

MAJOR DEVELOPMENTS IN INTERNATIONAL HUMAN RIGHTS LAW

The creation of the Human Rights Council (the Council) and its subsequent institution-building phase resulted in a shift away from new initiatives in UN human rights standard setting. This halting may not be a sole result of the need for States to devote almost their full attention to the Council, however. From the beginning of her appointment, UN High Commissioner for Human Rights (the High Commissioner), Ms Louise Arbour, has continued to state that there is a sufficient number of instruments currently in place at the international level to protect and promote human rights, and that the priority should be on effective implementation of existing standards.

This deceleration has been apparent in the work of the new Council. Its first act in June 2006 was to adopt the *International Convention for the Protection of All Persons from Enforced Disappearance* and the *Declaration on the Rights of Indigenous Peoples*. This was a fitting farewell to the former Commission on Human Rights (the Commission), as the drafting of these instruments were two of the former body's final achievements. The Council's decision to transform the Working Group on the consideration of the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights (OPICESCR) into a Working Group that will actually produce a draft optional protocol is also something that had been proposed by the Chair and the majority of the members of the Working Group before the dissolution of the Commission. Thus the Council merely finalised

or continued the processes already put in place by its predecessor.

The adoption of the *Declaration on the Rights of Indigenous Peoples* by the General Assembly in New York marked an outcome that was 20 years in the making, and indigenous peoples were jubilant and relieved that the final text maintained the key provisions relating to self-determination, lands and territories, cultural identities, and indigenous values and beliefs that had been adopted by consensus in the Council. The evolution of the Declaration also demonstrated that although the standard-setting process is rarely linear, the opportunity for States to work alongside and develop a deeper understanding of the needs and aspirations of the group concerned can be a valuable process for all.

Also following from the first decisions of the Council in June 2006, the **Working Group on the OPICESCR** met in July 2007 with an air of cautious optimism and the session moved through the articles of the draft at such speed, and with relatively muted opposition,¹ that there was ample free time left at the end of the session. One interpretation for the relatively tepid interventions of the opponents to the optional protocol was the fact that they have conceded the inevitability of its adoption as a comprehensive document. So, after years of procrastination, supporters of the protocol are now optimistic that a final draft will be placed before the Human Rights Council for adoption at its 8th session in June 2008.

¹ The only notable exceptions to this were Sweden, unhelpfully proposing that the Working Group could return to discussing the possibility of not having an optional protocol, and the United States of America (US), by continuing to oppose the optional protocol as usual.

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The Intergovernmental Working Group on the effective implementation of the Durban Declaration and Programme of Action is one of the three mechanisms established to follow up the *Declaration and Programme of Action of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, held in Durban, South Africa, in 2001. The Intergovernmental Working Group was established by Commission Resolution 2002/68 and approved by the Economic and Social Council (ECOSOC) in its *Decision 2002/270* of 25 July 2002. See www.ohchr.org/english/issues/racism/groups/. The 5th session of the Working Group in 2007 was divided into two parts in conformity with Council *Decision 3/103*. The first part took place between 5 and 9 March 2007; the second part was convened from 3 to 7 September 2007.

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The experts were appointed pursuant to Council *Resolution 1/5* of 29 June 2006.

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It will meet from 11 to 22 February 2008.

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See A/61/L.67 available at <http://daccessdds.un.org/doc/UNDOC/LTD/N07/498/30/PDF/N0749830.pdf?OpenElement>.

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This was the view expressed by the Indigenous Peoples' Global Caucus (representing indigenous peoples in all regions of the world) upon the adoption of the Declaration by the Council in June 2007. Statement available at www.iwgia.org/graphics/Synkron-Library/Documents/Noticeboard/News/International/IPclosingstatementHRC2006.htm. However some indigenous leaders, including the Chairperson of the Permanent Forum on Indigenous Issues, Ms Vicki Tauli-Corpuz, go back further, pointing to the trip of Cayuga Chief Deskaheh to the League of Nations in 1923 and Maori leader W. T. Ratana in 1925, as the beginning of the indigenous peoples' struggle to be heard at the international level.

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Between 1985 and 1993, the initial text was drafted by the five independent experts of the UN Working Group on Indigenous Populations with the participation of some 100 indigenous organisations. It was then approved by the Sub-Commission on the Protection and Promotion of Human Rights in 1994, and forwarded to the then Commission on Human Rights (the Commission). In 1995, the Commission established an Inter-Sessional Working Group to consider the draft declaration in 1995. This Working Group met for 11 sessions between 1995 and 2006. In June that year the text was adopted by the Human Rights Council, and just over a year later, it was adopted by the General Assembly.

One new development in the realm of standard setting did take place under the direction of the Council in 2007, although it remains at a preliminary stage. The **Intergovernmental Working Group on the effective implementation of the Durban Declaration and Programme of Action** met and reported to the Council twice in 2007.² The first meeting focused on complementary standards to bridge gaps in regional and international standards related to racism and racial discrimination, xenophobia and related intolerance. It was assisted by a group of five experts, who conducted a study on complementary standards and the positive obligations of States, and on complementary standards for vulnerable groups.³ The Council decided to convene an Ad Hoc Committee that will elaborate international complementary standards to the *International Convention on the Elimination of All Forms of Racial Discrimination*.⁴

In other areas, despite the assessment of the High Commissioner, there remained longstanding deficiencies in international protection. Discrimination on the basis of sexual orientation and gender identity remained among the most critical of these deficiencies. On account of the collective unwillingness of the UN's main human rights body to address the issue in any meaningful manner in previous years, initiatives therefore moved forward outside the UN and in early 2007 the *Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity* (the Yogyakarta Principles) were published. A reasonable expectation in 2008 may be to witness the same concerns being raised and acted upon by States in the Council. Whether or not the Council will meet this expectation will give some indication of how much it has improved on the former Commission as a body genuinely committed to the protection and promotion of all human rights for all.

THE DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

The significance of the adoption of the *Declaration on the Rights of Indigenous Peoples* (the Declaration) for the world's 370 million indigenous

peoples cannot be under-estimated.⁵ Its roots can be traced back to a pivotal gathering of indigenous peoples at the UN in Geneva in 1977, which opened the ears of the international community to the need for additional, specifically defined forms of recognition for indigenous peoples that would bring an end to the normative protection gap in international human rights law.⁶ What followed was more than 20 years of discussion and negotiation through five separate bodies within the UN human rights system to finally produce the Declaration.⁷

The end product owes much to the determination, patience, and negotiating skills of indigenous peoples, who worked in partnership with the Sub-Commission on the Promotion and Protection of Human Rights' Working Group on Indigenous Populations.⁸ At the time, this type of interaction by non-State actors in the development of a human rights standard-setting instrument was a rarity, and it helped to pave the way for the development of new, more inclusive procedures and structures within the UN system, including the Permanent Forum on Indigenous Issues. It also allowed indigenous voices to contribute valuable information and unique perspectives that helped member States gain some normative clarity about the kind of instrument required. Along the way, many States became important advocates for indigenous peoples, speaking on their behalf behind the scenes and in those fora that remain the exclusive domain of member States.

Despite the often frustrating and arduous journey, the integrity of the text withstood numerous and sustained efforts by a minority of States to weaken it. In the end, the Declaration was supported by 143 States in the General Assembly, as well as the Indigenous Peoples' Global Caucus, the Permanent Forum on Indigenous Issues, and the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, to name only a few. This is a remarkable outcome, especially given the turn of events when the text was introduced into the General Assembly during its 61st session.

The passage of the Declaration from the Human Rights Council to the General Assembly

Following its adoption by the Human Rights Council on 29 June 2006,⁹ the Declaration was submitted to the 61st session of the General Assembly for adoption. From the beginning, the Declaration faced a multiplicity of obstacles. First it was caught in the cross-fire among member States about what procedure should be used for the General Assembly to consider the reports sent by the newly established Council.¹⁰ After almost two months of arduous inter-governmental negotiations, it was agreed that although the Council's Report would be presented directly to the General Assembly Plenary, the two decisions included in it (the *Declaration on the Rights of Indigenous Peoples* and the *International Convention for the Protection of All Persons from Enforced Disappearance*) would first have to be considered and approved by the Third Committee of the General Assembly.

The next and more concerning obstacle arose in November 2006 when the Third Committee adopted a procedural resolution introduced by Namibia to take no-action, citing concerns regarding references to self-determination and the absence of a definition of indigenous peoples.¹¹ The resolution allowed 'more time for further considerations', requiring only that the General Assembly 'conclude its consideration of the Declaration before the end of its sixty-first session.'¹² Shortly afterwards the African Group issued a draft *aide mémoire*¹³ describing their concerns in more detail, which subsequently became the basis for a decision from the African Union Summit in January 2007.¹⁴

Not surprisingly, this development shocked and profoundly disappointed indigenous peoples. Although they knew the Declaration would encounter strong opposition from a minority of States that had been long-standing opponents to the Declaration in the Commission and the Council,¹⁵ they had expected a positive outcome, not further delays. The Indigenous Peoples' Global Caucus pointed out that most African States had chosen not to participate in the standard-setting process that gave rise to the Declaration, and many of the concerns they were now raising had already been asked and answered. Its Chairperson also expressed concern that this

action by the Third Committee 'delivered a huge blow' to the standing of the new Human Rights Council.¹⁶

On 8 May 2007, the African Group released proposed amendments to the text of the Declaration. The proposal made substantive changes to 36 provisions of the Declaration, including the deletion of the right to self-determination, the introduction of numerous references to 'national and territorial integrity', and the subordination to the applicable national legal system of more than ten fundamental rights, including the right to own and develop land.¹⁷ The release of this proposal coincided with the sixth session of the Permanent Forum on Indigenous Issues, which afforded the Indigenous Peoples' Global Caucus a platform to resoundingly condemn it as inconsistent with international law, discriminatory, and offensive to indigenous peoples.¹⁸ Instead the Indigenous Caucus, and subsequently the Permanent Forum on Indigenous Issues, appealed to States to approve the text of the Declaration as adopted by the Council.

These developments prompted States who were supportive of the text as adopted by the Council to engage in discussions with the African Group in an effort to reach an acceptable agreement that would allow for the adoption of the Declaration. These States, subsequently referred to as 'the co-sponsors', were led by Guatemala, Mexico, and Peru.

Also around this time, a number of influential documents were developed by African human rights experts to respond to the African Union's concerns about the Declaration.¹⁹ One of these was an advisory opinion on the Declaration prepared by the African Commission on Human and Peoples' Rights.²⁰ It addressed each of the African Union's concerns and provided an assurance that the text was consistent with the *Constitutive Act of the African Union*, the *African Charter on Human and Peoples' Rights* and the *United Nations Charter*. This advisory opinion was submitted for discussion at the African Union Summit in early July 2007, and together with the other expert documents, it helped to alleviate many of the genuine concerns African States held about the potential impact of the Declaration, particularly in relation to their sovereignty.

8 Indigenous peoples were also active participants in all 11 sessions of the Commission's Working Group on the draft declaration, which operated on a consensus basis to further refine the text.

9 The vote in the Council was of 30 in favour, two against (Canada and the Russian Federation), 12 abstentions, and three States were absent. African States who voted in favour included South Africa, Cameroon and Zambia. Six African States abstained: Algeria, Ghana, Morocco, Nigeria, Senegal and Tunisia. The text is contained in A/HRC/1/L.3 available at www.hreoc.gov.au/Social_Justice/declaration/DD-RIResolutionHRC.pdf.

10 The debate, which is ongoing, is between those States arguing that the Council Report should be presented directly to the GA Plenary given the status of the Council as a subsidiary body of the GA, and those who argue that it should be considered by the GA's Third Committee, which has human rights expertise, before being presented at the Plenary.

11 The resolution, adopted 28 November 2006, is contained in A/C.3/61/L.57/Rev.1, available at <http://www.un.org/ga/61/third/proposalslist.shtml> It was co-sponsored by the Group of African States and adopted by a vote of 82 in favour, 67 against, with 25 abstentions.

12 The 61st session was scheduled to conclude by mid September 2007.

13 Available at www.iwgia.org/graphics/Synkron-Library/Documents/InternationalProcesses/DraftDeclaration/African-GroupAideMemoireOnDeclaration.pdf

14 Available at www.iwgia.org/graphics/Synkron-Library/Documents/InternationalProcesses/DraftDeclaration/AUDecisionOnUNDeclarationDec_2006.doc The decision of the AU welcomes the GA's decision to allow further time for consideration of the Declaration and affirms that the AU has concerns in relation to: self-determination, definition of indigenous peoples; land ownership and exploitation of resources; the establishment of distinct political and economic institutions; and national and territorial integrity.

15 These included Australia, Canada, New Zealand and the US.

16 Malezer, L. (Chairperson, Indigenous Peoples' Global Caucus) 'UN affirms Indigenous Peoples are not equal to all other Peoples', press release, 28 November 2006. Available at www.iwgia.org/graphics/Synkron-Library/Documents/Noticeboard/News/International/06-11-28%20INDIGENOUS%20PEOPLES%20CAUCUS%20STATEMENT.doc.

To help progress matters in the General Assembly, on 6 June 2007 the President of the 61st session appointed Ambassador Davide of the Philippines as an independent facilitator to undertake consultations with the African Group, the Indigenous Peoples' Global Caucus and eight States who had 'expressed strong positions on the draft Declaration.'²¹ Given the entrenched positions of the various parties, the facilitator's task of achieving a consensus outcome was not possible in the time available. However he developed a five-point test to assist member States and others to identify consensus proposals. For example, he recommended that States ask themselves whether the proposal preserves the purpose of the Declaration; ensures that the Declaration does not fall below existing human rights standards; and represents a genuine effort to address the various concerns.²² This proved a useful yardstick for States, as well as an important lobbying tool for indigenous peoples and non-governmental organisations (NGOs).

As the facilitator's mandate was coming to an end in early July, the eight States opposed to the Declaration wrote him a joint letter. They advised that they required amendments to 16 articles, and 'only through amendments to the text of the Declaration ... will it be possible for us to consider supporting [it].' The eight thematic areas that remained of concern to them were: self-determination, self-government and indigenous institutions; lands, territories and natural resources; redress; free, prior and informed consent; rights of third parties; intellectual property rights; military issues; and education.²³

In August, the co-sponsors intensified their discussions with the African Group. Indigenous peoples were not included in these discussions, but became aware towards the end of the month that the co-sponsors were close to an agreement. The co-sponsors advised that the dynamics of the General Assembly were such that the support of the African Group would be essential if the Declaration was to be adopted.

A key element of the agreement that the co-sponsors negotiated with the African Group was that African States would vote against any amendments to the Declaration proposed on the floor of the General Assembly, so long as the Indigenous Caucus agreed to nine amendments to the Declaration.²⁴ Most of the proposed amendments

were non-controversial, but some indigenous peoples were concerned about the inclusion of a reference to territorial integrity in Article 46, something indigenous peoples had argued against including in the Declaration over many years. This was a critical inclusion for the African Group, as well as a number of Asian States, and proved to be non-negotiable.²⁵

Following regional indigenous consultations, the steering committee of the Indigenous Peoples' Global Caucus ultimately endorsed the text proposed by the African Group.²⁶ As the co-sponsors argued, this was a dramatic improvement on the initial proposal from the African Group, and left intact hard-won language in relation to self-determination, lands, territories and natural resources; free prior and informed consent; treaties; and preambular paragraphs recognising the inherent and equal rights of indigenous peoples.

This agreement, and negotiations by the co-sponsors and others to secure the support of Asian and Eastern European States, ensured the Declaration had a smooth passage in the General Assembly on 13 September 2007. The outcome of the vote was of 143 in favour, four against,²⁷ and 11 abstentions.²⁸

Looking forward to the implementation of the Declaration

The rights contained in the Declaration are not new, but draw together in one instrument existing international human rights norms, principles, and jurisprudence as they apply to indigenous peoples. This is an extremely useful tool for indigenous peoples as well as States because it provides a clear articulation of the nature of the obligations and entitlements that attach to the rights of indigenous peoples. Therefore, even though the Declaration is not a legally binding instrument, it is not surprising that it is already being used by some States as a guide to the minimum human rights standards and obligations they are required to uphold at the national level to ensure indigenous peoples can fully enjoy their human rights.²⁹ Whether this recognition translates into the world's indigenous peoples being able to more fully enjoy and exercise their human rights still remains to be seen.

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The proposal is available at www.hreoc.gov.au/Social_Justice/declaration/screport_070831.pdf

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Available at www.ishr.ch.

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A group of respected African human rights experts prepared a written response note to the African Union's *aide mémoire*, and with the support of the International Work Group on Indigenous Affairs (IWGIA), a group of six African experts visited New York in April 2007 to discuss the Declaration with 19 African embassies. IWGIA in collaboration with the Permanent Forum on Indigenous Issues also organised a roundtable discussion on the Declaration involving African and other permanent missions. A second document was written by the African indigenous umbrella organisation, Indigenous Peoples of Africa Coordinating Committee, which responded to the *aide mémoire*. For more detail see: www.iwgia.org/sw21505.asp.

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Available at www.iwgia.org/graphics/Synkron-Library/Documents/InternationalProcesses/DraftDeclaration/07-08-08AdvisoryOpinionENG.pdf.

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These States were Australia, Canada, New Zealand, the US, Columbia, Guyana, Suriname, and the Russian Federation.

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Other elements of the five-point test included whether the proposal: builds on and does not undermine the efforts and achievements of the process at the Commission and the Council; and is specific enough to allow the General Assembly to determine the particular amendments to be made to the current text in the time remaining.

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Available at: www.hreoc.gov.au/Social_Justice/declaration/govt_declaration.pdf. Note also, Canada, New Zealand, the Russian Federation, and Columbia released an alternative text for the Declaration on 13 August 2007 which addressed these eight thematic concerns and proposed changes to 20 provisions.

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The text is available at www.hreoc.gov.au/Social_Justice/declaration/screport_070831.pdf.

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The co-sponsors advised the Indigenous Caucus that if it insisted on opening up the language about territorial integrity, the African Group would then insist on opening up language about lands, territories and resources, and the chances of adoption of the Declaration would shrink.

There is a range of mechanisms in place to encourage the implementation of the Declaration. These include the Permanent Forum on Indigenous Issues, which sees the Declaration as 'the major foundation and framework in implementing its mandate [and]...a key instrument and tool for raising awareness on and monitoring progress of indigenous peoples' situations.³⁰ They also include the recently revised mandate of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples,³¹ who is now authorised to promote the Declaration and other relevant instruments 'where appropriate'. Finally, the universal periodic review mechanism of the Council and the UN treaty body system are expected to pay close attention to the implementation of the Declaration by individual States when their human rights situations are reviewed.

Despite this willingness on the part of many different entities to give effect to the Declaration, a number of influential States are likely to remain defiant objectors. The United States of America (the US) has been particularly strong in its ongoing opposition, taking the floor in recent sessions of both the Council and the Third Committee to express the view to the Special Rapporteur that the new mandate afforded him by the Council only authorises his promotion of the Declaration in countries that voted in favour of its adoption in the General Assembly.³² This is a clear sign that the challenge to ensure the respect, protection, and fulfilment of indigenous peoples' rights has just begun.

THE WORKING GROUP ON AN OPTIONAL PROTOCOL TO THE ICESCR

Background

The process of considering an optional protocol to the *International Covenant on Economic, Social and Cultural Rights* dates as far back as 1990,³³ with the intention that States party to the protocol would recognise the competency of the Committee on Economic, Social and Cultural Rights (CESCR) to receive and consider commu-

nications and potentially to conduct inquiries. Following an initial draft by CESCR in 1997 and the appointment of an independent expert by the Commission on Human Rights in 2001,³⁴ it took the intergovernmental Working Group on the consideration of the elaboration of an optional protocol, established in 2002 and chaired by Ms Catarina De Albuquerque of Portugal, three years to consider that it should in fact elaborate a draft optional protocol.

The Human Rights Council requested at its first session in June 2006 that the Working Group start negotiating the text of an optional protocol and that Ms De Albuquerque prepare a working draft based on her 'elements paper' of 2006.³⁵ The Working Group met on 16 to 27 July 2007 for a first reading of the text, and will meet again on 4 to 8 February and 31 March to 4 April 2008. On the basis of progress achieved, there is genuine optimism that a final draft can be brought before the Council during its 8th session in June 2008.

Areas of general convergence and remaining areas of divergence

On 23 April the Chairperson published her working draft based on her previous 'elements paper'.³⁶ Many of these elements of the protocol essentially replicate procedures well-established in communications procedures of other treaty bodies, and these more standard components were therefore less contentious during the first reading of the text. These included admissibility criteria (Article 4, with minor divergences of opinion on exhaustion of domestic remedies and time limits), procedure for transmission of communications from the Committee to the State (Article 6), friendly settlement (Article 7), and protection measures (Article 12, meaning that individuals are not subjected to ill-treatment as a consequence of communicating with the Committee).

Divergence in the most general form was still vocalised by the US, which throughout the Working Group challenged the legitimacy of any protocol deriving from a Covenant that 'still contained many unclear ideas', including the progressive realisation of rights. The most critical areas of divergence on substantive elements then sur-

26 In the steering committee's public statement announcing its decision (4 September 2007), it acknowledged that indigenous support was not unanimous. Although regional consultations indicated that 'many' indigenous peoples supported the adoption of the amended text, '[m]any others took the position not to oppose the adoption of the Declaration. Some felt strongly that they should not be bound by the process and emphasized the right of Indigenous Peoples to decide our own arrangements in our own time'. Available at www.iwgia.org/graphics/Synkron-Library/Documents/InternationalProcesses/DraftDeclaration/07-09-04Caucus-DecisionSupportDeclaration.pdf.

27 Australia, Canada, New Zealand, and the US.

28 States abstaining included the Russian Federation, Columbia, Burundi, Kenya, and Nigeria.

29 See for example the decision of the Supreme Court of Belize (Central America) on 19 October 2007, which affirmed that Belize is obligated not only by its Constitution, but also by international instruments and customary law, including the UN Declaration on the Rights of Indigenous Peoples, to respect and protect Maya customary land rights. This is the first judgment to rely on the Declaration as evidence of general principles of international law. For more information see www.law.arizona.edu/depts/plp/advocacy/maya_belize/index.cfm?page=advoc.

30 Tauli-Corpuz, V., 'Statement on the occasion of the adoption of the UN Declaration on the Rights of Indigenous Peoples', 13 September 2007. Available at www.iwgia.org/graphics/Synkron-Library/Documents/InternationalProcesses/DraftDeclaration/07-09-13StatementChairofUNPFIIIDeclarationAdoption.pdf. Importantly, Article 42 of the Declaration also explicitly asks the Permanent Forum on Indigenous Issues to promote respect for and full application of the provisions of the Declaration.

31 See Council Resolution 6/12 available at http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_6_12.pdf.

32 The US made these remarks at the time of the renewal of the mandate of the Special Rapporteur during the Council's sixth session, and during the Special Rapporteur's interactive dialogue with the 62nd session of the General Assembly's Third Committee.

33 The analytical paper of the Committee on Economic, Social and Cultural Rights submitted to the World Conference on Human Rights (A/CONF.157/PC/62/Add.5), available at www2.ohchr.org/english/issues/escr/intro.htm.

34 A useful summary is available at www2.ohchr.org/english/issues/escr/intro.htm.

35 Human Rights Council *Resolution 1/3*.

36 A/HRC/6/WG.4/2 (23 April 2007), available at www2.ohchr.org/english/issues/escr/documents_4.htm.

37 A 'comprehensive' approach would subject all rights in the Covenant to the communications procedure. The 'limited' approach would permit communications only in relation to Parts II and III of the Covenant, thereby eliminating communications in relation to self-determination.

An 'opt-out' or 'à la carte' approach would allow States to opt-out of certain rights they do not want to be subjected to under the communications procedure, in the same manner as currently practiced under the *European Social Charter*.

38 A minority led by the United Kingdom (UK) and the US.

39 *Report of the United Nations High Commissioner for Human Rights*, UN Doc. E/2006/86, para. 29 (2006).

40 Collective communications permit specified organisations to submit communications on behalf of victims. These communications are often of a more general nature, involving patterns of violations or harmful policy rather than individual rights abuses.

41 Algeria, Australia, Belarus, Burkina Faso, Columbia, Ecuador, Egypt (on behalf of the African Group) Greece, India, Japan, Morocco, Nigeria, Norway, the Republic of Korea, the Russian Federation, Senegal, Tanzania, the UK, Ukraine, the US, and Venezuela.

42 Belgium and Japan.

43 Supported by Australia, China, Egypt (on behalf of the African Group), Greece, and New Zealand.

44 The full text of Article 8.4 reads: 'When examining communications under the present Protocol concerning article 2, paragraph 1 of the Covenant, the Committee will assess the reasonableness of the steps taken by the State Party, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means.'

45 Azerbaijan, Nigeria, Norway, the Russian Federation, and Sweden.

46 The 'margin of appreciation doctrine' as evolved in the jurisprudence of the *European Court of Human Rights*. Supported by the US, Poland, and Denmark.

rounded the scope of the protocol (whether to pursue a 'comprehensive, limited or *à la carte* approach',³⁷ as outlined in Article 2.1), the standing required to submit a communication, the consideration of the merits of a communication, and the role of international assistance.

The debate on the scope of the protocol remained divided, and this will be critical in future meetings. Those who advocate a limited or *à la carte* approach³⁸ argue that it would exclude self-determination, account for the 'specific' nature of economic, social and cultural rights, allow States to limit the procedure to rights for which they have a domestic remedy, and would allow a larger number of States to become parties to the protocol. The majority favouring a comprehensive approach, including the extremely well-organised NGO Coalition for an optional protocol, pointed out that a limited or opt-out approach would: create a 'hierarchy of rights', contradicting current standards set by other communications mechanisms; adversely impact human rights work at the national and regional level; undermine the integrity of the protocol's jurisprudence and the inter-dependence of all human rights; and 'create unworkable distinctions' in the admissibility of communications.³⁹

There also remained considerable divergence of opinion over whether the Committee should have the competency to receive 'collective'⁴⁰ as well as individual communications, with the majority of States⁴¹ favouring a limited approach. While Portugal emphasised that certain rights provided for in the Covenant can only be exercised collectively, others expressed concern at the lack of a 'victim' component in collective communications⁴² and argued that collective complaints would provide an unprecedented widening of the scope of the protocol and would over-burden the treaty system.⁴³

A closely related and very significant point of divergence remained the consideration of the merits of a communication and the idea that the Committee apply a standard of 'reasonableness' when assessing national policy and resource allocation (Article 8.4).⁴⁴ The meaning of 'reasonableness' was queried in detail,⁴⁵ and it was proposed that a 'broad margin of appreciation' be given to the States when determining the use of its resources.⁴⁶ Attempts to introduce the 'respect, protect and fulfil' tripartite obligations

of States to this Article were opposed by Amnesty International and others as introducing concepts that are not in Covenant. The final proposal of the Chair to remove reference to Article 2.1 of the Covenant from the text of Article 8.4 of the protocol, thus removing the link between 'progressive realisation' in the Covenant and applying a standard of reasonableness under the protocol, managed to appease States for the time being. However, this issue is far from resolved and can be expected to consume the Working Group in its future sessions.

While there was general agreement to include an article on international assistance, in accordance with the provisions of the Covenant, the final substantive point of contention concerns the creation of an international fund or trust, and whether this would be voluntary. While Egypt, for example, suggested that such a fund be obligatory, Australia fundamentally opposed any such trust on the basis that it would duplicate existing funds and might lead to situations where non-compliance with Covenant rights were justified by a lack of international assistance. This question is also expected to remain under protracted negotiation in 2008.

Next steps

The report of the session, published expeditiously on 30 August 2007,⁴⁷ provided a detailed article-by-article summary of the discussions, and will serve as a valuable reference for forthcoming sessions in 2008. The Chairperson presented her report to the Human Rights Council at its resumed 6th session and stated that she would attend regional meetings in early 2008, including one convened by Egypt in Cairo with African States.⁴⁸ All those that took the floor expressed general support for the report,⁴⁹ with very little added by way of substance that had not already been raised in the Working Group.⁵⁰ The Chair concluded that she would circulate a revised draft by the end of 2007 that would form the basis of discussion at the next session of the Working Group.⁵¹

The first part of the 5th session of the Working Group is scheduled for 4-8 February 2008 in Geneva.

THE YOGYAKARTA PRINCIPLES

Effective international legal protection for persons suffering human rights violations on the basis of their sexual orientation and gender identity has been a long-standing deficiency of the international human rights system. Even though core human rights principles such as equality and non-discrimination underpin all existing international human rights instruments, and therefore imply that all persons are entitled to all rights, the evolution of human rights law has seen the development of instruments for particular vulnerable groups such as women, children, migrant workers, persons with disabilities, and others. However, to-date there has been no recognition of persons suffering human rights violations on the basis of their sexual orientation and gender identity as a vulnerable group requiring particular protection, nor have violations on this basis been prioritised on the international human rights agenda.

While many of the UN special procedures and treaty bodies have continued to highlight the responsibility of States to ensure effective protection of all persons from violations based on sexual orientation and gender identity, the lack of clarity and consistency in the application of existing international legal standards has led to a dispersed and inadequate response by the international community to a serious pattern of violations. Violations of civil, cultural, economic, political and social rights based on sexual orientation and gender identity have continued to pose a threat of global concern. The *Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity* (the Yogyakarta Principles) were developed as a direct response to the need for international legal protection for persons facing violations due to their sexual orientation and gender identity.

The issue of human rights violations based on sexual orientation and gender identity has received increasing attention at the UN level in recent years. The most striking early development on this issue at the UN occurred with the historic Brazilian resolution (supported by 22 States) at the former Commission in 2003, which expressed deep concern at the violation of the rights of persons on the basis of their sexual orientation and called for UN mechanisms to

give due attention to the issue.⁵² Although the resolution was defeated by a 'no-action' motion, it generated much-needed international attention on this issue. The impetus that it generated at the Commission was carried forward by its successor, the Human Rights Council, where at its 3rd session in December 2006, Norway, on behalf of 54 States from four of the five regional groups, delivered an unprecedented statement drawing attention to violations due to sexual orientation and gender identity, and calling upon the President of the Council to allow for a focussed discussion on this issue at a future session of the Council.⁵³ Capitalising on this increasing momentum at the UN in addressing the issue of sexual orientation and gender identity, the Yogyakarta Principles were launched on 26 March 2007 in parallel to the 4th session of the Council in Geneva.

The development of the Principles

The International Commission of Jurists and the International Service for Human Rights, on behalf of a number of other human rights organisations, took the initiative to develop a set of legal principles on the application of international law to address violations based on sexual orientation and gender identity and to clarify and reinforce the human rights obligations of States in this regard. In order to achieve this end, an international seminar was convened at Gadjah Mada University in Yogyakarta, Indonesia, from 6 to 9 November 2006, where a distinguished group of human rights experts from varied backgrounds and regions, and including current and former UN experts from the treaty bodies, special procedures, academics, judges, activists, and others were invited to contribute to the development of the Yogyakarta Principles. The aim of the seminar in Yogyakarta was to 'clarify the nature, scope and implementation of States' obligations with regards to sexual orientation and gender identity under international human rights law.'⁵⁴ The outcome of the meeting was the development and unanimous adoption of the Yogyakarta Principles.

47 *Report of the Open-ended Working Group on an optional protocol to the International Covenant on Economic, Social and Cultural Rights* (Geneva 16-27 July 2007), A/HRC/6/8 (30 August 2007). The summaries of the International NGO Coalition for an Optional protocol to the ICESCR also offer a very useful critical summary of the session, available at www.opicescr-coalition.org.

48 For a review of the presentation of the report to the Council, see ISHR's *Daily Update* of 11 December 2007 at www.ishr.ch.

49 Egypt (on behalf of the African Group), Cuba, Ukraine, Brazil, Italy, Republic of Korea, Pakistan, Azerbaijan, Mexico, Belgium, Algeria, Venezuela, Spain, Chile, Morocco.

50 One interesting elaboration included the Chair's response to a query by Belgium expressing concern that introducing the criterion of 'reasonableness' under Article 3 of the protocol would lead to a reinterpretation of the Covenant. Ms De Albuquerque pointed out that the Committee had expressed its views in this regard, saying that it was already applying the criterion in its work.

51 Advanced unedited version, A/HRC/8/WG.4/2, 24 December 2007.

52 E/CN.4/2003/L.92.

53 The full statement of Norway is available on the OHCHR extranet. The OHCHR extranet can be accessed (fill out the form on the page to receive the user name and password) at www.ohchr.org/english/bodies/hrcouncil/form.htm.

54 'Backgrounder: About the Yogyakarta Principles', available at www.yogyakartapinciples.org/principles_en.htm.

Content of the Principles

The Yogyakarta Principles affirm existing international human rights standards for the protection of persons on the basis of sexual orientation and gender identity. The Yogyakarta Principles are not an aspirational document and therefore do not create any 'new rights', such as, for example, the right to same-sex marriage. Instead, the Yogyakarta Principles collate and clarify already existing human rights standards, recognising that additional obligations may be placed on States with the advancement of human rights law and jurisprudence in the future. The core human rights principles of universality, non-discrimination and equality form the basis for the Yogyakarta Principles and run through them as a whole. In addition, the Yogyakarta Principles adopt a 'persecution analysis' framework, whereby they recognise that persons who face violations due to their sexual orientation and gender identity are in need of particular protection. The Yogyakarta Principles, while recognising that current international human rights mechanisms offer inadequate protection, provide depth to existing human rights standards and their application to human rights violations based on sexual orientation and gender identity.

The Yogyakarta Principles therefore address a broad spectrum of human rights standards, including protection from extra-judicial executions, violence and torture; non-discrimination; the rights to freedom of expression and assembly and other civil and political rights, in addition to economic, social and cultural rights such as the rights to health, housing, and education. Additionally, the Yogyakarta Principles reinforce the primary obligation of States to implement human rights, and present detailed recommendations on how to do so. The Yogyakarta Principles also contain recommendations to the UN human rights system, national human rights institutions, the media, NGOs, and other concerned actors, which is one of the most innovative and practically useful aspects of this unique document. Additionally, the main aim of compiling and drafting the Yogyakarta Principles was not only to present a clear and compelling document for affirming the rights of persons who are persecuted because of their sexual orientation and gender identity, but especially to serve as a tool for activists, UN human rights mechanisms, and other organisations working in this area.⁵⁵

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In order to facilitate wide distribution globally, the Principles were made available in all the official UN languages and have been widely disseminated to universities, individuals, NGOs, States, and regional organisations all over the world.

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Czech Republic, Switzerland, Norway on behalf of Denmark, Finland, Iceland, and Sweden.

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For a summary of this discussion, please refer to ISHR's *Daily Update* of 27 March 2007, available at www.ishr.ch.

Current status of the Principles

While the Yogyakarta Principles themselves are not equivalent in status to the UN human rights conventions, their endorsement and recognition by States, experts, and individuals has already raised their standing as a significant legal interpretation of the standards of protection for persons facing violations due to their sexual orientation and gender identity. Signatories of the Yogyakarta Principles include eminent experts from all parts of the world, which implies a wide acknowledgement that the issue of persecution on the basis of sexual orientation and gender identity is an important issue that requires attention, both within and outside the UN system. Since their launch in March 2007, the Yogyakarta Principles have also been launched at other international and regional events where they have received an overwhelmingly positive reception.

Numerous States have expressed their support for the Yogyakarta Principles. This was particularly evident in references to the Yogyakarta Principles in statements made by delegations in the plenary sessions of the Council soon after their launch in Geneva.⁵⁶ These States not only drew attention to the significance of the adoption of the Yogyakarta Principles but also urged the relevant UN mechanisms to use and integrate them into their own work. While many States made general statements about the Principles, there were also others who used them in relation to specific issues. The Czech Republic, for example, during the interactive dialogue with the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, called for the focus of the next report of the Rapporteur to be on violations of the right to freedom of expression based on sexual orientation and gender identity and pointed out that the Yogyakarta Principles could be useful in this regard.⁵⁷

The response of civil society actors and NGOs working on these issues from all regions of the world including from Argentina, Australia, Brazil, Cameroon, China, India, Indonesia, Japan, Kenya, Mexico, the Russian Federation, Senegal, the UK, the US, and Zimbabwe, among many others, has also been extremely positive. Civil society actors have also developed innovative uses for the Yogyakarta Principles ranging from

their use as a tool to lobby for reforming domestic legislation, to improving sexual health and in activities relating to HIV/AIDS prevention efforts, human rights training seminars, and for educational purposes.

In addition to their unique and innovative value as a legal resource for the protection of persons facing violations because of their sexual orientation and gender identity, the Yogyakarta Principles are significant in that they attempt to draw the issue of sexual orientation into mainstream human rights discourse, overturning past trends of marginalising both the issue and responses to it to specialist NGOs working in this area. However, sustaining the momentum will depend on the political will and commitment of the Human Rights Council, the rest of the UN human rights system, and of States at the national level, to ensure that the Yogyakarta Principles are indeed a step towards effective international legal protection for persons who face violations due to their sexual orientation and gender identity.