

PRÉCIS

**THIRTY-THIRD ANNUAL COLLOQUIUM ON  
“THE ROLE OF GOVERNMENT DEPARTMENTS  
IN THE FORMULATION AND IMPLEMENTATION  
OF HUMAN RIGHTS CONSIDERATIONS IN  
FOREIGN POLICY”**

Convened by

THE AMERICAN ASSOCIATION  
FOR THE INTERNATIONAL  
COMMISSION OF JURISTS

On the invitation of

**Ministry of Foreign Affairs  
Austria**

**Vienna  
26th and 27th May 2010**

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Thirty-Third Annual Colloquium Group at Vienna



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**26<sup>th</sup> and 27<sup>th</sup> of May 2010  
Vienna**

## CONTENTS

Introduction	7
List of Participants	8
Agenda	12
Précis	15



## INTRODUCTION

Since 1977 the American Association for the International Commission of Jurists has convened its annual meeting of Western governmental ministers and diplomats engaged in implementing Human Rights considerations in the foreign policy of their respective governments.

The objective of this colloquium is to provide a forum for the heads of governments charged with carrying out the Human Rights policies of their governments, to exchange experiences and to compare perspectives on the subjects selected for that particular year's agenda.

All participating governments agree that these meetings are to be held pursuant to Chatham House rules, so that all remarks are for non-attribution unless specifically agreed otherwise.

On 26-27 May 2010, governmental representatives from 21 countries gathered in Vienna, at the invitation of Honorable Dr. Michael Spindelegger at the Ministry for European and International Affairs of the Republic of Austria, for the thirty-third annual colloquium on Human Rights Policy. The following Précis is a summary of the discussions at that meeting.

We would like to thank the Ministry for graciously hosting this meeting. We would also like to express our gratitude to the United States Ambassador to Austria, the Honorable William Carloton Eacho, III, who graciously hosted a dinner reception for the participants at his residence.

In particular, we wish to express our deep appreciation to Mr. Engelbert Theurermann, Head of the Department of Human Rights, Humanitarian Law and Minority Issues, who did so much to make this intergovernmental colloquium so worthwhile.

William J. Butler  
President of The American Association  
for the International Commission of Jurists

New York, New York  
October 2010

**33RD ANNUAL COLLOQUIUM LIST OF PARTICIPANTS 26 - 27 MAY, 2010  
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## AGENDA

**Wednesday, 26 May 2010**

- 9:00 Arrival of participants at The Marble Room (“Marmorsaal”) of the Austrian Federal Ministry for European and International Affairs, Minoritenplatz 8, 1014 Vienna
- 9:15 Welcoming remarks by the Federal Minister for European and International Affairs, Dr. Michael Spindelegger
- 9:30 – 12:30 I. NEW OPPORTUNITIES TO INTEGRATE HUMAN RIGHTS INTO DEVELOPMENT POLICIES AND PRACTICES

- a) What can be done to ensure that human rights consideration are adequately addressed when Member States and international agencies review the entire architecture of the Millennium Development Goals at the high-level meeting in September 2010?
- b) How can the commitment to “gender equality, respect for human rights, and environmental sustainability”<sup>1</sup> in the Accra Agenda for Action be translated into action in the context of the Paris Declaration on Aid Effectiveness (2 March 2005)?
- c) In light of the report of the High Level Task Force on the Implementation of the Right to Development<sup>2</sup> and UN resolutions,<sup>3</sup> as well as the resolution of the Non-Aligned Movement at its Sharm El-Sheikh summit calling for a UN convention on the right to development,<sup>4</sup> what are the most productive courses of action? What should the resolutions of the Human Rights Council and the General Assembly say?
- d) What human rights lessons have been learnt from recent efforts at post-disaster reconstruction? What are the human rights issues to be addressed in assisting Haiti to recover from the earthquake, in light of the 13th Special Session of the Human Rights Council?<sup>5</sup> What can be done to overcome obstacles to rebuilding in Gaza resulting from the practices of the Israeli and Egyptian governments?

12:30-14:30 Lunch at the invitation of the Minister for Foreign Affairs hosted by Dr. Michael Spindelegger

14:30-17:30 II. NEW DEVELOPMENTS IN THE UNIVERSAL PERIODIC REVIEW AND OTHER URGENT MATTERS AFFECTING THE OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS

- a) As part of the ongoing review process, what major improvements can be made in the Universal Periodic Review in anticipation of the second UPR cycle (2012-2015)? Are there any alternatives to the UPR to ensure that an objective and honest assessment of human rights performance is made of all states?
- b) What should be expected from the appointment of an Assistant Secretary-General to head the OHCHR New York Office?<sup>6</sup> Will the ASG have too much or too little power? What new initiatives can be taken with the broad range of constituencies?
- c) What are the prospects for the Human Rights Council Advisory Committee<sup>7</sup> to function as a think-tank for the Council? Is the limitation of the scope of its advice to thematic issues and of its powers to making

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<sup>1</sup> Third High-level Forum on Aid Effectiveness, *Accra Agenda for Action*, 4 Sept. 2008, ¶ 3.

<sup>2</sup> A/HRC/15/WG.2/TF/2 and Add.1 and Add.

<sup>3</sup> Human Rights Council resolutions 4/4, 9/3 and 12/23, and General Assembly resolution 63/178 and 64/172.

<sup>4</sup> NAM2009/FD/Doc.1, 16 July 2009, ¶ 421.13.

<sup>5</sup> Special Session on Support to recovery process in Haiti: A Human Rights approach, held on 27 Jan. 2010.

<sup>6</sup> The new ASG will have with the responsibility to integrate human rights into key policy and management decisions, and the work of intergovernmental bodies based in New York, and to ensure that the New York Office activities are closely coordinated with OHCHR headquarters in Geneva

<sup>7</sup> Created by Human Rights Council resolution 5/1, replacing the Sub-Commission on the Promotion and Protection of Human Rights.

proposals to the Council without adopting resolutions or decisions, signs of progress or retrenchment in the human rights machinery?

d) Has the recent growth in staff and resources of the OHCHR and the restructuring of the secretariat had a noticeable impact on the effectiveness of the office? Are the special procedures and the Council being effectively serviced?

18:00-20:00 Reception by the Ambassador of the United States to Austria H.E William Carlton Eacho, III at his residence in Weidlichgasse 1-5, 1130, Vienna

#### **Thursday, 27 May 2010**

9:00 – 12:00 III. THE EVOLVING REGIONAL IMPLEMENTATION OF HUMAN RIGHTS

a) Acting under its new Charter, the Association of South East Asian Nations (ASEAN) appointed in 2009 the ASEAN Intergovernmental Commission on Human Rights (AICHR). What opportunities does this new commission open for the promotion and protection of human rights among the ASEAN members?

b) Also in 2009, the League of Arab States appointed the Arab Human Rights Committee. What opportunities does this new committee open for the promotion and protection of human rights among the Arab states?

c) Since its creation in 2005, the African Court of Human and Peoples' Rights has issued only one judgment.<sup>8</sup> What can be done to ensure that this court has the resources to be an effective regional judicial body? Can the African Commission on Human and Peoples' Rights continue to function in Banjul when the President of the country threatened to kill anyone collaborating with human rights defenders?<sup>9</sup>

d) Are the human rights bodies of the OAS and the Council of Europe meeting the challenges of the 21st century? Specifically will the entry into force of Protocol No. 14 resolve the problems posed by the flood of applications to the European Court of Human Rights? Have the Steering Committee on Human Rights and the Commissioner for Human Rights been useful mechanisms that might perhaps be emulated in other regions? Should the OAS system evolve towards a single full-time court like the European system?

12:30-14:30 Lunch with featured guest speaker, Director of the EU Fundamental Right Agency, Mr. Morten Kjærum

15:00- 17:00 IV. OPTIONS FOR DEALING WITH ALLEGED WAR CRIMES AND ACTS OF TERRORISM

a) What measures can be taken by the United States and other governments to ensure that human rights and national security are both protected in prosecuting former Guantánamo detainees and persons who may have been subjected to extraordinary rendition, where there is actionable evidence of criminal acts? Under what conditions should other countries share intelligence with prosecutors in cases of alleged terrorists?

b) Where prosecutions are not possible, for whatever reasons, what precautions must be taken to prevent future terrorism when former detainees are returned to civilian life and to protect the rights of innocent persons who have been detained? How can cooperation among governments be improved in this regard, consistent with the policy of protecting human rights while combating terrorism?

c) In light of the likely absence of serious investigations by Hamas or the Israeli Defense Forces of alleged crimes during the military operations in Gaza in December 2008 and January 2009, what action should the Human Rights Council, the General Assembly, the Security Council and concerned states take to give effect to the recommendations of the Goldstone report<sup>10</sup> or to those recommendations that are acceptable to nearly

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<sup>8</sup> Michelot Yogogombaye v The Republic of Senegal (Application No. 001/2008).

<sup>9</sup> See [http://www.africancourtcoalition.org/editorial.asp?page\\_id=179](http://www.africancourtcoalition.org/editorial.asp?page_id=179).

<sup>10</sup> United Nations Fact Finding Mission on the Gaza Conflict, A/HRC/12/48, 25 Sept. 2009 ¶¶ 1967-1979).

all states and to UN resolutions?<sup>11</sup>

d) If impunity prevails with respect to alleged crimes in Gaza, or alleged torture in Guantánamo and secret detention sites, or alleged genocide in Darfur—to name only a few cases where impunity seems likely—what will be long-term impact on the rule of law? Has any progress been made since the adoption of the Set of Principles for the Protection and Promotion of Human Rights Intended to Strengthen Action to Combat Impunity<sup>12</sup> and the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law?<sup>13</sup>

V. SHOULD WE DO IT AGAIN? IF SO, WHERE, WHEN AND SHOULD WE INVITE ADDITIONAL STATES?

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<sup>11</sup> Specifically A/HRC/RES/S-12/1 and A/RES/64/10.

<sup>12</sup> UN Doc. E/CN.4/Sub.2/1997/20/Rev.1 (1997).

<sup>13</sup> UN Doc. E/CN.4/2005/59 (2004).

## PRÉCIS

### I. New Opportunities to Integrate Human Rights into Development Policies and Practices

The discussion on the theme of human rights and development was begun by setting forth three main ideas: (1) the relationship between policy and implementation, (2) the questions of where to discuss this theme and when, and (3) the normative element – where do we stand now?

The meeting on the Millennium Development Goals (MDGs) in the fall will be an opportunity to take stock at the United Nations (UN) level and to raise the essential link between the MDGs and respect for human rights and development. The Secretary-General's report states that human rights must be embedded in the MDGs: the goals cannot be achieved without respect for human rights; in fact, such respect can actually accelerate development. This theme, however, entails debates as well. For example, there are particularly complicated discussions now aimed at conveying the general principle that human rights and security are inextricably linked. But the question remains: how do we move respect for human rights as an integral part of development from policy talks to actual implementation? Although the UN summit and other documents make it clear that the UN should implement human rights, in reality, it is a difficult challenge. Some countries have been disappointed in the efforts. Sweden, for example, has lowered its donation to the UN Development Programme due to the failure to implement human rights into actual policies and practices. One possibility is for individual countries to utilize the Universal Peer Review (UPR) system to push the link between development and human rights and to follow up on any commitments made.

We cannot forget the regional aspect as well. For example, consider the OSCE's experience in linking policy and practical capacity building.

As for where and when we should achieve progress, consider such situations as Gaza and disaster relief in Haiti. How do we pursue the agenda in the proper place? We need alternative channels at the Human Rights Council (HRC). The real link between development, human rights, and disasters does not appear on the agenda. With regard to long term assistance to Haiti, for example, how do we achieve human rights advances and what should the HRC consider in the future in Haiti? Another participant pointed out the work of Angela Kane and internally displaced persons, but questioned what sort of priority it receives in special sessions.

As for the normative theme, should there be a new UN convention on the right to development or should we focus on what can be done to push a broad agenda and implement existing human rights norms? Often, the debate loses sight of the individuals concerned. A related question is whether there is a legal obligation for donors to provide development assistance, though at least one participant believes the answer is no.

Different policy worlds speak different languages – not only between foreign ministries and the UN but also within each foreign ministry. When the terms differ or are unclear, implementation becomes more difficult. In this sense, respect for human rights starts within each foreign ministry. Another participant noted the need to coordinate at both the domestic and the UN level. The problem is that human rights and development are often split, and departments fail to sufficiently consult each other. One country has asked the Office of the High Commissioner for Human Rights (OHCHR) for a workshop on mainstreaming human rights into development work in order to foster a better understanding.

The participants were in agreement that we cannot achieve the MDGs without respect for human rights; moreover, we must work together to do so. In the words of one participant, the challenge today is not to immerse ourselves deeper in specialization but rather step out of our own legal realm, cross the corridors, and speak to our colleagues about better linking development and human rights, approaching it as an integrated issue. The MDGs can be treated as an opportunity to make human rights work more visible and a shared commitment. States can speak with a unified approach and work on making UN officials more accountable. There's also an interest in implementing non-discrimination, transparency, and consultations with civil society with the MDG objectives.

Human rights is one of the three pillars of the UN but receives only 2% of the budget. The High Commissioner must be encouraged to do more, particularly given the important role field presence plays. A convention would be counter-productive; governments need to work more practically instead, for example, in involving the private sector with trade promotion and investment.

It was proposed that the approaches of human rights and development must be de-ideologized and seen from the point of view of the final recipient – consulting with those affected is a prerequisite for a rights-based approach.

Another participant raised the theme of “human security”, explaining that it is a very bottom-up and people-centered approach aimed at protecting and empowering individuals so that they are free from want and fear and free to live in dignity. It attempts to handle problems holistically, seeing such threats as poverty, health, food security, climate change, and the financial crisis as closely interrelated. Further, it mobilizes intergovernmental and nongovernmental organizations, governments, and the private sector to seek effective measures to address the root causes of various threats.

The problem is how to utilize the concept of human security to add a human rights perspective in achieving the MDGs. The debate in New York in May was the first in the General Assembly on human security; it received strong support from the EU, Mexico, and Costa Rica but some resistance was felt from developing countries concerned with the possibility of using the concept of human security as inviting interference with national sovereignty. However, the Secretary-General’s most recent report clearly distinguishes human rights and security from the right to protect (R2P), which should alleviate some of those concerns.

It was noted that all five categories of human rights – economic, social, cultural, civil, and political – are interrelated and include human security. There was discussion that the West should be more committed to indivisibility, but there are concerns with the vagueness of the Optional Protocol and the general nature of economic, social, and cultural rights. On a related note, it was stated that the MDGs are actually full of human rights, particularly economic, social, and cultural rights, which are more controversial in the West.

One participant noted their approach would be to try to place human rights higher on the agenda for MDGs – it is only practical to spend money on development if it is spent in line with a human rights approach. However, we must also be realistic in light of the economic crisis. Talking about development implies money, but how much of it is available for development agencies is a decision for governments. Given their lack of resources, the private sector has an opportunity to play a more important role in achieving the MDGs.

There continues to be a battle between the global South and the rest of the world with respect to the right to development. It has been suggested that we should draft a convention on it because of the delay it would entail. Another participant agreed that developed countries want to enter the dialogue but questioned what developing countries want. It seems that a struggle continues with gaps between obligations of states and what actually is happening on the ground.

One participant raised the issue of the various instruments related to these topics – it is difficult to distinguish which is best or controlling. For example, with respect to goal number 3 on gender equality, CEDAW, the Beijing Platform, and Security Council Resolution 1325 on women in post-conflict situations must all be used together. We must be more critical; committee bodies are moving toward offering more concrete recommendations, which will make it easier for the country receiving assistance.

Another participant recalled last year’s discussion regarding R2P, noting that R2P involves a situation in which human rights have been violated and there is a question of intervention, whereas with the MDGs, it is first a question of development.

Integrating development policy and human rights is mainly an issue of resources and setting priorities.

One country explained that its development ministry, rather than human rights, has dominated preparations for the September meeting on MDGs, partly due to bureaucracy but also because the human rights element is a difficult aspect. It has been difficult to motivate the development ministry to be more involved in the human rights debates in Geneva, but there has been more progress made in talks outside Geneva in UNDP

and UNICEF, for example. The right to development has been treated like a football, kicking it far away so as to avoid dealing with it and then kicking it again as you get close. Drafting a convention would be like kicking the ball again because talks would tie things up for a long time, but the outcome likely would not help the UN system. However, voluntary guidelines may be a more attractive idea. Another participant was of the opinion that we do not have time to keep kicking the ball. We need a clear reference to human rights in the MDG outcome document.

There was some dissatisfaction expressed with respect to HRC sessions that do not adequately address human rights concerns. A few positive elements, however, emerged with respect to Haiti, including protection for OHCHR efforts in Haiti and the hope that human rights concerns will be addressed in post-disaster reconstruction.

One participant commented that UPR has been a useful tool, offering a more common language; making human rights and recommendations from treaty and special bodies a bit more visible; and forcing governments to consult with civil society. Moreover, a systematic focus on human rights and building democratic institutions is an important contribution to development and mitigating conflict.

One problem is that, although it has always been thought that there should not be development without human rights, countries are doing it – look at China. Another comment pointed out the need for some level of education, especially of women, before being able to guarantee and work on other human rights.

One participant stated that there is a need for confidence building with respect to HRC work and development agencies may bring that confidence, if done properly. There must be more cooperation among various UN agencies, as well as among countries from other regions.

The final comment noted that the discussion went from an international to national to local level and then back, highlighting just how broadly this theme extends. What is missing, however, is a framework for spreading best practices. We are usually good at identifying failures but not always very good at identifying successes – we need to focus more on putting success stories on the table and learning from each other.

## **II. New Developments in the Universal Periodic Review and Other Urgent Matters Affecting the Office of the High Commissioner for Human Rights**

The discussion opened with one participant's suggestion that it be titled "new developments and old challenges or deficiencies." These include (1) how to advance human rights work in the face of obstruction, which is as much or more than it was 30 years ago, (2) how to balance intergovernmental activity and rhetoric from practical human rights work on the ground, (3) how to look at individual country situations and the appropriate response, and (4) how to get the necessary number of votes.

A few points were made with regard to the transition from the Commission on Human Rights to the HRC. First, the international community had agreed that the Commission had been discredited and needed to be replaced, but there was no real game plan about how to do so. Second, we were not fully aware of all of the implications, including the issue of member states' status and votes. Third, the domestic discussion in the US over the Commission has played a crucial role in the reform. From these points, a few lessons can be drawn: (1) there is a need for leadership at the political level and on the practical side, (2) the political momentum created around the process was important, and (3) there is no "quick fix" by just re-labeling or changing structure with a few new rules.

A point was made about there being clear "red lines" (for example, protect the High Commissioner and her office, special procedures, and NGOs) but also a need for clear "green lines" – what do we want to achieve and what do we need to change to do so? Should we change the way we set the agenda and meetings during the year? How do we enhance diligence among different key actors within the HRC? Despite the HRC being a standing body, capitals still think it is too long for them to get involved, so they leave it to Geneva. Another state responded by cautioning that we cannot establish too many red lines because it could make the negotiating position too difficult.

It was emphasized that we must be more ambitious than what we have currently seen in Geneva.

With regard to elections, there must be a joint effort to bring in the right states as members.

With regard to UPR, it was proposed that each state must actively participate, although proof of UPR's success will only come in the future when it is seen what changes occur within each country. The key element in this realm is the follow-up process.

One participant expressed an interest in trying to move away from an item-by-item format to resolutions, interactive dialogues, panel discussions, site visits, and presidential statements (supported by another participant as well) so as to have a wider toolkit to address countries' flaws without taking a defensive approach. Although elections are important, to strengthen membership we should hold countries accountable to their voluntary pledges. It was agreed that UPR is an extremely helpful, though sometimes abused, tool, but to strengthen it, there should be a real "give and take" follow-up in the plenary session. The long sessions can be overwhelming, especially for smaller countries that cannot staff them. A better calendar may result in less bloc voting.

In response, one participant cautioned that, particularly in response to serious country situations, it is best to use existing tools, like an interactive dialogue with special procedures, as creating new ones risks being counterproductive. Special sessions, however, have not always been the best (e.g., Sri Lanka) – we need to do better advance planning.

Some states expressed concern about better responding to human rights violations on the ground, possibly by making the HRC more effective in doing so and by making more use of the High Commissioner. The second session of the HRC can focus on implementing recommendations from the first session and countries can provide technical assistance, especially for developing countries.

It was suggested that negotiation strategies among like-minded countries should be discussed so as to better achieve as much as they can in the UPR process.

Others agreed that, although it is good to be ambitious, countries must also be realistic in the current climate and strategic about achieving priorities. They must listen to and support each other rather than always attempting to make individual proposals. It is also important to protect the independence of special procedures and ensure NGO participation. As a tactical matter, the relationship between New York and Geneva must be considered, ensuring that whatever "package" is sent from Geneva can be "opened" in New York. Numerous other participants agreed on the need to better coordinate work between New York and Geneva.

One participant stated that the UPR is the best and most innovative element of the HRC; its advantage is that it engages each state and may generate internal debate that otherwise would not transpire. However, there is room for improvement: strengthen follow-up to recommendations, review recommendations to ensure they are consistent with international standards, create a better structure to avoid an unmanageable number of recommendations, lessen the number of speakers, increase NGO participation and regional coordination. It was also suggested that the budget for the advisory committee should be spent on strengthening expertise for situations, possibly to enhance effectiveness of *ad hoc* experts working for the HRC.

Another participant noted that to change the system of elections, we would need to eliminate the "horse trading," but countries generally are not elected if they do not enter into mutual agreements. This new system should be used for what it's worth: protect what does work (e.g., special procedures) and improve it where possible.

Another participant stated that we have not seen sufficient improvements in the field. Most countries did not fear the work of the sub-commission of the prior system; it was meant to be a driving force, which is the aim of the current complaints procedure, although it is not working very well. Country-specific situations should be raised more frequently in interactive and non-confrontational debates.

One participant warned that we must be careful (1) not to cut off the HRC's ability to innovate and (2) before we agree to any more reviews. None of the proposals made have been new and yet we have acted surprised. The EU needs to have a discussion with itself about how it approaches the HRC review: is the EU part of a wider coalition? If so, what does it have to maintain that? It does not seem to be a good coalition partner.

The same country noted that it had argued against UPR before the HRC was even created. Countries must be careful about "knee jerk reactions" to other offerings and not to get too tied up in their own internal procedures. It might be good to have the sub-commission reappear. It would also be within the scope of possibilities for the HRC to use *ad hoc* one to two year appointments to have special experts look at certain questions.

There was some excitement about the creation of the Assistant Secretary General position. Someone who is not necessarily the world's best human rights expert but rather is a political player with "tough elbows" is needed in the role. Moreover, it's clear that we need to support for the OHCHR.

Another participant noted that one challenge is to maintain political interest in these issues, the human rights fora of the UN, and in results stemming from such fora. We need to be careful during the review not to fall into too much introspection. We have not exhausted the means available within the HRC to deal with country specific issues. We need to learn from failures (for example, Sri Lanka) and work on getting more substantive results. We need to take the UPR recommendations seriously and encourage others to do the same – use it as a hook to raise the most difficult issues like torture. We also need to be strategic with resources, particularly to ensure that they are available for special procedures.

Another state agreed that protecting the independence of special procedures is important.

It was noted that we must be optimistic about outreach efforts, support initiatives from other groups, and identify proposals that smaller states will support. As for the HRC, the biggest disappointment has been what has been lost in identifying certain country situations – we need to use all mechanisms available, not just country resolutions. UPR, on the other hand, has been the major success story. The upcoming reviews would be a good opportunity to fold the UPR review into other reviews; its success might give a positive impetus to the overall discussion. With respect to round two, we need to focus on the follow-up and encourage states to make voluntary commitments.

The fact that the bulk of contributions are earmarked funds from Western states leads to the accusation that they control the agenda, so it is necessary to find a way to achieve objections without offending notions of independence.

One participant noted that the dynamics and atmosphere of the HRC have changed; the change being accelerated by certain working methods, special procedures, and the limit on NGOs' work. Another issue is with the composition of the HRC in which two groups without respect for human rights have a majority, putting us at the mercy of other countries that will not introduce country-specific resolutions if the country does not agree. Unfortunately, the last place where a human rights situation is addressed in real time is the HRC. The problem is that the ideas for addressing such situations do not go beyond the confines of the conference room, which means many actors are excluded. As for the calendar, it has become clear that ten weeks is too much, so we need to consider how to change it. It may be better to have more regular, but shorter, meetings.

There was a question about the interrelationship of the HRC, the Assistant Secretary General, and the OHCHR. It was explained that the High Commissioner is subject to the Secretary General's authority as well as to the wishes of the General Assembly, Economic and Social Council, and the HRC, but the High Commissioner has managed to carve out a lot of autonomy. Now, the relationship is a bit unclear, which may be a positive factor that will allow the future High Commissioner to create his or her own relations with the HRC. Voluntary contributions have fostered some independence because, otherwise, she would be subject to the larger bodies that distribute the funds. Another country pointed out, however, that there is a huge demand for resources; for example, with special procedures, people need to travel more to conduct better research, but the current system only provides for two trips per special procedures. Funding through

the regular budget has been suggested, but that entails greater control and time delays between decisions made in the HRC and financial ones made by the Fifth Committee.

### **III. The Evolving Regional Implementation of Human Rights**

The discussion began with commentary on the ASEAN governmental commission. It is still unclear exactly what sort of opportunities this mechanism provides. It does provide an opportunity to protect and promote human rights, but it will require a lot of encouragement from the international community. When ASEAN countries started talking about and civil society formed a working group on a human rights mechanism in the early 1990s, very ambitious ideas were on the table, including in the mandate investigations and responses in the regions as well as actions from individuals regarding human rights violations. As governments became more involved, however, the nature of the body changed. What we have now is characterized as a consultative body, one of non-interference that respects sovereignty, in which decisionmaking is based on consensus. It provides technical services on requests and advisory assistance.

States should not be too pessimistic, though, as they can give constant support, educate the mechanism, help it learn from the best practices of other regional mechanisms, and convey the expectations of the international community. A recent workshop regarding human rights in Asia adopted by consensus a resolution that encourages more regular exchange and asks the Inter-American Commission on Human Rights for technical expertise. States need to push it to become a meaningful regional human rights mechanism. Countries cannot be allowed to use it as a pretext to not take concrete actions themselves to redress human rights violations. Rather, this mechanism must be used to educate about and respond to human rights abuses.

Comments were then made on the Inter-American system. It, unlike the European Court, does not require membership. Moreover, there is no individual petition mechanism, so it has not yet achieved universality of the judicial system as exists in the EU. It is a strong force in human rights – take, for example, the decision holding Honduras responsible for rendition and protecting human rights even when the actor is not a state. However, it does not have the compliance record that the European Court does. There are questions whether the Inter-American Court should evolve into a more formal court system. The Inter-American Commission for Human Rights also has a strong, independent function. It is universal, with every country of the Organization of American States being subject to its authority, which is merely moral and political. Only Cuba has been suspended from its operations. The Commission serves as an early warning mechanism (e.g., Guantanamo in 2002) and has conducted site visits (e.g., Argentina). The Commission should not be subsumed into the court as has happened in the European system. Despite the non-binding nature of its decisions, it carries authority and is an important watchdog of human rights. However, it is starved for resources and lacks sufficient staff to monitor all of the countries under its purview. There is also some concern that many of its decisions are undisciplined and difficult to implement.

One participant raised the topic of the Arab Charter on Human Rights, which has been ratified by ten of the 22 members of the League of Arab States. The seven members of its committee serve four-year terms and can be re-elected once. Prohibiting these members from having a government function while in their post protects some degree of independence. The practice involves preparation and exchange of reports among the states parties and committees. Overall, this is more like an ombudsman than a classical human rights body. It was further commented by this participant that most ASEAN members wanted the ASEAN committee close to their representatives in order to exert more influence. Given the problems in Malaysia and Burma in 2009 at the time of its establishment, many EU representatives in Asia have doubts about the ASEAN committee's effectiveness and independence. It would be more beneficial if it had investigative or quasi-judicial functions. It has potential, and civil society must play a role in improving its effectiveness.

One participant referred to the European Court of Human Rights' large backlog of pending cases (roughly 100,000 are registered and awaiting decisions) as a difficult and critical situation. Although Protocol 14 entered into force 1 June 2010 and has provisions regarding inadmissible cases, it cannot solve everything. Further reform is necessarily, particularly with regard to handling repetitive cases and maximizing effectiveness. One suggestion, for example, was to use the Court's pilot judgment procedure in cases that involve claims for compensation for property that was nationalized in such countries as Romania and Albania. On a related note, the participant was not incredibly optimistic about the issue of EU accession to

the European Convention on Human Rights. Some of the proposals may lead to costly, bureaucratic procedures. Currently, the European Court is the only truly effective mechanism, but it exacts great financial and political costs. States originally agreed to establish this system based on a right to individual participation, but such a concept is very far away in many Arab, African, and Asian states. It was proposed that in establishing a court for Asian countries, it may be best to minimize ambition and establish a more limited system that first recognizes a right to individual participation and focuses on protecting certain rights.

One participant was pleased with the appointment in OHCHR of a focal point for regional arrangements and voiced plans for a fall resolution on regional arrangements. It was noted that one of the working groups under the Lisbon Treaty is on EU relations with regional mechanisms.

Another participant agreed with the cautious assessments of the ASEAN committee given by other states and that civil society must be involved, but questioned whether that will make a difference. The body lacks human rights experts, which may be in part due to its intergovernmental nature. A workshop was held in Jakarta with the Centre for Strategic and International Studies to bring together the ASEAN Secretary General and human rights NGOs. It would be beneficial to further exchange best practices, potentially through workshops with OHCHR in Geneva, the European Court, the Inter-American system, and ASEAN.

In considering the effectiveness of any regional mechanism, it is important to take account of the human rights approach, the engagement of governments, and the real impact on the ground. Consider the African court, which is new and has issued only one judgment. It takes time, however, to set procedures. Although its website provides transparency into the number of applications received, it gives no information about why no decisions have been issued since 2006. The limited number of applications may be due to individuals' lack of knowledge of their rights, fear of repression, or lack of legal advice.

One participant commented that the African system has an ambitious structure, but faces a problematic lack of resources. There's also a challenge to link human rights and political mechanisms in Africa; some connections can be seen, however, in crisis management work. With respect to the European system, the Council of Europe, the Organisation for Security and Co-Operation in Europe, and the European Union need to consider the totality of the structure and the combination of a far-reaching judicial system with a political mechanism. Political follow-up and accountability within the Council of Ministers is important. Protocol 14, which breaks the deadlock with the Russian Federation, is a crucial development, but it does not solve everything. The Council of Europe should continue standard-setting work through its normative role, such as the resolution on LGBT rights. The European Committee for the Prevention of Torture was mentioned as an interesting mechanism that can play an important role in moving human rights into the local level. It will be interesting to see how the judgments concerning the extraterritorial application of the European Convention on Human Rights affect the implementation of human rights moving forward. The accession of the EU to the Convention will show, and be an example for, other countries on how Europe is improving its own implementation efforts. Another important regional development was the European ratification of the Convention on Persons with Disabilities.

The three-pillar European system, including the Court, the Commissioner for Human Rights, and the process of implementing the judgments, is a model worth promoting. The impossibility to withdraw is also a worthwhile feature. Given that financial concerns exist in all regional mechanisms, we need to carefully consider how best to obtain monetary support.

Another participant reiterated the problem of the backlog of cases, noting that with so many cases, it will be difficult to achieve Europe's goal of having a zero growth budget. In fact, it may be necessary to increase financial contributions; assessing court fees (with certain exceptions) is one option. There are also structural issues within the Court. For example, the current jurisprudence is inconsistent, making case outcomes unpredictable. The political will of Member States to implement decisions is lacking and must be encouraged. Procedural rules should be simplified.

One participant commented that CPD and ECRI criticized the lack of coordination, but noted that the process on follow-up to the draft report was different from that of the concluding observations of a treaty body. It is true that we need to go beyond Protocol 14; the Interlochen meeting is one example. The European Court functions as a second constitutional court in that there is not a question on whether countries should comply

with judgements. The UN system, on the other hand, still involves question of how to deal with the views of treaty bodies in individual cases; for many, they are nothing more than political obligations. Regional mechanisms may provide a better forum for raising tough issues that otherwise will not be raised in Geneva. Others may argue, however, that regional mechanisms shield regions from the outside world, in a sense undermining the global system. Rather, the answer may be to engage to the fullest extent possible with all of these mechanisms and encourage them to learn from each other.

Others agreed that a slow and cautious approach is necessary for developing the potential of the ASEAN commission. It is important to find ways to work with Asian countries, especially given that many are largely absent from the HRC. Despite the work of the Inter-American system, one participant noted that its budget is “in shambles”. Some questioned how we can build capacity in the African human rights court as well as in the field work of the OHCHR.

Protocol 14 is a welcome reform piece, but it will likely take years to see real results. Another development at the European level has been the work on a new convention on violence against women and domestic violence, as there is a need for clear guidelines for states to follow. There is hope for a new institution to help achieve tangible changes at the national level. More precise recommendations would also be beneficial to countries, as it would allow domestic improvements on human rights to be more focused.

One participant shared their country’s experience of compiling and reviewing all of the recommendations of the Council of Europe and UN treaty bodies to see which had or had not been implemented. They noticed that many of the UN treaty bodies copy some of the work of other bodies, but they took it as an indication that the relevant bodies may be exchanging information by sharing each others’ findings and reports. Another participant commented, along a similar line, that a challenge for treaty bodies is how to deal with issues relevant to other bodies, particularly given the implications this has for coherence and efficient use of resources.

Another participant advised paying attention to the views of Thomas Hammarberg, the Council of Europe Commissioner for Human Rights, which could be helpful in better understanding current situations and possible dangers.

There was a brief discussion on the relationship between European protocols and the Convention and the European Charter on Fundamental Rights. At this point, there is no legal answer to link these documents; rather, it is more a political issue. In the future, there may be discussion of replacing provisions of the Lisbon Treaty, but another state noted their desire to have the EU accede to the Convention and have the Charter remain legally binding such that they are complementary to each other, not competing. The more we can push the EU to conform to the norms of the Convention, then the fewer cases the Court will have to handle. European countries’ role is to work together to ensure that the system works. It was once said that Europe does not have interlocking institutions, but inter-blocking institutions.

One participant voiced the belief that we need caution in standard setting, especially with regional mechanisms to ensure that we hold ourselves to the highest standards and use any regional standards to complement universal ones.

#### **IV. Options for Dealing with Alleged War Crimes and Acts of Terrorism**

This discussion was begun with a review of the 1993 International Commission of Jurists meeting in Berlin of 160 chief justices on terrorism, counterterrorism, and human rights. The outcome document noted that, in the ICJ’s opinion, acts of terrorism are criminal acts that should be referred to criminal justice system of where they occurred but also recognized a state’s obligation to protect its citizens. If an act amounted to an armed attack, the Geneva Conventions would be triggered and

may warrant a military response by the nations involved. This meeting resulted in the Report of the Eminent Jurists Panel on Terrorism, Counterterrorism, and Human Rights. It was noted that this view may be gaining acceptance.

There has been opposition within the United States, for example, against pursuing alleged war crimes perpetrators under grounds that such actions could impede gaining intelligence important to national security. But the other side argues that taking no action may hamper integrity of international human rights and perpetuate impunity.

In reference to the 1993 report, one participant agreed that terrorist acts are criminal acts and that military response may be triggered by an act that rises to the level of an armed attack, including that of September 11. It was noted that in the United States, for example, the Supreme Court acted as a self-correcting mechanism when there were issues of the application of international humanitarian law with regard to the treatment of persons taken in Afghanistan. A number of cases addressed the right to habeas corpus in response to changes in federal legislation. With the inauguration of the new administration, executive orders were signed, with a focus toward treating detainees pursuant to domestic law and the Geneva Conventions. It was ordered that (1) the Guantanamo detention facility be closed within one year, though that has not been achieved because of difficulties in finding a place to keep the remaining detainees; (2) all investigations be conducted in conformity with Common Article 3 and the revised US army field manual; and (3) that all detainees be treated humanely and with due process. The orders also have led to the closure of CIA “black sites” and requiring detainees to be registered with the International Committee of the Red Cross.

One participant noted the particular challenges faced by the United States given its position as a superpower and the “default target” of people who are not happy with the way the world is but that does not justify human rights violations. Special prosecutions and military commissions are not sufficient for due process and respect of human rights. We must also pay attention to rehabilitating criminal offenders to become contributing members of society again.

With regard to the situation in Gaza and the Goldstone Report, it was noted that the General Assembly is still dealing with it and there has been no referral by the Security Council to the ICC, nor is there meant to be immediately. As a very politically sensitive issue, it is being dealt with carefully. It seems unlikely that the Security Council would refer it given that there may be a self-correcting mechanism within the Israeli-Palestinian system, something that did not exist in the Darfur situation. Moreover, the primary responsibility to investigate and prosecute lies under the command of local authorities, which may help reconciliation and long-term peace and security.

What must be remembered is that human rights do not disappear in the face of armed conflict; rather, international humanitarian law and human rights law must coexist. Human rights considerations must be present in the context of preventing and fighting extremism and in responding to terrorist acts. One area of particular interest is with regard to private investment and security companies. What are states’ responses to these activities and what are, or should, corporations be doing?

Efforts have been made in recent years with respect to counter-radicalization. But it is unknown exactly how far a state can go in a positive way to influence its citizens.

In the past ten years, we have seen positive outcomes from the way counter-terrorism efforts have tested the system. For example, serious scrutiny has been applied to measures in some countries trying to place people in detention or under house arrest. With each regime that pushes too far, courts and others have placed pressure on the regime in order to change it to comply with proper standards. The Council of Europe and the United States Supreme Court have also played an

important role in shaping certain notions, particularly with respect to the applicability of the European Convention on Human Rights to people in certain territories.

This participant also flagged two relatively new challenges: (1) issues of due process and fair, open procedures surrounding the imposition of sanctions in the counter-terrorism context (e.g., freezing assets, travel restrictions, etc.) and (2) issues of non-refoulement (i.e., what does a state do with non-citizens for whom the state has grounds to believe they are a danger but cannot prosecute them?). When the Convention against Torture and the European Convention on Human Rights prevent deportation, this situation becomes a political issue and one that most members of public do not understand.

What is clear is, in the fight against terrorism, fundamental freedoms cannot be set aside.

**V. Should We Do It Again? If So, Where, When and Should We Invited Additional States?**

Mr. Butler and other participants exchanged their gratitude to the AAICJ and the Austrian Foreign Ministry for organizing and hosting the colloquium. It was announced that the thirty-fourth meeting will take place in Croatia in 2011.