SUBMISSION MADE ON BEHALF OF THE INTERNATIONAL SERVICE FOR HUMAN RIGHTS TO THE UNITED NATIONS HUMAN RIGHTS COUNCIL ON ITS OBLIGATIONS TO PROTECT FROM REPRISALS INDIVIDUALS WHO COOPERATE WITH THE COUNCIL AND ITS SUBSIDIARY MECHANISMS

Freshfields Bruckhaus Deringer

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I. INTRODUCTION 3

II. THE PROTECTION OF INDIVIDUALS WHO COOPERATE WITH INTERNATIONAL HUMAN RIGHTS BODIES 5

III. THE COUNCIL'S OBLIGATIONS UNDER INTERNATIONAL LAW 7

IV. CONSIDERATIONS RELEVANT TO THE COUNCIL'S FULFILLMENT OF ITS OBLIGATIONS 11

I. INTRODUCTION

1. The issue of reprisals against individuals who seek to or have communicated or cooperated with United Nations human rights representatives and mechanisms is one of the central challenges facing the Human Rights Council (the Council) and the United Nations more generally.[1]

2. Such reprisals violate human rights and fundamental freedoms that the United Nations and the Council are obliged to promote and protect. They also seriously impede the Council's ability to discharge its mandate effectively, threaten the integrity of the Council as the primary human rights organ of the United Nations and undermine the credibility of the United Nations' work in the field of human rights.[2]

3. In August 2012, the Secretary-General concluded his annual report to the Council on "Cooperation with the United Nations, its representatives and mechanisms in the field of human rights" by noting that:

> [T]he United Nations could not do its invaluable work for human rights without those who cooperate with us. When they are intimidated and targeted for reprisals, they are victims, but we are all less secure. When that cooperation is stifled, our work in the field of human rights is compromised.[3]

4. The Secretary-General continued by identifying the critical role played by the Council in addressing allegations of reprisals against such individuals and endorsed the public condemnation by the Council's President of acts of intimidation and harassment:

> [The Human Rights Council] should underscore the obligation of States concerned to investigate any alleged acts of intimidation and

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1 Report of the Secretary-General on Cooperation with the United Nations, its representatives and mechanisms in the field of human rights, 31 July 2013, UN Doc A/HRC/24/29, paras 3, 50.

2 Report of the Secretary-General on Cooperation with the United Nations, its representatives and mechanisms in the field of human rights, 31 July 2013, UN Doc A/HRC/24/29, paras 6, 55; Council Resolution 24/24 on Cooperation with the United Nations, its representatives and mechanisms in the field of human rights, 9 October 2013, UN Doc A/HRC/RES/24/24, para 1; Report of the Secretary-General on Cooperation with the United Nations, its representatives and mechanisms in the field of human rights, 13 August 2012, UN Doc A/HRC/21/18, para 71; Council Decision 18/118 on Cooperation with the United Nations, its representatives and mechanisms in the field of human rights, 17 October 2011, UN Doc A/HRC/DEC/18/118, para 1; Report of the Secretary-General on Cooperation with the United Nations, its representatives and mechanisms in the field of human rights, 21 July 2011, UN Doc A/HRC/18/19, para 94.

3 Report of the Secretary-General on Cooperation with the United Nations, its representatives and mechanisms in the field of human rights, 13 August 2012, UN Doc A/HRC/21/18, para 71.

> reprisal and ensure that they report back to the Human Rights Council on their action in this context. I support the stance taken by the President of the Human Rights Council in condemning acts of intimidation and harassment and urge the Bureau and members of the Council to continue to address allegations of reprisals in a robust and consistent manner.[4]

5. Despite passing resolutions and issuing a number of public statements regarding the importance of ensuring unhindered access to United Nations human rights mechanisms, the Council has yet to adopt in practice the robust, consistent and unified approach that it has publicly endorsed for the prevention of, protection against, investigation into and accountability for reprisals against those who cooperate with the United Nations in the field of human rights.

6. During its 25th regular session (3–28 March 2014), the Council reiterated the United Nations' grave concerns with regard to the serious risks faced by persons who cooperate with the United Nations human rights mechanisms.[5] The International Service for Human Rights (***ISHR***) is committed to raising awareness about the issue of reprisals and encouraging a robust and consistent response from the Council, as the primary human rights organ of the United Nations.[6]

7. In the light of the anticipated consideration of this issue at the Council's upcoming 26th regular session (10–27 June 2014),[7] the ISHR have instructed us to prepare a submission addressing the legal basis for the protection of individuals who cooperate with the Council and its subsidiary mechanisms. The submission further identifies practical steps that the Council, its President and its Bureau could take to ensure that they comply with their obligations under international law and with the Council's mandate to promote universal respect for the protection of human rights and fundamental freedoms for all.

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4 Report of the Secretary-General on Cooperation with the United Nations, its representatives and mechanisms in the field of human rights, 13 August 2012, UN Doc A/HRC/21/18, para 73.

5 Council Resolution on the Mandate of the Special Rapporteur on the Situation of Human Rights Defenders, 27 March 2014 (Oral Revisions – adopted without a vote), UN Doc A/HRC/25/L.24.

6 M Ineichen, Joint Statement delivered by the International Service for Human Rights at the 25th session of the United Nations Human Rights Council, expressing the views of several organisations, 28 March 2014.

7 See, Secretary-General, Annotations to the agenda for the twenty-sixth session of the Human Rights Council, 25 April 2014, UN Doc A/HRC/26/1; ISHR, Council Alert: a preview of the Human Rights Council's 26th session, 27 May 2014.

II. THE PROTECTION OF INDIVIDUALS WHO COOPERATE WITH INTERNATIONAL HUMAN RIGHTS BODIES

8. The right of individuals to communicate or cooperate with international human rights bodies, including the Council, is derived from international human rights law and, in particular, the rights to freedom of expression and association.[8] The right of effective access to such bodies requires that States should take all appropriate measures to protect the individual from reprisals for such communication or cooperation and from all forms of intimidation to prevent or hinder such communication or cooperation.

9. The right of all individuals to unhindered access to and communication with international bodies with the general or specific competence to receive and consider communications on matters of human rights is specifically recognised by the United Nations Declaration on the Rights and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms (***Declaration on Human Rights Defenders***).[9]

10. The Declaration on Human Rights Defenders further recognises the right of individuals who seek to or have communicated or cooperated with international human rights bodies to protection from reprisals for such communication or cooperation.[10]

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8 The Universal Declaration on Human Rights (Articles 13, 19, 20), the International Covenant on Civil and Political Rights (Articles 12, 19, 22), the International Covenant on Economic, Social and Cultural Rights (Article 8, Optional Protocol Article 13), the Convention on the Elimination of All Forms of Racial Discrimination (Article 5(d)(i), (viii)), the Convention on the Elimination of All Forms of Discrimination against Women (Article 7, Optional Protocol Article 11), the Convention on the Rights of the Child (Article 13), the European Convention on Human Rights (Articles 10, 11, Article 2 to Protocol No 4), the African Charter on Human and Peoples' Rights (Articles 9, 10, 12), the American Convention on Human Rights (Articles 13, 16, 22), the Arab Charter on Human Rights (Article 28), the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (Article 13, Optional Protocol Article 15), the Convention No 87 on Freedom of Association and Protection of the Right to Organise of the International Labour Organisation (Article 2); and UNGA Resolution 53/144 on the United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms, 8 March 1999, UN Doc A/RES/53/144, Annex, Articles 5, 6. See also, United Nations, *Commentary to the Declaration on the Rights and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms*, July 2011, p 48.

9 UNGA Resolution 53/144 on the United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms, 8 March 1999, UN Doc A/RES/53/144, Annex, Articles 5(c), 9(4).

10 UNGA Resolution 53/144 on the United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms, 8 March 1999, UN Doc A/RES/53/144, Annex, Articles 2(1), 9(1), 12(2). In this submission, the term "reprisal" is used to denote any form of violence, threats, retaliation, de facto or

The right to be free from reprisals that threaten an individual's life or physical liberty can also be an aspect of the protection afforded by other international human rights, such as freedom from arbitrary arrest, detention or deprivation of liberty; torture; cruel, inhuman and degrading treatment; and arbitrary deprivation of life where, as is too often the case, acts of reprisal amount to violations of such freedoms.[11]

11. States have the primary responsibility for protecting and enforcing the rights of individuals who seek to or have communicated or cooperated with international human rights bodies.[12] As subjects of international law, international organisations may also have an obligation to uphold these rights.[13] In particular, where an international organisation's constituent instrument requires compliance with rules of international law the organisation and its subsidiary organs are obliged to act consistently with such rules.[14] Similarly, where a subsidiary organ's mandate requires compliance with rules

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de jure adverse discrimination, pressure or any other arbitrary action as a consequence of a individual's attempted or actual communication or cooperation with an international human rights body that amounts to a violation of that individual's human rights.

11 The Universal Declaration on Human Rights (Articles 3, 5, 9, 10, 11); the International Covenant on Civil and Political Rights (Articles 4, 7, 9, 14); the European Convention on Human Rights (Articles 2, 3, 5, 6); the African Charter on Human and Peoples' Rights (Articles 4, 5, 6, 7); the American Convention on Human Rights (Articles 4, 5, 7, 8); the Arab Charter on Human Rights (Articles 5, 8, 12 13, 14); and the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (Articles 1, 2).

12 UNGA Resolution 53/144 on the United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms, 8 March 1999, UN Doc A/RES/53/144, Annex, preambular para 7, Article 2; UNGA Resolution 66/164 on the Promotion of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms, 19 December 2011, UN Doc A/RES/66/164, preambular para 15. For the manner in which human rights treaties link States' obligations to ensure respect for human rights and the exercise of territorial control and jurisdiction, see, eg, the International Covenant on Civil and Political Rights, Article 2(1)–2(3).

13 *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (Advisory Opinion)* [1980] ICJ Rep 73, pp 89–90. See also *Reparation for injuries suffered in the service of the United Nations (Advisory Opinion*) [1949] ICJ Rep 174, pp 179–180. For the purpose of being a "subject" of international law, international organisations include their subsidiary organs in the same manner that State organs form part of the State for the purpose of its status as a subject of international law.

14 D Sarooshi, "The Legal Framework Governing United Nations Subsidiary Organs" (1996) 67(1) British Yearbook of International Law 413, p 413; HG Shermers, NM Blokker, *International Institutional Law* (4th edn, 2003), pp 167, 722. It is a corollary of the requirement that the international organisation not exercise powers beyond its constituent instrument that it comply with limitations imposed by its constituent instrument: CF Ameraginshe, *Principles of the Institutional Law of International Organisations* (2nd edn, 2005), pp 140–141; HG Shermers, NM Blokker, *International Institutional Law* (4th edn, 2003), pp 155–157, 493. International organisations can also be bound directly by customary international law: see note 17 below.

of international law, it is obliged to exercise its powers consistently with such rules, as subsidiary organs are only competent to act in accordance with their mandates.[15]

III. THE COUNCIL'S OBLIGATIONS UNDER INTERNATIONAL LAW

Obligations of the Council

12. The Council is a subsidiary organ of the General Assembly and the United Nations' principal human rights organ.[16]

13. The Council has specific obligations relating to the protection of individuals who seek to or have communicated or cooperated with it and its subsidiary mechanisms. These obligations derive from three primary sources:

    (a) the United Nations Charter, which obliges the United Nations and its subsidiary bodies to act in conformity with international human rights law;[17]

    (b) the Council's mandate, as reflected in the General Assembly resolutions establishing the Council and reviewing its work;[18] and

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15 D Sarooshi, "The Legal Framework Governing United Nations Subsidiary Organs" (1996) 67(1) British Yearbook of International Law 413, p 413; CF Amerasinghe, *Principles of the Institutional Law of International Organisations* (2nd edn, 2005), p 140. The ICJ has acknowledged the possibility of an international organisation acting *ultra vires* where it takes action not in fulfilment of one of the purposes stated in its constituent instrument (*Certain Expanses of the United Nations (Article 17, paragraph 2, of the Charter) Advisory Opinion of 20 July 1962* [1962] ICJ Rep 151, p 168), which applies *mutatis mutandis* to a resolution establishing a subsidiary body. Any rules of international law that a subsidiary organ is required to respect by virtue of its mandate must be consistent with the constituent instrument of the international organisation: HG Shermers, NM Blokker, *International Institutional Law* (4th edn, 2003), p 167.

16 UNGA Resolution 60/251 on the Human Rights Council, 3 April 2006, UN Doc A/RES/60/251, preambular para 1; UNGA Resolution 65/281 on the Review of the Human Rights Council, 20 July 2011, UN Doc A/RES/65/281, para 3.

17 Charter of the United Nations, Articles 1(3), 55. Moreover, as a subject of international law created by States, the Council is also obliged under customary international human rights law to act consistently with those human rights that protect persons who seek to or have cooperated with the Council: see, eg, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (Advisory Opinion)* [1980] ICJ Rep 73, pp 89–90; *Reparation for injuries suffered in the service of the United Nations (Advisory Opinion*) [1949] ICJ Rep 174, p 179; P Sands, P Klein, *Bowett's Law of International Institutions* (5th edn, 2001), pp 456, 458; CF Amerasinghe, *Principles of the Institutional Law of International Organisations* (2nd edn, 2005), p 400.

18 UNGA Resolution 60/251 on the Human Rights Council, 3 April 2006, UN Doc A/RES/60/251; UNGA Resolution 65/281 on the Review of the Human Rights Council, 20 July 2011, UN Doc A/RES/65/281; Charter of the United Nations, Articles 1(3), 55. See also, Council Resolution 5/1 on Institution-building of the United Nations Human Rights Council, 18 June 2007, UN Doc A/HRC/RES/5/1, Annex (endorsed by

(c) the internal law of the United Nations, which requires the Council to act consistently with the Declaration on Human Rights Defenders, it being a declaration by the primary organ of the United Nations that created the Council which sets out the United Nations' approach to an issue within the Council's field of competence.[19]

14. The Council's overarching obligation is to "promot[e] universal respect for the protection of all human rights and fundamental freedoms for all".[20] This obligation cover all human rights and fundamental freedoms, including those specifically relating to individuals who seek to or have communicated or cooperated with the Council. In the pursuit of this overarching objective, the Council has at least three relevant obligations:

(a) First, to "contribute, through dialogue and cooperation, towards the prevention of human rights violations".[21] This includes the prevention of reprisals.

(b) Second, to ensure it exercises its functions "with a view to enhancing … the protection of all human rights".[22] This includes protection of individuals who seek to or have communicated or cooperated with it and its subsidiary mechanisms.

UNGA Resolution 62/219 on the Report of the Human Rights Council, 28 February 2008, UN Doc A/RES/62/219).

19 *Robinson v Secretary-General of the United Nations* (1952) UNAT Judgment No 15, p 47; HG Shermers, NM Blokker, *International Institutional Law* (4th edn, 2003), p 790 ("[t]he internal legal force of declarations seems indisputable. When the supreme organ of an organization declares that a particular rule should be applied, that declaration will bind all lower organs, even if it has no external binding effect. This is the consequence of the hierarchy of organs"). For a similar view as to the relevance of supervisory powers of the United Nations General Assembly, see the views expressed by Judge Lauterpacht in *Voting Procedures on Questions relating to Reports and Petitions concerning the Territory of South West Africa (Advisory Opinion)* [1955] ICJ Rep 67, pp 118–122.

20 UNGA Resolution 60/251 on the Human Rights Council, 3 April 2006, UN Doc A/RES/60/251, preambular para 2.

21 UNGA Resolution 60/251 on the Human Rights Council, 3 April 2006, UN Doc A/RES/60/251, para 5(f). See also Council Resolution 24/16 on the role of prevention in the promotion and protection of human rights, 8 October 2013, UN Doc A/HRC/RES/24/16, preambular para 3, para 6.

22 UNGA Resolution 60/251 on the Human Rights Council, 3 April 2006, UN Doc A/RES/60/251, paras 2, 4. The Council is also empowered to "address situations of violations of human rights" in accordance with purposes and principles of the United Nations: UNGA Resolution 60/251 on the Human Rights Council, 3 April 2006, UN Doc A/RES/60/251, para 3.

(c) Third, to promote the full implementation of human rights obligations undertaken by States.[23] This includes encouraging effective investigation into and accountability for reprisals against individuals who cooperate with the Council and its subsidiary mechanisms.

Responsibilities of the President and Bureau

15. The President and Bureau (comprising the President, together with four elected Vice-Presidents) are the Council's leadership and coordination unit. In that role, the President and Bureau have a responsibility to protect the Council's processes and defend its integrity.[24] This responsibility derives from the powers conferred on the President and the Bureau by the United Nations General Assembly and the Council itself.[25]

16. The Bureau's powers relate to control of the Council's procedural and organisational matters.[26] The President has the additional responsibilities of chairing Council sessions, appointing special mandate holders and, in consultation with the Bureau, speaking on behalf of the Council by meeting and exchanging correspondence with States and relevant stakeholders, and issuing public statements on matters ranging

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23 UNGA Resolution 60/251 on the Human Rights Council, 3 April 2006, UN Doc A/RES/60/251, para 5(d).

24 This is an implied power. For discussion of the implied powers of international organisations generally, see: *Reparation for injuries suffered in the service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174, p 182; *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion)* [1996] ICJ Rep, 66, pp 78–79. This doctrine applies to subsidiary organs of the United Nations: *Crawford and Others v Secretary-General of the United Nations* (1955) UNAT Judgment No 66, concerning the implied power of the United Nations Administrative Tribunal to interpret previous decisions. See also the follow-up work of the Human Rights Committee on the implementation of its decisions and reports carried out by its Special Rapporteurs on Follow-up to Concluding Observations and Follow-up to Views, despite the silence of the Optional Protocol to the International Covenant on Civil and Political Rights on that issue: Human Rights Committee, Note by the Human Rights Committee on the procedure for follow-up to concluding observations, 21 October 2013, UN Doc CCPR/C/108/2.

25 Report of the Secretary-General on Cooperation with the United Nations, its representatives and mechanisms in the field of human rights, 31 July 2013, UN Doc A/HRC/24/29, para 6. This responsibility is also reflected in the legal obligation of Member States of the Council, of which the President and Bureau Vice-Presidents are representatives, to uphold the "highest standards in the promotion and protection of human rights": UNGA Resolution 60/251 on the Human Rights Council, 3 April 2006, UN Doc A/RES/60/251, para 9.

26 Council Resolution 5/1 on Institution-building of the United Nations Human Rights Council, 18 June 2007, UN Doc A/HRC/RES/5/1, Annex, para 114, Rules 8, 10 (endorsed by UNGA Resolution 62/219 on the Report of the Human Rights Council, 28 February 2008, UN Doc A/RES/62/219); UNGA Resolution 65/281 on the Review of the Human Rights Council, 20 July 2011, UN Doc A/RES/65/281, Annex, paras 45–46.

from specific human rights situations to the improvement of the modalities of the Council's operations.[27]

17. The President and Bureau have a special responsibility to protect the integrity and effectiveness of the Council and its processes through the exercise of these powers. This responsibility was expressly acknowledged by the President and Bureau when they agreed that "all efforts should be made to preserve the integrity and universal nature of the [Universal Periodic Review (***UPR***)]" and to that end, settled on steps to be taken by the President that are "crucial for maintaining the integrity" of the UPR mechanism such as by continuing a dialogue with absent States to ensure their full participation.[28] The need for the President and Bureau conscientiously to fulfil their responsibility to protect the Council's processes and integrity in situations concerning reprisals is particularly acute because of the importance of individual and civil society cooperation to the effectiveness of the Council.[29] This has been explicitly recognised by the Secretary-General, who noted that a robust response to reprisals from the Council's President was "necessary to preserve [the Council's] credibility."[30]

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27 Rules of Procedure of the General Assembly, September 2007, UN Doc A/520/Rev.17, Rule 106; UNGA Resolution 60/251 on the Human Rights Council, 3 April 2006, UN Doc A/RES/60/251, para 11; Council Resolution 5/1 on Institution-building of the United Nations Human Rights Council, 18 June 2007, UN Doc A/HRC/RES/5/1, Annex, paras 18(a), 52–53, 118, Rules 1, 8, 10, 19 (endorsed by UNGA Resolution 62/219 on the Report of the Human Rights Council, 28 February 2008, UN Doc A/RES/62/219); eg Minutes of the Human Rights Council Bureau Meeting, 25 February 2014, item 3(a); eg Statement of the Council President on Modalities and practices for the Universal Periodic Review process, 9 April 2008, UN Doc A/HRC/PRST/8/1.

28 Note on the Meeting of the Council Bureau with Mr Ban Ki-Moon, Secretary-General of the United Nations, 1 March 2013, p 1.

29 Both the Council and the United Nations Secretary-General have regarded such cooperation as "indispensable" to the effectiveness of the United Nations' human rights work: Council Resolution 24/24 on Cooperation with the United Nations, its representatives and mechanisms in the field of human rights, 9 October 2013, UN Doc A/HRC/RES/24/24, para 1; Council Decision 18/118 on Cooperation with the United Nations, its representatives and mechanisms in the field of human rights, 17 October 2011, UN Doc A/HRC/DEC/18/118, para 1; Report of the Secretary-General on Cooperation with the United Nations, its representatives and mechanisms in the field of human rights, 21 July 2011, UN Doc A/HRC/18/19, para 94.

30 Report of the Secretary-General on Cooperation with the Untied Nations, its representatives and mechanisms in the field of human rights, 31 July 2013, UN Doc A/HRC/24/29, para 6.

IV. CONSIDERATIONS RELEVANT TO THE COUNCIL'S FULFILLMENT OF ITS OBLIGATIONS

18. In pursuit of its core aim of promoting respect for and the protection of human rights, the Council is obliged to exercise its functions in a manner that both contributes to the prevention of reprisals and enhances the protection of individuals from reprisals who seek to or have communicated or cooperated with it.

19. The Council has a broad discretion as to what action it takes to fulfil its obligations. However, as a subject of international law, the Council must act in good faith, which informs the assessment of the type of action that the Council is required to take to discharge its obligations.[31] As a general proposition, the principle of good faith requires that the Council's powers must be reasonably exercised,[32] and that the Council may not unreasonably decline to exercise its powers in circumstances where the proper fulfilment of its mandate in compliance with international law would require it to do so.

20. The observance in good faith of its legal obligations requires the Council to act in genuine pursuit of the prevention of reprisals and the protection of persons who cooperate with the Council, and that its own internal practice is consistent with the public positions that it endorses.[33] Any failure by the Council to take appropriate action where it possesses information about reprisals having occurred or a credible risk of their occurring would be inconsistent with its obligations. It follows that the Council is legally obliged to take action if it possesses information about a credible risk or

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31 *Nuclear Tests (Australia v France)* [1974] ICJ Rep 253, p 268 ("[o]ne of the basic principles governing the creation and performance of legal obligations, *whatever* their source, is the principle of good faith" (emphasis added)); *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (Advisory Opinion)* [1980] ICJ Rep 73, p 93; B Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953), p 105. See also, in the context of treaty obligations, the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations (1986), preambular para 3 ("*[n]oting* that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognised"), Article 26 ("[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith").

32 B Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953), p 131.

33 The public positions endorsed include those called for in resolutions and decisions, as well as those adopted by the Council, the President and the Bureau in responding to risks or allegations of reprisals. This is also consistent with the United Nations' agenda on strengthening the rule of law at the international level: see, eg, Guidance Note of the Secretary-General, May 2011; Dialogue with Member States organised by the Rule of Law Unit: Rule of Law at the International Level, Concept Note, 15 June 2009.

allegation of reprisals. The following considerations are relevant to the actions that the Council should take to ensure the fulfillment of its legal obligations in good faith.

21. First, the Council should ensure that it acts in accordance with the public positions that it has endorsed unless it provides a valid explanation for its failure to do so. For example, the Council has on a number of occasions publicly rejected any act of intimidation or reprisal against individuals or groups who cooperate or have cooperated with the United Nations, its representatives and mechanisms in the field of human rights.[34] The Council's position is recorded in resolutions[35] and its support for States and other United Nations actors who have publicly denounced such reprisals.[36] The Council has also called on States to investigate allegations of reprisals, hold perpetrators to account and provide appropriate remedies to victims of such reprisals.[37] The Council has repeatedly encouraged, requested and required that information about credible risks and allegations of reprisals be provided to it.[38] Where the Council has

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34 Council Resolution 24/24 on Cooperation with the United Nations, its representatives and mechanisms in the field of human rights, 9 October 2013, UN Doc A/HRC/RES/24/24, preambular para 2; Council Decision 18/118 on Cooperation with the United Nations, its representatives and mechanisms in the field of human rights, 17 October 2011, UN Doc A/HRC/DEC/18/118, preambular para 3; Council Resolution 12/2 on Cooperation with the United Nations, its representatives and mechanisms in the field of human rights, 12 October 2009, UN Doc A/HRC/RES/12/2, para 2. See also UNGA Resolution 65/281 on the Review of the Human Rights Council, 20 July 2011, UN Doc A/RES/65/281, Annex, para 30.

35 See note 34 above.

36 Council Resolution 24/24 on Cooperation with the United Nations, its representatives and mechanisms in the field of human rights, 9 October 2013, UN Doc A/HRC/RES/24/24, preambular para 6.

37 Council Resolution 24/24 on Cooperation with the United Nations, its representatives and mechanisms in the field of human rights, 9 October 2013, UN Doc A/HRC/RES/24/24, preambular para 9, para 5; Council Decision 18/118 on Cooperation with the United Nations, its representatives and mechanisms in the field of human rights, 17 October 2011, UN Doc A/HRC/DEC/18/118, para 2; Council Resolution 13/13 on the Protection of human rights defenders, 25 March 2010, UN Doc A/HRC/RES/13/13, para 12; Council Resolution 12/2 on Cooperation with the United Nations, its representatives and mechanisms in the field of human rights, 12 October 2009, UN Doc A/HRC/RES/12/2, paras 3, 4. The Secretary-General of the United Nations has endorsed these measures and emphasised the need for the Council to require States to report back to it on the actions taken: Reports of the Secretary-General on Cooperation with the United Nations, its representatives and mechanisms in the field of human rights of 31 July 2013, UN Doc A/HRC/24/29, para 54; 13 August 2012, UN Doc A/HRC/21/18, para 73; 21 July 2011, UN Doc A/HRC/18/19, para 96(d).

38 Council Resolution 24/24 on Cooperation with the United Nations, its representatives and mechanisms in the field of human rights, 9 October 2013, UN Doc A/HRC/RES/24/24, paras 6, 10, 11; Council Resolution 22/6 on Protecting human rights defenders, 12 April 2013, UN Doc A/HRC/Res/22/6, paras 19, 20; Council Decision 18/118 on Cooperation with the United Nations, its representatives and mechanisms in the field of human rights, 17 October 2011, UN Doc A/HRC/DEC/18/118, para 2; Council Resolution 12/2 on Cooperation with the United Nations, its representatives and mechanisms in the field of human rights, 12 October 2009, UN Doc A/HRC/RES/12/2, paras 6, 8.

such information, it is legally obliged to act upon it in good faith. The United Nations Secretary-General has declared that it is "incumbent" on the Council to follow up on information it receives about reprisals.[39]

22. Second, the President of the Council should act consistently with the precedent set by former Presidents on issues of central importance, such as reprisals, unless the President publicly explains the change in approach. The vital importance of responding to credible risks of reprisals has been expressly recognised by former Presidents of the Council as a core function of that office. Thus, for example, in 2012, President Dupuy Lasserre explained that the President was "entrusted with ensuring that decisions of the Council [concerning the rejection of reprisals] are respected"[40] and that "the Council has to assume its responsibilities and ensure that those who wish to participate in our discussions … can do this without fear of reprisal."[41] This position was formally endorsed by the Secretary-General.[42] Following public statements by President Dupuy Lasserre calling attention to the risk of reprisals, the Secretary-General participated in a panel discussion organised by the Human Rights Council on the issue of reprisals in which he:

> …welcomed the initiatives taken by various bodies and mechanisms to respond to reprisals, and praised the active role played by the President of the Human Rights Council in this regard. [The Secretary-General] expressed the hope that the panel would act as a catalyst for robust and coordinated action throughout the United Nations system to systematically condemn and respond to persecution and intimidation.[43]

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39 Report of the Secretary-General on Cooperation with the United Nations, its representatives and mechanisms in the field of human rights, 21 July 2011, UN Doc A/HRC/18/19, para 96(d).

40 Letter of the President of the Council to the Permanent Representative of Jordan to the United Nations in Geneva (in his capacity as Chair of the Arab Ambassadors' Council), 11 June 2012, concerning alleged reprisals in Bahrain.

41 Statement by Ms Laura Dupuy Lasserre (Uruguay), President of the Human Rights Council at the 15th meeting of the 19th regular session of the Human Rights Council, 5 March 2012, <http://www.unmultimedia.org/tv/webcast/2012/03/presidential-statement-15th-meeting-19th-session-human-rights-council.html>.

42 Report of the Secretary-General on Cooperation with the United Nations, its representatives and mechanisms in the field of human rights, 13 August 2012, UN Doc A/HRC/21/18, para 73.

43 Summary of the Human Rights Council panel discussion on the issue of intimidation or reprisals against individuals and groups who cooperate or have cooperated with the United Nations, its representatives and mechanisms in the field of human rights, 17 December 2012, UN Doc A/HRC/22/34, para 6.

23. Third, whether or not the United Nations adopts a coherent organisation-wide approach to reprisals, the special responsibility of the Council in the area of human rights obliges it to take steps in good faith to ensure that its own response is unified, internally consistent and reflects best practice of the United Nations human rights mechanisms. In three successive reports to the Council on the cooperation of individuals with the United Nations, its representatives and mechanisms in the field of human rights, the Secretary-General has identified good practices of specific United Nations human rights bodies and called for a "coherent and unified response" to reprisals from across the United Nations system. The Secretary-General has drawn particular attention to the Committee Against Torture's establishment of both a Working Group on Reprisals, which is preparing a formal policy position on responding to the risk of reprisals,[44] and two Special Rapporteurs on Reprisals, who are empowered to investigate reprisals, communicate with complainants, State authorities, the United Nations High Commissioner for Human Rights and the United Nations Secretary-General, request the immediate cessation of impugned acts, conduct site visits and follow-up interviews, and report publicly on such situations.[45] The Chairman of the Committee Against Torture and its Special Rapporteurs on Reprisals also publish correspondence with States identifying specific allegations of reprisals and calling on the State concerned to fulfil its obligations to prevent such reprisals and protect the individuals concerned.[46]

24. Failure by other human rights bodies within the United Nations, including the Council, to meet the standards set by the Committee Against Torture in responding to credible risks or allegations of reprisals creates a risk that individuals who cooperate with the Committee Against Torture and its subsidiary mechanisms will be perceived as

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44 The Working Group falls under the Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: see Sixth Annual Report of the Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 23 April 2013, UN Doc CAT/C/50/2, para 64; Seventh Annual Report of the Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 20 March 2014, UN Doc CAT/C/52/2, paras 63–68.

45 Committee against Torture, Statement of the Committee against Torture, adopted at its fifty-first session (28 October–22 November 2013), on reprisals, 16 December 2013, UN Doc CAT/C/51/3, paras 1, 5–6.

46 See, eg, Letters sent by the Chairperson of the Committee against Torture and the Rapporteur on Reprisals to the Russian Federation on 28 May 2013 and 17 May 2013.

receiving better protection than those who cooperate with the Council. This would be antithetical to the United Nations' official position that human rights are universal, indivisible, interrelated, interdependent and mutually reinforcing, and that all human rights must be treated in a fair and equal manner.[47] It would also undermine the legitimacy of the Council and the effectiveness of its processes.

25. Finally, the Council should also take notice of best practice in the field of human rights. The connection between a strong and consistent response to reprisals and the effectiveness of human rights regimes is well-established in the jurisprudence of both the European Court of Human Rights (***ECtHR***) and the Inter-American Court of Human Rights. For example, the ECtHR has taken a broad approach to the interpretation of Article 34 of the European Convention on Human Rights, which protects the right of individuals to freely and without hindrance submit petitions to and cooperate with the ECtHR, by finding that the right to communicate freely with the ECtHR is protected from any form of "pressure", which includes not only direct coercion and intimidation, but also improper direct acts designed to dissuade or discourage applicants from pursuing a Convention remedy.[48]

Measures designed to contribute to the effective prevention of reprisals

26. The Council is obliged to contribute to the prevention of reprisals. To ensure that it is acting in accordance with this obligation and consistently with the requirement of good faith, the Council should take the following steps:

    (a) The Council as a whole or its President and Bureau should provide guidance that clearly enumerates the steps that the Council will take upon receipt of information about credible risks of reprisals to ensure consistency of action

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47 See, eg, UNGA Resolution 60/251 on the Human Rights Council, 3 April 2006, UN Doc A/RES/60/251, preambular para 3.

48 *Yefimenko v Russia* (App No 152/04), ECtHR First Section, 12 February 2013, para 158; *Markin v Russia* (App No 30078/06), ECHR 2012, para 158. The Inter-American Court of Human Rights has also explained that States have positive obligations to protect individuals from reprisals, including "the duty to provide the necessary means for human rights defenders to conduct their activities freely; to protect them when they are subject to threats in order to ward off any attempt on their life or safety; to refrain from placing restrictions that would hinder the performance of their work, and to conduct serious and effective investigations of any violations against them, thus preventing impunity", and reaffirmed the "undeniable" relationship between the protection of individuals who promote human rights and the effective enjoyment of human rights generally: see *Kawas-Fernández v Honduras* (Series C No 196), IACtHR, 3 April 2009, paras 143–149, esp para 145.

across different terms of the Presidency and memberships of the Bureau.[49] Both the Council[50] and the President[51] have previously issued statements introducing guidelines on the modalities of Council operations. The adoption of clear guidelines is consistent with the United Nations' objective of achieving a unified and coherent approach to this issue and with the Council's mandate to perform its work in a transparent, fair and impartial manner.[52]

(b) The Council should request that the Office of the High Commissioner for Human Rights prepare a study, in consultation with relevant Special Procedures mandate holders, to review the ways in which individuals engage with the Council and its subsidiary mechanisms and make recommendations for the improvement of these processes to better protect persons who communicate or cooperate with the Council. This could include recommendations in respect of confidentiality procedures, practical precautions for meetings and communications between Council mechanisms and individuals, and responsible fact-finding to prioritise good practices for preventing reprisals.[53]

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49 The good practices of other bodies on reprisals reflect the need to develop "formal policy position[s] on responding to the risk of reprisals": Sixth Annual Report of the Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 23 April 2013, UN Doc CAT/C/50/2, para 64; Seventh Annual Report of the Subcommittee on the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 20 March 2014, UN Doc CAT/C/52/2, paras 64–68 (concerning the "proactive policy that asserts its uncompromising commitment to preventing reprisals"). This is consistent with the Secretary-General's recommendations to the Council to develop a "coherent and unified response" to address reprisals in a "systematic manner": Reports of the Secretary-General on Cooperation with the United Nations, its representatives and mechanisms in the field of human rights of 31 July 2013, UN Doc A/HRC/24/29, para 53; 3 August 2012, UN Doc A/HRC/21/18, para 75; 21 July 2011, UN Doc A/HRC/18/19, para 96(e).

50 See, eg, Council Decision 6/102 on Follow-up to Human Rights Council Resolution 5/1: General Guidelines for the Preparation of Information Under the Universal Periodic Review, 27 September 2007, UN Doc A/HRC/DEC/6/102.

51 See, eg, Statement of the President of the Council on Modalities and Practices for the Universal Periodic Review Process, 9 April 2008, UN Doc PRST/8/1; Statement of the President of the Council on Follow-up to President's statement 8/1, 24 September 2008, UN Doc PRST/9/2.

52 UNGA Resolution 60/251 on the Human Rights Council, 3 April 2006, UN Doc A/RES/60/251, para 12.

53 These recommendations could be incorporated into the Council's Code of Conduct for Special Procedures Mandate Holders and the Manual of Operations of the Special Procedures: HRC Resolution 5/2 on the Code of Conduct for Special Procedures Mandate-holders of the Human Rights Council, 18 June 2007, UN Doc A/HRC/RES/5/2; Manual of Operations of the Special Procedures of the Human Rights Council, 2008.

Measures for the protection of individuals who cooperate with the Council

27. The Council is obliged to ensure that it discharges its functions in a manner that contributes to the protection of human rights, including the human rights of individuals who cooperate with it and its subsidiary mechanisms. The Council should take the following steps to ensure good faith compliance with this obligation:

(a) The President in consultation with the Bureau should publicly identify and denounce specific instances of reprisals by issuing formal statements, conducting press-briefings, corresponding directly with the State concerned and publicly releasing such correspondence with and from States.[54] This is consistent with the practice of past Presidents and has been endorsed by the Secretary-General.[55]

(b) The President in consultation with the Bureau should meet with delegations of Member States to discuss information the Council possesses about credible risks of reprisals occurring or allegations of reprisals having occurred, and express serious concern about such acts, as previous Council Presidents and the current President have done.[56] In such instances, the President should also seek

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54 See, eg, concerning alleged reprisals in Bahrain, Letter from the Permanent Representative of Jordan to the United Nations in Geneva (in his capacity as Chair of the Arab Ambassadors' Council) to the President of the Council, 30 May 2012; Letter from the President of the Council to the Permanent Representative of Jordan to the United Nations in Geneva (in his capacity as Chair of the Arab Ambassadors' Council), 11 June 2012; Letter from the Permanent Representative of Jordan to the United Nations in Geneva (in his capacity as Chair of the Arab Ambassadors' Council) to the President of the Council, 19 June 2012 (enclosing the official response of the Ambassador and Permanent Representative of Bahrain to the United Nations in Geneva to the President of the Council, 18 June 2012); Letter from the President of the Council to the Permanent Representative of Jordan to the United Nations in Geneva (in his capacity as Chair of the Arab Ambassadors' Council), 27 June 2012.

55 See, Statement by Ms Laura Dupuy Lasserre (Uruguay), President of the Human Rights Council at the 15th meeting of the 19th regular session of the Human Rights Council, 5 March 2012, <http://www.unmultimedia.org/tv/webcast/2012/03/presidential-statement-15th-meeting-19th-session-human-rights-council.html>; Statement by Ms Laura Dupuy Lasserre (Uruguay), President of the Human Rights Council at the 13th Session (Second Cycle) of the Universal Periodic Review Working Group, 25 May 2012, <http://www.unmultimedia.org/tv/webcast/c/13thbahrain.html>; Report of the Secretary-General on Cooperation with the United Nations, its representatives and mechanisms in the field of human rights, 13 August 2012, UN Doc A/HRC/21/18, para 73.

56 Report of the Secretary-General on Cooperation with the United Nations, its representatives and mechanisms in the field of human rights, 13 August 2012, UN Doc A/HRC/21/18, para 45; Minutes of the Human Rights Council Bureau, 17 March 2014. The minutes do not reveal details of the specific cases of reprisals or the actual action taken by the President.

clarification of the facts[57] and insist on undertakings from the State concerned to investigate, hold the perpetrators accountable and report back to the Council concerning measures taken. In accordance with the Council's mandate to perform its work in a transparent manner, minutes should be kept and made publicly available for all such meetings.

(c) The Council should adopt resolutions that publicly and unambiguously identify and condemn reprisals every time they occur, calling on States to uphold their human rights obligations by investigating, ensuring accountability of the perpetrator, providing appropriate remedies and reporting back to the Council on the measures it has taken.[58]

(d) The Council should follow-up with the State concerned, by requiring it to report back to the Council and by including the discussion of its response to the risk or allegation of reprisals in its next UPR review. The Council should also consider recommending that the Special Rapporteur on the Situation of Human Rights Defenders or the President correspond with and visit the State concerned.[59]

Ensuring effective investigation and accountability

28. By reason of their legislative and judicial competence over reprisals by both State and non-State actors within their territory and subject to their jurisdiction, States have the primary obligation to take all appropriate measures to prevent reprisals and, where

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57 As the 2013 President had done on at least one occasion, see Minutes of the Human Rights Council Bureau Meeting, 18 October 2013.

58 See notes 34 to 37 above.

59 Reports of the Secretary-General on Cooperation with the United Nations, its representatives and mechanisms in the field of human rights of 31 July 2013, UN Doc A/HRC/24/29, paras 54; 13 August 2012, UN Doc A/HRC/21/18, para 73; 21 July 2011, UN Doc A/HRC/18/19, para 96(d). This is similar to the Committee against Torture's ability to request its rapporteurs on reprisals to visit States where reprisals are reported to have occurred: see Committee against Torture, Statement of the Committee against Torture, adopted at its fifty-first session (28 October–22 November 2013), on reprisals, 16 December 2013, UN Doc CAT/C/51/3, para 5.

such reprisals have occurred, to investigate, ensure the perpetrator is brought to justice and that the victim receives an effective remedy.[60]

29. The Council's mandate obliges it to promote the full implementation of States' human rights obligations and to review States' compliance with such obligations.[61] The Council should take the following steps to ensure good faith compliance with this obligation:

(a) The Council has, on numerous occasions, reaffirmed the obligation of States to investigate and hold accountable perpetrators of reprisals against individuals who cooperate with United Nations human rights mechanisms.[62] To discharge its obligation to promote the full implementation of States' international human rights obligations, including the obligation to prevent reprisals against individuals who cooperate with United Nations human rights mechanisms, the Council should seek information concerning the action taken by the State to prevent and ensure accountability for reprisals, assess that State's compliance with its international human rights obligations and call on the State to take further action where it falls short of meeting those obligations.

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60 See, eg, UNGA Resolution 53/144 on the United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms, 8 March 1999, UN Doc A/RES/53/144, Annex, preambular para 7, Article 2; UNGA Resolution 66/164 on the Promotion of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms, 19 December 2011, UN Doc A/RES/66/164, preambular para 15. For the manner in which human rights treaties link States' obligations to ensure respect for human rights and the exercise of territorial control and jurisdiction, see, eg, International Covenant on Civil and Political Rights, Articles 2(1)–2(3).

61 UNGA Resolution 60/251 on the Human Rights Council, 3 April 2006, UN Doc A/RES/60/251, paras 5(d)-(e).

62 Council Resolution 24/24 on Cooperation with the United Nations, its representatives and mechanisms in the field of human rights, 9 October 2013, UN Doc A/HRC/RES/24/24, preambular para 9, para 5; Council Decision 18/118 on Cooperation with the United Nations, its representatives and mechanisms in the field of human rights, 17 October 2011, UN Doc A/HRC/DEC/18/118, para 2; Council Resolution 13/13 on the Protection of human rights defenders, 25 March 2010, UN Doc A/HRC/RES/13/13, para 12; Council Resolution 12/2 on Cooperation with the United Nations, its representatives and mechanisms in the field of human rights, 12 October 2009, UN Doc A/HRC/RES/12/2, paras 3, 4. The Secretary-General of the United Nations has endorsed these measures and emphasised the need for the Council to require States to report back to it on the action taken: Reports of the Secretary-General on Cooperation with the United Nations, its representatives and mechanisms in the field of human rights of 31 July 2013, UN Doc A/HRC/24/29, paras 54; 13 August 2012, UN Doc A/HRC/21/18, para 73; 21 July 2011, UN Doc A/HRC/18/19, para 96(d).

(b) The Council has repeatedly requested and/or required that information concerning credible risks and allegations of reprisals against individuals cooperating with United Nations human rights mechanisms be provided to it.[63] Having requested that information, the Council is obliged to evaluate and respond to such information, including where appropriate to undertake an investigation. Given that the Council receives a considerable number of communications concerning reprisals,[64] it may be necessary to designate a specific individual or body, such as a working group on reprisals, to receive and investigate all such information. This could also be a function fulfilled by the system-wide focal point on reprisals envisaged by Human Rights Council Resolution 24/24 in the event that this position is designated.[65]

(c) Finally, where acts of intimidation, harassment and reprisals occur during or in connection with Council sessions against individuals who are seeking to participate in Council sessions or events, the Council, acting through the President, has a responsibility to investigate and publicly denounce such acts, in order to preserve the integrity of its processes.[66] This conduct was expressly endorsed by the United Nations Secretary-General[67] and provides a standard in

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63 See note 38 above.

64 The Council receives information on reprisals through numerous channels, including: the established complaint and communication procedures; stakeholder reports submitted to be summarised for the UPR Working Group reviews on individual States; the annual reports of the Secretary-General on the cooperation of individuals with the United Nations, its representatives and mechanisms in the field of human rights; the regular reports of the Special Rapporteur on the Situation of Human Rights Defenders and other special procedures of the Council; the correspondence and meetings that the President engages in with other United Nations bodies and officials, States and other interested stakeholders; and information presented during the general debate under agenda item 5. The General Assembly has acknowledged that the Special Rapporteur on the Situation of Human Rights Defenders, as one avenue for the receipt of information, receives a "considerable number of communications": UNGA Resolution 66/164 on the Promotion of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms, 19 December 2011, UN Doc A/RES/66/164, preambular para 7.

65 Council Resolution 24/24 on Cooperation with the United Nations, its representatives and mechanisms in the field of human rights, 9 October 2013, UN Doc A/HRC/RES/24/24, para 7.

66 Statement by Ms Laura Dupuy Lasserre (Uruguay), President of the Human Rights Council at the 15th meeting of the 19th regular session of the Human Rights Council, 5 March 2012, <http://www.unmultimedia.org/tv/webcast/2012/03/presidential-statement-15th-meeting-19th-session-human-rights-council.html>.

67 Report of the Secretary-General on Cooperation with the Untied Nations, its representatives and mechanisms in the field of human rights, 31 July 2013, UN Doc A/HRC/24/29, para 73.

conformity with which the Council, in particular its President and Bureau, should continue to act.

30. Respectfully submitted on behalf of the International Service for Human Rights, PO Box 16 CH-1211, Geneva 20 CIC, Switzerland by

Sir Nicolas Bratza
Former President of
the European Court of
Human Rights

Professor Egbert Myjer
Former Judge of
the European Court of
Human Rights

Lucy Reed
Ben Juratowitch
Robert Kirkness
Catherine Drummond
Freshfields Bruckhaus Deringer