture was the trend of States accepting that torture is acceptable in the fight against terrorism. Among the achievements of the mandate he identified a deeper understanding and knowledge of the issue of torture. Mr Nowak also drew attention to the focus of his last report, which deals with specific threats of torture to women. Finally, he stressed that the Special Rapporteur on torture with its robust mandate was an ideal complement to the treaty-based mechanisms. The added value of the mandate, he said, was its leadership in drawing together the different interested actors, including States, various UN bodies, civil society and donors, thus serving as a sort of 'spokesperson' for the fundamental norm of the prohibition of torture.

All States and NGOs taking the floor supported the mandate in general.¹⁵ Canada, Turkey and Norway particularly highlighted the Special Rapporteur's effort to include a gender perspective in his work, and

¹⁴ Slovenia (on behalf of the EU), Pakistan (on behalf of the OIC), Cuba, India, Argentina, Ecuador, Permanent Assembly for Human Rights, ICJ, Amnesty International.

¹⁵ Slovenia (on behalf of the EU), Russian Federation, Cuba, Indonesia, Switzerland, Canada, Turkey, Chile, Norway, Commission on Human Rights of the Philippines (in a joint statement with the National Consultative Commission on Human Rights of France, National Commission for Human Rights of Togo, Ugandan Human Rights Commission, Advisory Council on Human Rights of Morocco), ICJ, Association for the Prevention of Torture (APT) in a joint statement with World Organization Against Torture, International Federation of ACAT (Action by Christians for the Abolition of Torture – FIACAT), Comisión Jurídica para el Autodesarrollo de los Pueblos Originarios Andinos.

encouraged him to continue on that track. Further achievements of the mandate that were mentioned included the focus on torture in the fight against terrorism, the fact-finding component of the mandate, its urgent communications procedure, the thematic studies, the mandate's close cooperation with NGOs, and torture committed against indigenous peoples.

There were also a number of critical remarks, which primarily seemed to stem from some States' discomfort with the thorough work of the Special Rapporteur. The Russian Federation was of the view that Mr Nowak had, in carrying out his work, violated the Code of Conduct for special procedures.¹⁶ Unfortunately, the English translation of the statement read in Russian was of very poor quality, and even seemed to confuse the Russian delegation. The Russian Federation also argued that since Mr Nowak had completed a first term of three years, the Council should consider appointing a new mandate holder.¹⁷ Indonesia accused the mandate holder of a 'liberal interpretation' of the Code of Conduct and complained specifically about insufficient consultations by the mandate holder with the Government in preparing his visit to the country, and about the mandate holder's insistence on a 'letter of authorisation' allowing him to carry out unannounced visits to places of detention. Indonesia asserted that Mr Nowak's 'unilateral interpretation of the Code of Conduct' undermined the trust between Governments and the mandate holder.

Both statements to be a continuation of efforts by many States during the institution-building process to reign in the independent working methods of special procedures. When recalling the adoption of the Code of Conduct, neither the Russian Federation nor Indonesia mentioned the fact that the Coordination Committee of special procedures has since adopted a procedure to deal with communications from States or other stakeholders if they feel that a working method applied by special procedures is not in consonance with the Code of Conduct.¹⁸ It is therefore not known if that procedure has been called upon in any of the two instances that were mentioned.

In his final remarks, the Special Rapporteur assured the Russian Federation and Indonesia that he is fully aware of his obligations under the Code of Conduct, and has always acted in compliance with its provisions. However, he stressed that the particular phenomenon of torture, which 'only takes place behind closed doors', needs particular methods of fact finding. These include unannounced visits, private interviews with detainees, and as a matter of practicality, letters of authorisations. Recalling that Indonesia had not objected to that practice at the time of the visit in 2007, he expressed his surprise at the critical words.

Rights of reply

Zimbabwe responded to the various references made by Slovenia (on behalf of the EU) and a number of NGOs. Sri Lanka felt compelled to quote from the Bible to refute the EU statement. Of note was Sri Lanka's reply to the suggestion made by an NGO to apply the concept of 'responsibility to protect' to Sri Lanka and Myanmar. The Ambassador warned that if 'irresponsible parties try to invoke the concept outside [the Security Council], they must be prepared to the full spectrum of resistance by the Sri Lankan people and Government. India and Pakistan exchanged their standard rights of reply with each other on the issue of Jammu and Kashmir, and China quoted a stream of figures to prove that the situation in Tibet was not as negative as reported by NGOs.

¹⁶ Human Rights Council *Resolution 5/2*.

¹⁷ There is currently a debate going on in the corridors about the call by some States that special procedures mandate holders who have served one term of three years need to be reappointed, despite the fact that the term limit imposed by *Resolution 5/1* is set at six years (two terms of three years). The institution-building text is silent on the issue of 'reappointment' after three years, however the practice of the Commission on Human Rights was that mandate holders automatically continued to serve a second term.

¹⁸ See 'Interim Advisory Procedure' at <http://www2.ohchr.org/english/bodies/chr/special/ccspecialprocedures.htm>.

Informal consultations on business and human rights

Norway, India, the Russian Federation, Argentina, and Nigeria as main sponsors convened informal consultations on the draft resolution to renew the mandate of the Special Representative of the Secretary-General on business and human rights.

Norway explained that the renewal of the mandate was based on a step-by-step approach that would build on the first phase of mapping, research, and development of a conceptual framework. The next step would be to provide normative guidance to governments and businesses by operationalising the conceptual framework. This would be achieved by through recommendations on ways to ensure that States can better protect human rights from corporate abuse; elaborating further the concept of corporate responsibility to respect human rights; and exploring options for enhancing access to effective remedies. A ‘step three’ would have to be developed at a later stage.

In response, some States argued that step three should be more clearly outlined now and that it was not possible to embark on this new phase without knowing where the process was going.¹⁹ The Russian Federation defended the approach of the main sponsors comparing the resolution to a navigator in a car that showed part of the road and added that ‘we will see the end goal once we pass this phase’. The United Kingdom (taking the lead on behalf of the EU on this resolution) argued that the resolution was a step in the right direction but warned that not all EU countries may be able to endorse the conceptual framework. Notably the Netherlands asserted that it could not accept a complaints mechanism under this mandate, as it would make the mandate ‘unmanageable’.²⁰ Egypt argued that a complaints mechanism was desirable.

In specific comments on the draft resolution, States were divided over the nature of the duties of governments and businesses for protecting human rights, thereby reflecting the long-standing divisions on this issue. Some States argued that States should not be allowed to shift their primary responsibility for human rights to businesses,²¹ while others stated that businesses have human rights obligations under international law.²²

Of note was also a debate on a paragraph in the draft resolution intended, as explained by the Russian Federation, to preserve the title of the mandate holder as ‘Special Representative of the Secretary-General’. The issue of titles of mandate holders was particularly sensitive during the reviews of the mandates of the Representative of the Secretary-General on internally displaced persons (IDPs) and the Special Representative of the Secretary-General on human rights defenders. During the review of the mandate on IDPs, where the mandate holder had served only one term of three years, the Council adopted a very vague paragraph allowing him to continue his mandate for another term as provided in the institution-building package, but ‘without prejudice to the ... appointment procedure’. This was intended to address the desire of many States that the new appointment procedure would be followed for all mandate holders. It was re-used in the resolution on business and human rights for similar reasons.

However, some States have recently mounted an argument that mandate holders that have only served one term of three years must be reappointed, and there should be no assumption that they will serve two terms. Accordingly, some States opposed the mentioned paragraph arguing that the issue of reappointment was already pending before the Council.²³ Egypt claimed that there was ‘an emerging consensus’ on this issue and that the President may take a decision towards the end of the session. Norway noted that the concerns

¹⁹ South Africa, China, Egypt, Algeria.

²⁰ The UK made a similar point.

²¹ UK.

²² South Africa, Egypt, Algeria, Azerbaijan.

²³ South Africa, Algeria, Egypt, China.

expressed had been duly noted and that the main sponsors would re-examine the paragraph. The next informal consultations will be held on Friday 6 June from 11.

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