



MAJOR DEVELOPMENTS IN INTERNATIONAL HUMAN RIGHTS LAW

THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Background

The process of considering an optional protocol to the *International Covenant on Economic, Social and Cultural Rights* (the Covenant) dates as far back as 1990,¹ with the intention of recognising the competency of the Committee on Economic, Social and Cultural Rights (the Committee) to receive and consider communications and potentially to conduct inquiries. Following an initial draft by the Committee in 1997 and the appointment of an independent expert by the Commission on Human Rights in 2001,² 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 (the Council) requested at its 1st 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 2006.³ The Working Group met on 16-27 July 2007 for a first reading of the text, and again on 4-8 February and 31 March-4 April 2008. A final draft was then presented to the Council for adoption at its 8th session in June 2008. The protocol was adopted, but not without complications as Pakistan demanded amendments at the eleventh hour to incorporate the right to self determination under the scope of the protocol.

The adoption of the protocol by the General Assembly in New York was a similarly complex process, but much to Portugal's credit, adoption by consensus was achieved on 10 December 2008, International Human Rights Day. Adding to the significance of this date was the fact that it marked the 60th anniversary of the General Assembly's adoption of the *Universal Declaration of Human Rights* (the Declaration). In this respect, many felt that the adoption of the protocol was a concrete action reaffirming, as the Declaration did, that there is no hierarchy between civil and political rights on the one hand, and economic, social and cultural rights on the other.

¹ 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.

² A useful summary is available at www2.ohchr.org/english/issues/escr/intro.htm.

³ Human Rights Council *Resolution 1/3*.

5th session of the Working Group to elaborate a draft optional protocol

The 5th and final session of the open-ended Working Group on an optional protocol to the International Covenant on Economic, Social and Cultural Rights (the Working Group) took place on 4 to 8 February and 31 March to 4 April 2008. The decision by the Chairperson Ms Catarina de Albuquerque to hold it in two parts was clever, as the session was the Working Group's last and it was expected to present a draft to the Council within the prescribed duration of its mandate. Ms de Albuquerque most likely realised that the Working Group could move through the articles of the draft text within a week, but that States would need time to revert back to their capitals in order to get closer to a final consensus. The Working Group therefore had two opportunities to arrive at such a consensus before the June session of the Council.

The main points of contention in finalising the draft protocol were the same general points that had been contested since the idea of a protocol began to take hold as far back as 1991.⁴ These included: the scope of the Committee's competency to receive communications; whether communications would be limited to individuals or could also be submitted by groups; the consideration of the merits of a communication and the threshold that might be applied by the Committee in determining violations, including whether a margin of discretion could be applied in accounting for the 'reasonableness of steps taken by the State Party'; and whether there would be a trust fund to assist States that do not have the capacity to meet their obligations. The dividing lines of States were generally well-defined, with Egypt (on behalf of the African Group) broadly seeking a comprehensive protocol, while Canada, the United States (the US), Australia, and the United Kingdom (the UK) broadly sought to limit its scope. The European Union (the EU), perhaps uniquely in UN human rights standard setting, was publicly divided on its support for the optional protocol and its character.

It was clear from the first meeting of the Working Group in February that the *à la carte* approach to the **scope of communications** was no longer a viable option.⁵ However, there was a clear divide over whether Part I of the Covenant, concerning

peoples' right to self-determination, should be included as grounds for the submission of communications. Pakistan argued that it needed to be included in order not to create 'artificial distinctions between Covenant rights'⁶ and to ensure the 'integrity' of the Committee.⁷ The US and the UK, on the other hand, proposed that at the very most the protocol should exclude the consideration of the right to self-determination, as is the practice of the Human Rights Committee.⁸ The issue was not satisfactorily concluded, and the final draft presented to the Council was a cautious compromise by the Chairperson, accommodating the position of the UK, China, India, and the US in this regard. As a result, Algeria, Pakistan, Syria, and others reserved their right to 'remain constructively engaged in negotiation prior to the session of the Council'⁹ and to raise the issue there. This is addressed below.

The issue of whether the protocol would be limited to an **individual communications** mechanism was more or less resolved before the final meeting, where there were too few States that were willing to mount a challenge against a mechanism that would allow for communications by 'groups of individuals.'¹⁰ This scope therefore distinguishes the draft from the first optional protocol to the *International Covenant on Civil and Political Rights*. During the Working Group, several States also supported the option of extending *amicus* standing to NGOs,¹¹ although the Chairperson chose not to include this in her final draft, presumably on the basis of arguments by a number of States that NGOs had sufficient opportunities to participate as third parties under Article 2.

A very critical component of the protocol, and to the standing of the justiciability of economic, social and cultural rights, 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)). While Egypt, Mexico, India, Lichtenstein and others were content to allow the Committee to simply 'consider steps taken' by the State to meet its obligations under the Covenant as prescribed by Article 2(1), Australia, Austria, Slovenia, and Sweden sought that the qualifier of a 'standard of reasonableness' be added. The US, Denmark, the UK, and Japan sought to set the bar even higher by expecting that the Committee should be considering a

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For a background to the process, see the homepage of the Working Group at www2.ohchr.org/english/issues/escr/intro.htm

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This was supported by Canada in the form of an 'opt-in' rather than 'opt-out' approach. See *Report of the Open-ended Working Group on an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its fifth session, A/HRC/18/7*, Para. 38.

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Ibid., Para. 245.

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The deletion of reference to Parts II and III from the draft text was supported by Algeria, Bangladesh, Belgium, Egypt (on behalf of the African Group), Finland, Liechtenstein, Mexico, Portugal, and the NGO Coalition for an optional protocol.

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States who favoured the exclusion of Part 1 included Canada, China, Greece, India, Italy, New Zealand, Poland, the Republic of Korea, Slovenia and Turkey.

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Supra, n.5.

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New Zealand still pursued its efforts to entitle Article 2 'individual communications' but received little support.

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Amicus standing refers to the right of NGOs to provide expert input on particular cases when requested.

State's 'unreasonableness' in attempting to meet its obligations. The compromise outcome was to incorporate 'reasonableness', although it was agreed by a sizable majority that the draft reference to the exercise of a 'margin of appreciation' be removed as this was a European Court of Human Rights concept that was alien to international human rights law.¹² Instead, the terminological compromise reached was to recognise that State parties 'may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant'. The NGO Coalition for an optional protocol, in its concluding statement to the Working Group, made the important point that Article 8(4) should be read consistently with the fact that many of the Covenant rights are not subject to 'progressive realisation'.

A divergence of opinion was also apparent in relation to whether the **inquiry procedure** provided in Article 11 was of an optional nature. While few opposed such a procedure, in line with a similar one under the optional protocol to the *Convention on the Elimination of All Forms of Discrimination against Women*, some regret was expressed at the final compromise that it be an 'opt-in' clause for States.¹³ Identical to the scope of individual communications, the scope of the inquiry procedure was later revisited by Pakistan to include the right to self-determination.

A final element unique to the draft protocol concerned the creation of a **trust fund** in accordance with the Covenant's recognition of the need for 'international action' in ensuring that rights of the Covenant are achieved.¹⁴ The need for such a fund had been contested and opposed by a number of States from the first draft,¹⁵ including the US, Canada, and Sweden as unnecessary and without precedent, with the US interpreting it as a means of 'funding complaints'. The trust fund garnered sufficient support to be maintained, however, although it was restricted to receipt of technical assistance for States, with the African Group objecting to any reference to assistance to individuals.¹⁶

By the final day of the 5th session the Chairperson was insistent that the draft be presented to the Council, as the draft before the Working Group was the best compromise text it was likely to achieve. However, while the majority of States appreciated the efforts of the Chairperson,

a modest number expressed satisfaction with the outcome,¹⁷ and many expressly reserved their positions on the text.¹⁸ Sweden also raised its concern for the haste in which the negotiations were conducted and stated that transmission of the text to the Council did not mean general acceptance. This did not augur well for the upcoming Council session.

Adoption of the optional protocol by the Human Rights Council, June 2008

It was clear on the final day of the Working Group that a number of States held strong reservations to various elements of the draft text (21 States according to Pakistan) as the Chairperson had attempted to push the draft through in order for it to be presented to the Council. This gamble meant that it was likely that complications would arise between this point and adoption by the Council.

On 4 June 2008, the Chairperson of the Working Group presented her final report to the Human Rights Council. She explained the history of the draft protocol leading to the present draft and highlighted many of its innovative features.¹⁹ She noted that some delegations had, at the last Working Group session, reserved their positions on the text, although no delegation had opposed the forwarding of the text to the Council. Ms de Albuquerque stressed that the Working Group had done its utmost to achieve as widely acceptable a text as possible through years of negotiation.

Many States followed Ms de Albuquerque by declaring that the protocol would signal the end of the division between civil and political rights, on the one hand, and economic, social and cultural rights on the other, and urged respect for the protocol's delicate balance.²⁰ However, Egypt (on behalf of the African Group) and Cuba encouraged a resolution of 'outstanding issues' in informal consultations. They were followed by Pakistan's insistence that the exclusion of the right to self-determination from the draft would require an amendment of the Covenant, and instead it sought to remedy the omission. While India countered that amendments at this stage would risk unraveling the entire package and Finland

¹² Norway was particularly disappointed at the removal of any reference to 'margin of appreciation'.

¹³ Belgium, for instance, felt that such a compromise should allow those who favoured it to also accept a trust fund, as invariably those who favoured an opt-in approach to the inquiry were the same States that opposed the trust fund. Switzerland was one exception, as it favored the opt-in approach and held reservations to the trust fund.

¹⁴ *International Covenant on Economic, Social and Cultural Rights*, Articles 2, 22, 23.

¹⁵ A/HRC/6/WG.4/2 (23 April 2007), Art. 14.

¹⁶ Art. 14 of the draft of February 2008 had read 'in order to assist individuals or groups of individuals to submit communications under the present protocol and to provide expert and technical assistance to Governments and non-governmental organisations for the implementation of the rights recognized in the Covenant', A/HRC/8/WG.4/2/Rev.1.

¹⁷ States that expressed a general satisfaction with the draft text included the Russian Federation, Egypt (on behalf of the African Group) with regret around its comprehensiveness, Egypt (in its national capacity), Morocco, Spain, Guatemala, Austria, Croatia, Brazil, Senegal, South Africa, France, and Finland. India, Indonesia, and China welcomed the text as a compromise but stated that they would reserve their position pending study of the draft by relevant government departments.

¹⁸ States that reserved their positions on the text included Pakistan, Algeria, Syria, Iran, the US, Denmark, Netherlands, Japan, Canada, Poland, Norway, New Zealand, and the UK.

¹⁹ This included an explanation of the new admissibility criteria, the flexibility for the Committee to make available its good offices to assist parties in reaching a final settlement, express consideration of the 'reasonableness' of States' policy measures, and the provision for a trust fund.

²⁰ Chile on behalf of the Latin American and Caribbean Group (GRULAC), India, the Russian Federation, and some NGOs.

recalled that the text had been open to all governments for five years, during which they had had ample time to present their concerns, Syria, Algeria, Qatar, and Iran rallied to Pakistan's call by requesting that the draft's 'defect' be rectified. It was in this spirit that unannounced, closed negotiations took place outside of the Council plenary, reluctantly chaired by Portugal, who did not favour a change in the text but was nonetheless anxious not to see years of hard work being reduced to a lost vote in the Council.

The NGO Coalition for an optional protocol also found itself in a difficult situation. On the one hand, from the outset it had argued for a comprehensive scope that included Part I of the Covenant, but it also understood the long-term importance of the protocol being adopted by consensus, which ran the risk of being completely undermined by Pakistan's tactics. Their objection to the manner in which Pakistan was conducting informal consultations did not have a significant bearing, however, as the Coalition was effectively shut out from the final deliberations in any case.

Following two weeks of closed informal meetings and loose rumours on the status of the draft optional protocol, Portugal introduced its amended draft resolution to adopt the protocol on 18 June.²¹ Changes had been made to the original draft in order to accommodate Pakistan so that the scope of the protocol now covered 'any of the economic, social and cultural rights set forth in the Covenant',²² including therefore the right to self-determination. Canada and the UK particularly voiced strong objections both to the content of the amendments and the manner in which they were agreed outside of the Working Group.

Concerning the attempt to include the right to self-determination, the UK, Turkey, Canada, Australia, and Switzerland all expressed the view that the amendment did not allow individuals to submit allegations of violations of the right to self-determination. Concerning the manner of adoption of the draft and next steps, the UK made it clear that it would not stand in the way of consensus in respect of the efforts that had been made, but that it was concerned that amendments were made 'following agreement with a small group of States rather than as a result of an open meeting of all interested States.' It stated

that it would therefore reserve its position for the time when the protocol came before the General Assembly in November 2008. This discontent with the process was echoed by others, including Romania, who exclaimed that this would affect the 'climate of trust' that had prevailed in the Working Group.²³

Pakistan's response was no less forthright. It sought to correct what it referred to as 'two fallacies' that had emerged in the lead-up to the adoption of the protocol – that the text was finalised by the Working Group and that restricted consultations were held to 'resolve differences'. It applied the maximalist interpretation that an 'open-ended' Working Group meant that the text was not closed until adopted by the Council and that the 'legal lacuna' of the initial draft had now been removed. Consistent with Pakistan's historic position, it reasoned that as the right to self-determination constitutes *jus cogens*²⁴ under international law and is essential to the guarantee of all individual human rights, the protocol was designed to cover all rights of the Covenant, of which Part I 'remains non-derogable and operative'.

On the margins, other States²⁵ praised Portugal for its efforts to strike a balance between political rights and economic, social and cultural rights. The UK and Canada also placed on record their interpretation that the right to self-determination could not be invoked to trigger a complaint under a future complaints mechanism. Germany and others also insisted that group rights 'cannot be invoked in an individual complaints procedure', unlike under the Human Rights Committee, although the optional protocol is not an 'individual complaints procedure'.

The adoption of Council *Resolution 8/2* by consensus generated applause among the audience as it signified the finalisation of years of delicate negotiations in Geneva, but the undercurrent of dissatisfaction with the manner in which the final draft was handled and the content of its amendments suggested that the smooth passage of the protocol was far from assured through the General Assembly in New York.

²¹ A/HRC/8/L.2/Rev.1/Corr.1

²² Articles 2 and 11.

²³ UK, Germany, Switzerland, China, Japan, Turkey.

²⁴ *Jus cogens* refers to the body of peremptory principles or norms under international law from which no derogation is permitted under any circumstances.

²⁵ Germany, Egypt, South Africa, Romania, Qatar, Mexico.

Consideration and adoption of the optional protocol by the General Assembly, November/December 2008

The contention surrounding the Council's adoption of the protocol was carried over to New York and further exacerbated by the fact that rather than it being considered in its own right, adoption of the protocol was one of three recommendations contained in the Council's annual report to the General Assembly. This meant that the protocol was caught up in the annual wrangle between the General Assembly plenary and its Third Committee²⁶ over which body would consider and take action on the Council's report. It also meant that the recommendation regarding the protocol looked set to be caught up in the politics of the two other controversial recommendations in the Council's report,²⁷ as normally only one General Assembly resolution is adopted to deal with the Council's report. Towards the end of October, the General Committee of the General Assembly decided on a compromise solution, allocating it first to the Third Committee for action on the recommendations, and subsequently to the General Assembly plenary for consideration of the report as a whole.

On 31 October, the President of the Council presented the Council's annual report to the Third Committee, which then held a general discussion on the subject. Many States used this as an opportunity to express support for the adoption of the protocol.²⁸ The Council's report was then presented by the President of the Council to the General Assembly plenary on 4 November. Of the 15 States that spoke, only three commented on the protocol, and each advocated its adoption.²⁹

In mid October, Portugal had held closed informal negotiations on a draft resolution to facilitate the adoption of the protocol by the Third Committee. Part of Portugal's motivation was to draw the protocol out of the politics of the Council's report and ensure that its adoption by the General Assembly could be celebrated as a critical step in the development of international human rights law. Another factor was Portugal's recognition that the adoption of the protocol in the Council had not been smooth, and it would be important to give any State with continuing grievances or concerns an opportunity

to air these in the Third Committee. Finally, the goal to have the protocol adopted on 10 December 2008, International Human Rights Day, and the date commemorating the 60th anniversary of the adoption of the *Universal Declaration of Human Rights*, meant that the Third Committee needed to adopt the resolution on the protocol as early as possible to ensure it could be considered by the General Assembly plenary on this date.

Portugal's draft text was drawn from Council *Resolution 8/2*, which proposed that the General Assembly would 'welcome the adoption by the Human Rights Council' of the protocol, 'adopt' it and 'recommend' that it be opened for ratification in Geneva in March 2009.³⁰ The main sticking point, predominantly for the US and Canada, proved to be whether the General Assembly could 'welcome' the adoption of the protocol by the Council. Portugal was persuaded to rethink this aspect of the text when some States suggested that it was the practice of the General Assembly to simply 'take note' of the adoption of resolutions in the Council, and pointed to the recent examples of the General Assembly resolutions to adopt the *Declaration on the Rights of Indigenous Peoples*, and the Council's institution-building package.³¹ Several States balked at 'welcoming' the adoption of the protocol in the Council, given their very public criticism in Geneva of the last-minute change to the text to include the right to self-determination. Further, it became clear that unless Portugal was willing to amend this paragraph, the US would not rule out calling for a vote on the resolution, thereby preventing adoption by consensus.

Portugal was also persuaded to delete any reference in the draft resolution to a specific timeframe or location for the signing ceremony for the protocol. Rather, the UN Secretariat suggested that a more general reference to a ceremony in 2009 would be preferable, to ensure that the official documentation could be provided to all permanent missions, and sufficient time allowed for States to decide to take part in such a ceremony. This would leave open the possibility of a signing ceremony in Geneva in March 2009, but not bind the General Assembly to this outcome.

These amendments enabled Portugal to introduce the resolution into the Third Committee on

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This is one of the six Main Committees of the General Assembly, and is responsible for dealing with human rights matters. It has universal membership.

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The other two recommendations contained in the Council's report were contentious in their own right: Council *Recommendation 9/18* related to follow-up on the Council's mission to Beit Hanoun in the occupied Palestinian territories, which some States were thought to object to on political grounds; and Council *Decision 9/103* proposing the creation of an Office of the President of the Council, which some States were thought to object to on financial grounds, given the significant budget expenditure that would be required.

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France (on behalf of EU), Cuba, Algeria, Sudan, Portugal, Spain, Chile, Slovenia, Egypt.

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Senegal, Mexico, Egypt.

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Council *Resolution 8/2* is available at http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_2.pdf.

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General Assembly *Resolution A/RES/61/295* and *Resolution A/RES/62/219* respectively.

11 November with 46 co-sponsors and a degree of confidence that it could build consensus prior to the Third Committee taking action on it the following week.³²

However, things became more complicated when Cuba (on behalf of the Non-Aligned Movement) and Mauritius (on behalf of the African Group) introduced a resolution to 'take note of the report of the Human Rights Council' and 'endorse' its recommendations.³³ Many States were caught off guard by its introduction on 11 November, with some in the African Group allegedly not having seen the text, and many States perplexed by its intended purpose. Part of the problem was the poor construction of the text, which 'considered the recommendations' in the Council's report and 'endorsed' them. This was problematic for three reasons. Firstly the text did not specify which of the many recommendations contained in the report the General Assembly proposed to take action on.³⁴ Secondly, several States were concerned that the text implied that the Third Committee was taking action on the report as a whole, thereby overturning the decision of the General Committee that it limit itself to consideration of the recommendations. Thirdly, the text appeared to be in competition with Portugal's resolution on the protocol, given that both sought to take action on one or more of the Council's recommendations to the General Assembly.³⁵ When it introduced the text, Cuba indicated it was open to alternative language. However, despite the fact that two revised texts were subsequently issued,³⁶ these initial flaws in drafting were not corrected.

Despite these initial concerns, it soon became clear that Portugal's draft resolution, with its focus on the adoption of the protocol and no reference to the Council's report, was gaining support amongst delegations and would not be disrupted by the fate of the Cuba/Mauritius draft resolution on the Council's report.

Concerted advocacy by Portugal and others ensured that its resolution was adopted by consensus in the Third Committee on 18 November.³⁷ As the main sponsor of the resolution, Portugal made brief introductory remarks, appealing to all States to give concrete meaning to the notion that all human rights are universal and interdependent, and to give voice to the victims whose economic, social and cultural

rights are violated. Some States praised Portugal for its critical role in ensuring the passage of the draft protocol over many years, and acknowledged the historic achievement of the adoption of an individual complaints mechanism under the Covenant, a development that would reset the balance between civil and political rights on the one hand, and economic, social and cultural rights on the other.³⁸ However most explanatory statements expressed skepticism about the ability of the protocol to enhance the enjoyment of economic, social and cultural rights, or sought to highlight inherent problems in its practical application. Nonetheless, it was significant that no State was prepared to stand in the way of consensus or hinder the adoption of the resolution.

A widely-held concern was that the Committee on Economic, Social and Cultural Rights should follow the decision of the Human Rights Committee not to examine individual complaints relating to the right of self-determination. States pointed to the Human Rights Committee's view that the right to self-determination was a collective right and thus not able to be exercised by an individual complainant.³⁹

Another common criticism of the protocol in the Third Committee was that the majority of rights in the Covenant did not carry immediate legal effect as they were subject to 'progressive realization'. States argued that such rights would be difficult, if not impossible, to adjudicate by third parties and were thus ill-suited to an individual complaints mechanism.⁴⁰ A related concern was that the Committee would be inundated with complaints requiring it to adjudicate individual claims against States' decisions on the allocation of resources and other policy measures. Not only would this overburden the Committee, and perhaps result in it taking on a role in managing overseas development assistance,⁴¹ but it would also divert it from its core responsibility of addressing violations under the Covenant.⁴² However, several States pointed out that these concerns were addressed by the protocol's 'reasonableness test' in Article 8(4), which they believed reaffirmed that States should determine the best use of their resources to progressively realize these rights.⁴³ South Africa also argued that economic, social and cultural rights were justiciable.

³² A/C.3/63/L.47.

³³ A/C.3/63/L.57.

³⁴ In addition to the three recommendations that requested the General Assembly to take action, there were many other general recommendations in the Council's report.

³⁵ Rule 123 of the Rules of Procedure of the General Assembly (which apply in the Third Committee) provides that it is not possible to take action on a proposal twice in the same session.

³⁶ A/C.3/63/L.57/Rev.1 and A/C.3/63/L.57.

³⁷ The list of co-sponsors is contained in A/63/435, Para. 6.

³⁸ New Zealand, Germany, South Africa, Finland, Slovenia, Austria, Philippines.

³⁹ UK, Canada, Switzerland, Turkey, Australia, New Zealand, Argentina.

⁴⁰ US, UK, Denmark, Norway, Canada, Sweden, Liechtenstein, Poland.

⁴¹ Sweden.

⁴² UK.

⁴³ New Zealand, Austria, Australia, Philippines, South Africa.

Some States reiterated their objection to the last-minute amendment to the draft protocol prior to its adoption by the Council, pointing out that the Working Group had not approved the text and it therefore was not subject to proper consultation.⁴⁴ Liechtenstein also put on record specific concerns and reservations to certain provisions of the protocol.⁴⁵ Poland was of the view that the complaints procedure might allow the Committee to expand the interpretation of the rights contained in the Covenant through 'so-called case law', but warned that any such case law would only be applicable in States that have ratified the protocol.

When drawing the discussion to a close, the Chairperson of the Third Committee announced that the Committee would transmit the resolution to the General Assembly plenary for discussion on 10 December. Although no State objected at the time, in the subsequent days rumours circulated that some of the 'skeptics of the protocol' were advocating that the resolution be dealt with by the General Assembly when it was considering the remainder of the Third Committee's work, some time after 10 December. Their intention appeared to be to lessen the significance of the adoption of the protocol by ensuring it did not coincide with the General Assembly's celebrations to commemorate the 60th anniversary of the adoption of the UDHR.

In an effort to garner maximum support for the adoption of the protocol in the General Assembly, Portugal and its close supporters remained active until the very end. On 9 December they organised a side event that was well attended, predominantly by States, to showcase the protocol and tackle the concerns States had expressed in the Third Committee. The main speakers were former Chairperson of the Working Group Ms Catarina de Albuquerque from Portugal and member of the Committee on Economic, Social and Cultural Rights Professor Eibe Reidel from Germany, both of whom provided compelling legal arguments to address States' concerns.

With the support of the President of the General Assembly, and a degree of flexibility on the part of the 'skeptics' of the protocol, the General Assembly took action on the protocol on 10 December. Given the very busy programme of work for the General Assembly on Human Rights Day, it was agreed in advance that all

explanations of position on the protocol would be deferred until the General Assembly considered other reports of the Third Committee later that month. This meant that the General Assembly's adoption of the protocol by consensus occurred in a matter of seconds and was something of an anti-climax for many who had been engaged in the process over the years.⁴⁶ There was however brief applause in the General Assembly following its adoption.

News of the adoption of the protocol prompted welcoming statements from the UN High Commissioner for Human Rights (the High Commissioner), as well as 36 of the special procedures of the Council. All agreed that the protocol closed a historic gap in the field of human rights. The High Commissioner described the General Assembly's adoption as 'a milestone in the history of universal human rights, making a strong and unequivocal statement about the equal value and importance of all human rights and the need for strengthened legal protection of economic, social and cultural rights.' A joint statement of UN human rights special procedures commented that '[t]he combination of the petitions mechanism, the inquiry procedure and the possibility of interim measures will contribute to a body of jurisprudence around these rights, thereby helping States to ensure their implementation.'

On 18 December 2008, the General Assembly commenced work on the reports of the Third Committee, providing an opportunity for States to make their 'explanations of vote' on the protocol. Thirteen States addressed the General Assembly to reiterate the views they had expressed in the Third Committee, and once again the so-called 'skeptics' of the protocol dominated.⁴⁷

Looking forward, Portugal is working towards a signing ceremony for the protocol to be held in Geneva in March 2009, as was envisaged by the Council. If all goes to plan, the ceremony will take place during the high-level segment of the 10th session of the Human Rights Council in March 2009. When it adopted the protocol, the General Assembly requested the Secretary-General and the High Commissioner to 'provide the necessary [financial and other] assistance' to enable such a ceremony to be held.⁴⁸ The protocol will enter into force once it has been ratified

44 UK, Liechtenstein, Japan, Poland.

45 Liechtenstein noted its reservation to Article 14(3), relating to the trust fund linked to the individual complaints procedure. It argued that the reference to a fund was 'an anomaly' that would discriminate against States that had not ratified the protocol, but which were required to report to the treaty body as States parties to the Covenant. It also described the 'negative formulation' of Article 3(2) (e) as 'inappropriate in such an important legal instrument'.

46 General Assembly Resolution 63/117 available at www.un.org/Depts/dhl/resguide/r63.shtml.

47 Canada, UK, USA, Sweden, Turkey, Norway, Denmark. Some States, including Australia and Argentina, outlined their interpretation of key provisions of the protocol, and others, including Finland, Slovenia, Austria and Algeria, welcomed its adoption.

by ten States,⁴⁹ after which time the Committee on Economic, Social and Cultural Rights will be able to begin receiving communications and initiate its inquiry procedure, which may include country visits.

DRAFT DECLARATION ON HUMAN RIGHTS EDUCATION AND TRAINING

At its 6th session in September 2007, the Council requested that its expert mechanism, the Advisory Committee, 'prepare a draft declaration on human rights education and training',⁵⁰ with an interim report expected in March 2009. At its first meeting in August 2008, the Advisory Committee created a drafting group composed of five of its members to work on this issue.⁵¹ The group actively sought input from NGOs present at the session and prepared a paper 'containing the elements of the conceptual framework for further work and consultations',⁵² which was adopted by consensus by the Advisory Committee. The Advisory Committee has placed its focus on the reinforcement of existing State obligations contained in international and regional instruments such as the *Universal Declaration of Human Rights*, the two Covenants, UNESCO declarations, and the Millennium Development Goals. The draft declaration will identify duty-bearers (State and non-State actors) and beneficiaries (including vulnerable groups); emphasise the importance of education and training at all levels of teaching; and highlight the need for a multi-disciplinary approach. The document adopted by the Advisory Committee also identifies potential governmental and non-governmental interlocutors and United Nations documents to be consulted. The Advisory Committee will continue working on this issue with a view to submitting an interim report to the Council for its consideration in March 2009.⁵³

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The Program Budget Implications (PBI) for the implementation of the resolution were estimated by the UN Secretariat at \$15,900 in 2009, which would be met within existing resources, and a further \$248,600 for the 2010-2011 biennium, which would be considered within the context of the proposed budget for that biennium. Statement from the Secretary of the Third Committee on 18 November 2008, available at www.un.org/News/Press/docs/2008/gashc3938.doc.htm.

⁴⁹
See statement from the High Commissioner for Human Rights, 11 December 2008. Available at www.ohchr.org/EN/NewsEvents/Pages/Media.aspx.

⁵⁰
Para. 1, Council Resolution 6/10.

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The members of the drafting group are Mr Emmanuel Decaux (rapporteur of the Working Group), Ms Halima Embarek Warzazi (chairperson of the Working Group), Mr Kartashkin, Mr Héctor Felipe Fix Ferrero, and Ms Quisumbing.

⁵²
Advisory Committee Recommendation 1/1, A/HRC/AC/2008/1/L.11.

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For further information on the work of the Advisory Committee in this respect and on other substantive matters, please see pp. XX of the current edition.