

# DEVELOPMENTS IN INTERNATIONAL HUMAN RIGHTS STANDARDS

## INTRODUCTION

2009 saw the continuation of efforts to elaborate complementary standards to the *International Convention on the Elimination of All forms of Racial Discrimination*. The process has largely stagnated and remains extremely polarised with seemingly little prospect for progress.

A potentially new standard-setting process was set in motion with the establishment of a Working Group to examine the possibility of elaborating an optional protocol to the *Convention on the Rights of the Child* establishing a communications procedure under that treaty. Both of these processes are discussed in more detail below.

It is also worth noting that the General Assembly in 2009 adopted a resolution welcoming the *Guidelines for the alternative care of children* (the Guidelines). This followed the Human Rights Council's (the Council) adoption of the Guidelines at its 11th session.<sup>1</sup> Although not legally binding, the Guidelines are intended to assist in the implementation of the Convention by 'helping to inform policy and practice' by States and all other actors involved in deciding alternative care arrangements for children who are deprived of parental care or at risk of being so. They include detailed guidance on how to keep

children in, or return them to, the care of their family or, failing this, to find another appropriate and permanent solution that is in the best interests of the child.

As it had done at the Council, Brazil took a leadership role in New York to facilitate the process, introducing a brief procedural resolution that enjoyed cross-regional support from 40 co-sponsors.<sup>2</sup> The resolution encouraged States to 'take the Guidelines into account and bring them to the attention of the relevant executive, legislative and judiciary bodies of government, human rights defenders and lawyers, the media and the public' as well as to States, regional commissions, and relevant intergovernmental and non-governmental organisations (NGOs).

Reflecting the strong international support for the Guidelines, only a handful of Western States sought to clarify their position prior to the adoption of the resolution in the General Assembly. Amongst these, only the United Kingdom (the UK) and the United States (the US) had 'outstanding concerns',<sup>3</sup> but these did not prevent either of them from joining consensus.<sup>4</sup> The implementation of the Guidelines by those States and other actors wishing to apply them can begin immediately.

<sup>1</sup> Council Resolution 11/7, 17 June 2009.

<sup>2</sup> A/C.3/64/L.50.

<sup>3</sup> The UK pointed out a number of inconsistencies between the Guidelines and existing UK and European Union law, such as the privacy rights of adults relating to data protection, and sentencing provisions for parents. The US was concerned by the very broad scope of the Guidelines and, like the UK and Canadian delegates, stressed their non-binding nature. Positive interventions were also made by Sweden (on behalf of the EU) and Australia.

<sup>4</sup> A/RES/64/142.

## TOWARDS AN OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD

The idea of an optional protocol to the *Convention on the Rights of the Child* establishing an individual complaints procedure under that instrument is not new. As has been reminded by those campaigning for such a protocol, it was discussed when the Convention was negotiated more than 20 years ago and again at the 10th anniversary of its adoption in 1999. The idea was brought up again by NGOs in 2008 through a petition in favour of an optional protocol and a panel discussion held at the Council that year.<sup>5</sup> The proposal enjoys the support of members of the Committee on the Rights of the Child (CRC) and other international and regional human rights mechanisms. Recently, it has also gained significant support among States from all regions of the world as NGOs have successfully used the momentum of the Convention's 20th anniversary in 2009. Consequently, fertile ground now exists for strengthening the specific protection mechanisms relevant to the rights of children through a complaints procedure.

In June 2009, the Human Rights Council established an open-ended Working Group to 'explore the possibility of elaborating an optional protocol' to establish a communications procedure and to report to the Council on progress at its 13th session in March 2010.<sup>6</sup> The resolution was initiated by a cross-regional group of States and a core group of States advocating for the optional protocol has since been formed.<sup>7</sup> The original proposal by the co-sponsors was to mandate the Working Group to start drafting an optional protocol. However, this proposal met with resistance from several States, in particular China, Singapore, and the United Kingdom, and was abandoned in favour of a more cautious process that gained broad support within the Council.

### The Working Group

The Working Group held its first session from 14 to 18 December 2009. However, due to difficulties in securing full conference services for the session, in particular the absence of interpretation services into the six official UN languages, the session did not effectively start until 16

December. Many States and NGOs that had travelled to Geneva to attend the session complained about the failure of the secretariat to secure logistical support for the Working Group. Despite this significant delay, the Working Group was able to deal with all the topics scheduled for discussion. This indicated that a five-day session was more than what was needed and perhaps also that States were not fully ready to engage in substantive debates on issues related to the drafting of an optional protocol. States that had expressed serious reservations about an optional protocol at the establishment of the Working Group still seemed unconvinced but did not express outright opposition.

The aim of the Working Group's session was broadly to 'hear the views' of States and other stakeholders on the 'possibility of elaborating a new optional protocol' to the Convention. As part of this broad question the Working Group also examined the reasons and timing for elaborating an optional protocol; the effectiveness of existing protection mechanisms at the national, regional, and international levels; the complementarity of a new communications procedure with existing procedures; admissibility criteria and exhaustion of domestic remedies; and the right of the child to be heard, including issues related to children as complainants and representation of children by others.

The Working Group was presented with a number of background papers drafted by experts to inform its discussions on these topics.<sup>8</sup> Mr Stefanek, of Slovakia was elected as the Chairperson Rapporteur of the Working Group. It was also agreed that if the Working Group were to be given a mandate to draft an optional protocol, Slovenia would chair its work. While the background papers provided the Working Group with a good basis for its work, the session's preparation and outcome was hampered by other factors. It seems that the inability of Slovenia and Slovakia to reach an early agreement on who would chair the session may have negatively affected the preparation of the session. The fact that Mr Stefanek is not a Geneva-based representative of Slovakia may also have had an impact on his ability to negotiate a successful outcome.

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For more information, please see [www.crin.org/petitions/petition.asp?petID=1007](http://www.crin.org/petitions/petition.asp?petID=1007).

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Council Resolution 11/1.

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Chile, Egypt, Finland, France, Kenya, the Maldives, Slovakia, Slovenia, Thailand, and Uruguay.

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The documentation for the session is available at [www2.ohchr.org/english/bodies/hrcouncil/OEWG/index.htm](http://www2.ohchr.org/english/bodies/hrcouncil/OEWG/index.htm).

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## First reactions to the idea of a complaints procedure

From the outset of the Working Group's debate it was clear that a majority of States favour the elaboration of an optional protocol in principle.<sup>9</sup> While cautiously supportive of an optional protocol, many States underlined that several important questions needed to be discussed and resolved before a communications procedure could be established.

However, some States seemed to have more fundamental reservations about an optional protocol.<sup>10</sup> The United Kingdom stated that while it was open to the idea of an optional protocol, it had questions around what would be the best way to protect children's rights. Pakistan questioned the need for an international mechanism since national mechanisms to protect children's rights often exist, clearly failing to mention that international complaints mechanisms are always only complementary to national mechanisms where these are not effective in providing human rights protection. Nigeria (on behalf of the African Group) argued that protection of children's rights should start at the national level and that the discussions in the Working Group should only be exploratory. Both the Russian Federation and Iran also argued that there was a need for more discussion on the need for an optional protocol. China noted that it was necessary to set up a complaints mechanism, but argued that the mechanism should take account of the cultural and developmental particularities of the country and respect domestic jurisdiction. Not surprisingly, this 'cultural relativism' argument was also put forward by Iran and, perhaps more surprisingly, by Morocco as well. It was notable that Singapore did not actively participate in the Working Group's discussion although it had been among the more vocal reticent States.

The Chairperson of the Committee on the Rights of the Child, Ms Lee, expressed disappointment at what she saw as a weak mandate for the Working Group to only explore the possibility of an optional protocol and repeatedly underlined that the time has come to elaborate it.

While the arguments in favour of a complaints procedure are many and compelling, its development will likely face obstacles from States that so far have only expressed reservations but who

may in fact be opposed to an optional protocol. At the same time, several difficult legal issues will have to be resolved.

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## Substantive discussion

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### Reasons and timing to elaborate an optional protocol

Ms Lee highlighted that violations of children's rights still occur on a large scale and as a result there is a need to strengthen protection systems. A number of States argued that the Convention is the only treaty that does not have a complaints procedure attached to it, indirectly suggesting that the absence of such a procedure is a result of inequality in the treatment of human rights.<sup>11</sup> Slovenia and the Netherlands stated that there were no good reasons why an optional protocol should not be adopted. However, the absence of good counter arguments will not be sufficient to ensure the drafting and eventual adoption of an optional protocol. The serious reservations of several States, although perhaps not based on compelling reasons, will have to be addressed and overcome.

Slovenia acknowledged that it would be up to States to decide whether to ratify the optional protocol once adopted, thus recalling that the drafting and adoption of the protocol will only be a first step toward strengthened international protection for children's rights. While it is true that States are sovereign in accepting, or not, international obligations, the development of international human rights standards requires broad endorsement by UN member States. In this regard there is clearly a need for civil society to lobby States to support the drafting.

The Special Representative of the Secretary-General on violence against children, Ms Marta Santos Pais, underlined that the CRC does not consider individual cases in the context of its examination of periodic reports by State parties. One expert, the director of the 'Institut international des droits de l'enfant', Mr Zermatten, argued that the consideration of individual cases should be an essential part of the Committee's mandate and that its current work is only partially fulfilling its mandate.

<sup>9</sup> Uruguay (on behalf of Mercosur), Finland, Slovakia, Germany, Mexico, Norway, Indonesia, Thailand, Switzerland, Greece, Slovenia, the Republic of Korea, Brazil, the Maldives, Denmark, Argentina, France, the Netherlands, and Syria.

<sup>10</sup> Nigeria (on behalf of the African Group), China, the Russian Federation, Iran.

<sup>11</sup> Argentina, Finland, Greece, Mexico, and Slovenia.

Uruguay stated that while existing communications procedures under other international human rights treaties are open to child complainants they do not cover the specific rights of children that are recognised in the Convention. It further argued that cases involving children under other communications procedures have not been resolved in favour of the complainant because the specific rights of children were not considered. Slovakia stated that effective enjoyment of human rights by children requires the presence of remedies for violations. The Special Representative of the Secretary-General on violence against children explained that in many countries there is no specific system of redress for violations of children's rights and that a new international communications procedure could offer guidance to States.

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#### Existing international mechanisms

The Special Rapporteur on the sale of children, child prostitution and child pornography, Ms Najat Maalla M'jid, presented her views on how a communications procedure could be complementary to the existing international mechanisms. She stated that the fact that demand for a communications procedure mainly comes from NGOs is an indication that existing mechanisms are inadequate or inaccessible for the effective protection of children's rights. Slovakia noted that existing mechanisms only provide 'fragmented protection' to children.

Thailand and Uruguay argued that there is a need for a specific complaints mechanism for children as existing mechanisms do not cover the specific rights of children. The Republic of Korea also suggested that existing procedures could be extended to children. On the other hand, Portugal suggested that the rights of the child to be heard and the principle of the best interest of the child, some of the specific provisions in the Convention, could be integrated into existing communications procedures thus making a specific complaints procedure for children unnecessary.

China argued that duplication with existing mechanisms should be avoided and queried how these had been used to date by children. Argentina was not concerned with the issue of duplication but expressed worries about the pos-

sible increased workload for the Committee as a result of a new complaints procedure.<sup>12</sup>

Ms Maalla acknowledged that while the number of complaints from children under existing international procedures may be limited, this is not an indication of a lacking need but rather suggests that those procedures are not accessible to children.

There was relatively limited discussion of how existing national and regional mechanisms are relevant to a new complaints procedure.

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#### Specific rights of children

Mr Zermatten underlined that almost all of the articles in the Convention are child-specific. He highlighted that the principle of the best interest of the child (Article 3) and the right of children to be heard in matters that concern them (Article 12) are cornerstones of the Convention and its recognition of children as rights-holders.

China questioned how the Committee would assess the maturity of a child, a key factor in Article 12 of the Convention, which states that a child's views must be given due weight in accordance with his or her age and maturity.

Overall, there was little discussion of the many specific issues and rights of children under the Convention. However, many States raised questions throughout the Working Group's debates on the legal capacity of children to lodge complaints and how to ensure their representation in the complaints procedure, and much less with how the procedure will ensure that their views are heard and their best interests respected. Clearly, these are difficult legal issues that will have to be resolved before a communications procedure can be established. Italy noted that the children's legal capacity needed to be carefully considered. Indonesia also raised questions in this regard and asked if the Committee had already developed criteria regarding legal representation of children. Ms Lee sought to reassure States by responding that these issues are of concern to the Committee and will be considered by it.

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The Convention and its optional protocols on sale of children and protection of children in armed conflict are among the most widely ratified and as a result the Committee on the Rights of the Child already has a heavy work schedule examining periodic reports from State parties.

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### Feasibility of a communications procedure

A paper by former Committee member, Ms Nevena Vuckovic Sahovic, formed the basis for discussion of the feasibility of a communications procedure. She highlighted that longer term solutions must be found to the Committee's growing backlog of periodic reports. The Committee has in the past worked in two chambers to deal with this backlog and its membership has also been expanded. Ms Vuckovic also drew attention to concerns about the existing expertise within the Committee to deal with complaints under the Convention. She noted in this regard that the Committee is the treaty body with the most members with a legal background. Mr Newell, coordinator of the Global Initiative to End All Corporal Punishment of Children, noted that other areas of expertise are very useful to the Committee's examination of children's rights. Ms Lee also rightly pointed out that the Committee members' qualifications are not within the control of the Committee, but is a matter for the State parties to consider when electing the members.

The secretariat informed the Working Group that approximately 2% of existing complaints to treaty bodies are lodged by or on behalf of minors.

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### Conclusion and outcome

The Working Group concluded its work without agreeing to put any concrete recommendations to the Council. Its report to the Council will therefore only contain a summary of its discussions and it is at the time of writing unclear when and how States will take the next steps towards an agreement to begin drafting an optional protocol to the *Convention on the Rights of the Child*. Nevertheless, it is expected that the March 2010 session of the Council will provide an opportunity to discuss the Working Group's work and how to take it forward.

## AD HOC COMMITTEE ON THE ELABORATION OF COMPLEMENTARY STANDARDS

Discussions on complementary international standards to combat racism date back to the adoption of the *Durban Declaration and Programme of Action* (DDPA) adopted in 2001. Paragraph 199 of the DDPA recommends 'that the Commission on Human Rights prepare complementary international standards to strengthen and update international instruments against racism, racial discrimination, xenophobia and related intolerance in all their respects'. This task was given to the Intergovernmental Working Group, which was established by the Commission on Human Rights in 2002.<sup>13</sup>

The Intergovernmental Working Group devoted most of its work in the following years to examining whether there are gaps in the international legal framework for combating racism and xenophobia and if so, how they should be filled. In 2006 studies were requested from the Committee on the Elimination of Racial Discrimination (CERD) on possible measures to strengthen implementation of the *International Convention on the Elimination of All Forms of Racial Discrimination* through additional recommendations or to update its monitoring procedures to address any procedural gaps in protection.<sup>14</sup> A group of five experts<sup>15</sup> was also requested to produce studies on the content and scope of substantive gaps in the existing international instruments to combat racism, racial discrimination, xenophobia and related intolerance, with recommendations for how to address them.<sup>16</sup> The studies were submitted to the Human Rights Council at its 6th session in late 2007. They concluded in general that there is no need for new international standards but that protection against racism could be enhanced through the development of general comments by relevant treaty bodies.

In 2007 the Council decided to replace the Intergovernmental Working Group with an Ad Hoc Committee on the Elaboration of Complementary Standards (the Ad Hoc Committee).<sup>17</sup> It was mandated 'to elaborate (...) complementary standards in the form of either a convention or additional protocol(s) to the International Convention on the Elimination of All Forms of Racial Discrimination, filling the existing gaps in the Convention, and also providing new normative

<sup>13</sup> Commission on Human Rights *Resolution 2002/68* on racism, racial discrimination, xenophobia and related intolerance.

<sup>14</sup> A/HRC/WG.3/7.

<sup>15</sup> The five experts were Mr Syafi'i Anwar (Indonesia, Group of Asian States); Ms Jenny Goldschmidt (the Netherlands, Group of Western European and other States); Mr Tiyanjana Maluwa (Malawi, Group of African States); Ms Dimitrina Petrova (Bulgaria, Group of Eastern European States); and Mr Waldo Luis Villalpando (Argentina, Group of Latin American and Caribbean States).

<sup>16</sup> A/HRC/4/WG.3/6.

<sup>17</sup> Council *Decision 3/103*.

standards aimed at combating all forms of contemporary racism, including incitement to racial and religious hatred'.<sup>18</sup>

At the first session of the Ad Hoc Committee in 2008, all relevant previous documents and studies were considered and views exchanged on issues that should be addressed in future sessions. The main outcome was the agreement on a 'roadmap' for future discussions. It was also agreed that the Chairperson, Mr Idriss Jazairy, the permanent representative of Algeria to the UN, would prepare an 'outcome document' containing the views of States on where gaps exist and identifying issues for further discussion, which would form the basis for discussion at the 2nd session.<sup>19</sup> To-date all resolutions on the elaboration of complementary standards have been adopted by vote rather than consensus reflecting the divided views of States on this issue.<sup>20</sup>

States are deeply divided on the need for, content and format of complementary standards. Western States such as the United States, Canada, Norway, Liechtenstein, Sweden (on behalf of the European Union) argued that the existing international legal framework for the protection against racial discrimination and xenophobia is sufficient and that the main issue is a lack of implementation of the existing standards at the national level rather than the existence of legal gaps in the international framework. Many non-Western and developing States, in particular from the African Group and the Organization of the Islamic Conference (OIC) criticised this view and underscored that new standards are vital to effectively tackle new forms of racial discrimination such as incitement to hatred, xenophobia, hate crimes, and 'cyber discrimination', which are not or only partly covered by existing standards such as the *International Convention on the Elimination of Racial Discrimination* or the *International Covenant on Civil and Political Rights*. Regarding the format of new standards the African Group, supported by the OIC, favoured the elaboration of an additional protocol to the *International Convention on the Elimination of Racial Discrimination*.

<sup>18</sup> Council Resolution 6/21.

<sup>19</sup> A/HRC/AC.1/2/2 available at [www2.ohchr.org/english/issues/racism/docs/Outcome\\_en.pdf](http://www2.ohchr.org/english/issues/racism/docs/Outcome_en.pdf).

<sup>20</sup> The countries that voted against or abstained can be mainly found in the Western hemisphere and also included Japan and the Republic of Korea.

<sup>21</sup> The following issues were discussed: advocacy and incitement to racial, ethnic, national and religious hatred; comprehensive anti-discrimination legislation; discrimination based on religious belief; establishment, designation or maintaining of national mechanisms; genocide; hate crimes; human rights education; implementation of existing standards; impunity and provisions of free legal aid to victims; multiple forms of discrimination; non-discrimination in the provision of aid to victims of natural catastrophes; protection of migrants; protection of people under foreign occupation; protection of refugees, returnees, and IDPs; ethnic and religious profiling and measures to combat terrorism; and discussions on the way forward.

## The second session of the Ad Hoc Committee

The Ad Hoc Committee held its 2nd session from 19 to 30 October 2009 in Geneva. It was expected that the session would elaborate specific proposals on the format and nature of complementary standards. However, due to significant disagreements among States on the programme of work during the first one and a half weeks of the two-week session, substantive discussions were jeopardised. Most of the public discussions were moved to private informal consultations where the regional coordinators negotiated the programme of work.

The disagreement on the programme of work concerned the following topics: discrimination based on sexual orientation; protection of asylum seekers, migrants, internally displaced persons (IDPs), and refugees from racist and discriminatory practices; and non-discrimination in the provision of aid to victims of natural catastrophes. After lengthy discussions to resolve the disagreements on these issues, the Ad Hoc Committee agreed to adopt a programme of work that followed a list of issues that was presented in alphabetical order.<sup>21</sup> The compromise allowed all of the contested issues to be discussed. Although discrimination based on sexual orientation was not explicitly listed, the issue could be raised in the context of multiple forms of discrimination, which seemed appropriate. Knowing how sensitive these issues are to many States, it is not clear why their proponents saw a need to have them explicitly acknowledged in this context, which is already highly polarised. It could seem that the opponents of new standards are seeking to stall the process and further aggravate those States that would like to see new standards by introducing issues that could be seen as provocative. If that is the case it is unlikely to be a useful tactic.

The discussions in the Ad Hoc Committee largely repeated the diverging views of States already reflected in the outcome document. As States continue to disagree on the need for new standards to fight racism, there was little common ground regarding how the discussions on complementary standards should be conducted. The African Union and the OIC proposed specific provisions for an optional protocol to the *International Convention on the Elimination of Racial Discrimination*. They argued that it is time

to move away from expert consultations and general comments and towards the elaboration of specific proposals. Several States and participating NGOs expressed concerns about these proposals arguing that the suggested provisions would undermine existing international human rights protection, in particular the right to freedom of expression and the right to equality.<sup>22</sup>

States who oppose the elaboration of new standards, such as the US, Norway, Denmark, Sweden (on behalf of the EU), and Japan continued to only make general comments. They reiterated their view that existing international standards are adequate to fight racism and that the problem is a lack of full implementation of these standards.<sup>23</sup> Their concrete proposals for how to strengthen protection against racism generally focused on the sharing of best practices; critical self-reflection; assessments of whether national laws and mechanisms effectively protect against racism; compilation of case studies and regional jurisprudence; and data collection.

Interestingly, a cross-regional group comprising Argentina, Brazil, Japan, the Republic of Korea, Switzerland, Mexico, Chile, and Uruguay emerged during the session. It generally advocated the view that there is not sufficient evidence that complementary standards are needed but did not oppose the elaboration of new standards and seemed to seek possible compromises. On certain issues it suggested the developing of general comments by the treaty bodies rather than the drafting of a new instrument. It is worth noting that the group is composed of States that do not belong to the EU, the OIC or the African Group, which all hold strong views on this issue. The cross-regional group may therefore have the ability to build compromises that have so far been impossible.

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### The debates

The following section provides a brief overview of some of the substantive issues discussed during the 2nd session of the Ad Hoc Committee with a focus on specific proposals that did not merely restate the above-described positions.

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### Comprehensive anti-discrimination legislation and domestic mechanisms

The African Group advocated the adoption of an optional protocol to the *International Convention on the Elimination of Racial Discrimination* to address gaps, in particular regarding xenophobia, and proposed specific language in this regard. The proposal suggested that ‘States should review and if necessary modify their laws and practices relating to migration, asylum and citizenship (...)’. Mexico and Ecuador supported the specific proposal for review of legislation relating to migrants. Several States from the Western Group argued that the African Group’s proposal is already sufficiently covered by the Convention. It is clear from discussions in the Council that migration is a sensitive issue for many European States.

The US suggested that States should compile a list of current laws prohibiting racial and religious discrimination, review this legislation to ensure compliance with international standards, and assess whether domestic legislation and institutions are effective in protecting against racism.<sup>24</sup> The UK proposed that experts should be invited to brief the Ad Hoc Committee on the implementation of national anti-discrimination legislation but Nigeria rejected this proposal on the basis that information on racism is already widely available.

It should be remembered that CERD’s main task is to examine the state of domestic laws and institutions and their compliance with international obligations under the Convention.

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### Incitement to racial, ethnic, national, and religious hatred, and hate crimes

While the African Group and the OIC argued that the current international instruments do not provide sufficient protection against incitement to hatred and proposed specific provisions to be included in an optional protocol, Switzerland on behalf of the cross-regional group,<sup>25</sup> argued that CERD could consider elaborating a general comment on the scope and interpretation of Article 4 of the Convention.

South Africa expressed concern over the growing occurrence of hate crimes. It argued that relevant

<sup>22</sup> Liechtenstein, Canada, Argentina, the US, Sweden, and Norway.

<sup>23</sup> Liechtenstein, Sweden, Ireland, Norway, Denmark, Netherlands, the US, Germany, the UK, Belgium, France, and Canada.

<sup>24</sup> This was supported by the UK, Ireland, France, Canada, and Slovakia.

<sup>25</sup> As mentioned above, the cross-regional group consists of Argentina, Brazil, Chile, Japan, Mexico, the Republic of Korea, Switzerland, and Uruguay.

instruments do not contain a specific definition and that one should therefore be incorporated in a new protocol.<sup>26</sup> The EU suggested collecting and publishing data on hate crimes in order to strengthen the efforts to combat racial discrimination. Argentina suggested the development of guidelines on hate crimes.

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#### Implementation of existing norms and standards

Several States agreed that the ratification and implementation of existing standards are fundamental to the fight against racism and that new instruments will not overcome the lack of implementation of these instruments.<sup>27</sup> Brazil pointed to the importance of the withdrawal by States of reservations to ratified treaties to advance the fight against racism. Sweden (on behalf of the EU) proposed that a comprehensive report should be elaborated on the ratification of the *International Convention on the Elimination of Racial Discrimination*, the *International Covenant on Civil and Political Rights*, and the *International Covenant on Economic, Social and Cultural Rights* to identify the reasons for non-ratification and on the reporting status of States under these treaties. South Africa and Nigeria argued that the Ad Hoc Committee is mandated to elaborate new standards and not to review implementation of existing ones.

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#### Monitoring procedures of CERD and other mechanisms

The US pointed to the late submission of reports to CERD by over 50 States and argued that rather than revising existing monitoring procedures, States should ensure timely submission of their reports. The EU, Canada, and Norway argued that the implementation of the Convention was the way to address all types of racial discrimination. The cross-regional group stated that international monitoring must be improved and ‘if new standards were needed they could focus on follow-up, investigations and country visits.’ Nigeria and Cuba repeated that implementation gaps should not to be discussed in the Ad Hoc Committee as this issue does not fall within its mandate. Liechtenstein, Denmark, and Italy argued that proposals to give CERD additional ‘standards’ are part of the mandate of the Ad Hoc Committee.

The OIC argued that a new and universal mechanism was necessary to address contemporary forms of racism. It therefore suggested ‘to establish a specialized body to monitor the whole process related to racio-religious discrimination and intolerance (...)’ The OIC linked its proposal to the idea of an observatory, originally proposed by the High Commissioner but never agreed at the Durban Review Conference.

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#### Discrimination based on religion or belief

Unsurprisingly, Pakistan (on behalf of the OIC), Iran, South Africa, Saudi Arabia, and Syria argued that substantial gaps exist regarding discrimination based on religion or belief. In this regard, Pakistan (on behalf of the OIC) underscored that the concepts of defamation of religions and xenophobia do not exist in any international human rights instrument. Also not surprisingly, the US, Sweden (on behalf of the EU), Norway, Denmark, Poland, and France expressed their long-standing opposition to the concept of ‘defamation of religions’ and stressed that in international human right law only individuals and not religions are subjects of protection.

It is largely these issues that are at the heart of the disagreement over the elaboration of complementary standards. While some States, in particular in Latin America, have changed their positions in recent years, thus enlarging the group opposing ‘defamation of religions’, there is still a majority of States that seek to have it not only recognised in UN resolutions but in international human rights law as well.

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#### Multiple forms of discrimination

The EU criticised that the issue of discrimination based on sexual orientation was not sufficiently reflected in the outcome document and highlighted the importance of including the issue in the discussions. The African Group and the OIC outright rejected the inclusion of discrimination based on sexual orientation. Instead, The African Group and OIC underscored the vulnerability of women. Several Latin American States requested that the Office of the High Commissioner for Human Rights (OHCHR) elaborate a

<sup>26</sup>

This was supported by Algeria, Nigeria and Pakistan in its national capacity.

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Sweden (on behalf of the EU), Canada, Poland, France, Denmark, Liechtenstein, the US, and the Republic of Korea.

compilation of general comments of the treaty bodies related to multiple forms of discrimination as a source of information for national human rights institutions on effective implementation. It could also provide the basis for the development of guidelines in this area. The cross-regional group argued that this issue needs further study and that CERD might consider the elaboration of a general comment on the issue.

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#### Protection of migrants and IDPs against racist, discriminatory, and xenophobic practices

The Group of Latin American and Caribbean States (GRULAC) stated that the issue should be considered by the Ad Hoc Committee. Sweden (on behalf of the EU), Mexico, and Canada argued that there are no substantive gaps in international instruments regarding migration. Liechtenstein noted that international instruments do not cover internal migrants and there are more internal migrants than international migrants. It requested OHCHR to prepare a study on the effectiveness of the international legal framework for the protection of migrants. Nigeria, Pakistan, Mexico, Argentina, and Algeria stated that the Ad Hoc Committee's discussion should focus on international migration not internal migration as internal migrants enjoy the same rights as other persons in their country.

Azerbaijan stated that there is no legally binding international convention that covers **internally displaced persons**. Liechtenstein recommended that the Special Representative of the Secretary-General on IDPs examine in a future report the effectiveness of existing standards with regard to the protection of IDPs.

Nigeria also stated that xenophobia is a contemporary form of racism and is not covered under international instruments. It proposed that a definition should be elaborated. Algeria went further and argued in favour of an international instrument on the issue. Liechtenstein and Portugal rejected the interpretation that the Convention does not cover xenophobia and pointed out that CERD made recommendations in many cases on xenophobia, including in two general recommendations on non-citizens.<sup>28</sup>

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#### Racial, ethnic and religious profiling and measures to combat terrorism

The US claimed that the issue is sufficiently covered by existing instruments. Sweden and France argued that no complementary standards are necessary as CERD has already adopted a general recommendation regarding ethnic profiling<sup>29</sup> and any new norm would be duplication. The cross-regional group stated that effective enforcement of existing legislation is needed as well as improvements in training programmes for police officers. South Africa and Algeria claimed that there is a need for a definition of racial profiling. The OIC stated that 'a new instrument should provide for mandatory prohibition by law to eliminate racio-religious profiling based on any grounds of discrimination, with provisions for legal action against perpetrators as well as legal guarantees to remedy and reparations for victims.'

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#### Racism in modern information and communication technologies

The African Group pointed to a gap on this issue in the international framework. Nigeria referred to the Council of Europe's additional protocol to the *Convention on cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems* and argued that a new international instrument should be modelled on that protocol. Sweden underscored the importance of freedom of expression and the media and claimed, rather unconvincingly, that self-regulation by the media has been seen as an effective measure to protect against crimes, such as child pornography. The US stated that it had serious reservations about limiting the Internet and characterising cyber crimes as human rights violations.

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#### Human rights education and inter-cultural and inter-religious dialogue

Italy reminded the Ad Hoc Committee that the Council is working on a *World Programme for Human Rights Education* and a draft declaration on human rights education and training.<sup>30</sup> Many States from all regions underlined the importance of human rights education, a clear indication that this is a non-controversial topic on

<sup>28</sup> General Recommendation No. 30: Discrimination against non-citizens, and General Recommendation No. 11: Non-citizens (Art. 1), available at [www2.ohchr.org/english/bodies/cerd/comments.htm](http://www2.ohchr.org/english/bodies/cerd/comments.htm).

<sup>29</sup> General Recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system, available at [www2.ohchr.org/english/bodies/cerd/comments.htm](http://www2.ohchr.org/english/bodies/cerd/comments.htm).

<sup>30</sup> For a full discussion of that process, please see the chapter on the Advisory Committee in the present edition of the Human Rights Monitor. The draft declaration on human rights education and training will be presented to the Council in March 2010.

which there is broad agreement. The EU, the US, and the cross-regional group called upon States to step up efforts to provide human rights education.

Similarly, States underscored the importance of inter-cultural and inter-religious dialogue in the fight against racism.<sup>31</sup> Sweden suggested that UNESCO experts be called upon to assist the Ad Hoc Committee on this issue. Nigeria argued without giving further reasons that this issue is important but not relevant for the Ad Hoc Committee's work.

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### Other issues

Syria and Pakistan argued that racism under **foreign occupation** needs to be addressed. Both countries obviously have strong national interests in this issue. Several other States noted that the *Fourth Geneva Convention* protects the population of countries under foreign occupation from racist practices and that there is no need for complementary standards.

GRULAC called for universal legally binding standards to protect **victims of natural disasters**. Nigeria stated that this is an issue of general discrimination and in order to be acceptable to the African Group, it should focus on racial discrimination.

South Africa (on behalf of the African Group) argued that significant gaps exist regarding **genocide** as the *Convention on the Prevention and Punishment of the Crime of Genocide* has no treaty-monitoring body to examine State compliance with its provisions.<sup>32</sup> Moreover, there is a lack of preventive measures and the definition of genocide places a heavy burden of proof on those alleging the crime. The African Group proposed that a new forum should be established to address the issue but did not offer more details of what the forum could look like. Moreover, it proposed to create a new mandate for a special rapporteur on genocide and to prepare an additional protocol to the Convention to define the crime of genocide. The EU together with Norway, Canada, and Turkey felt that existing UN mechanisms such as the High Commissioner for Human Rights and the Special Advisor on the prevention of genocide sufficiently cover the issue.

All States identified the issue of **reparations** as a serious problem but were divided on the way to address it. Western States argued that the adoption of even a non-binding instrument would weaken international obligations. In contrast Nigeria and Algeria argued that while a number of countries have adopted national laws in this area, there is a need for international standards on reparations.

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### Conclusions and next steps

The outcome of the Ad Hoc Committee's session was rather disappointing but reflected the deep divisions between States. No agreement could be found regarding the content of future sessions of the Ad Hoc Committee. Some States underlined that in the next session complementary standards have to be drafted, whereas opponents of new standards objected to this demand.

Despite having been provided with abundant advice by experts on the substantive and procedural gaps in international standards, many States continue to ignore the experts' assessments and recommendations. This has resulted in repetitive and deadlocked discussions further reinforcing the political polarisation.

Argentina (on behalf of the cross-regional group) and supported by Canada underscored that the Ad Hoc Committee would benefit from further input by experts and recommended the exchange of best practice. It remains far from clear that more expert input would serve to improve the discussions or help unblock the process.

As States were so fundamentally divided on whether new standards are needed, the Chairperson decided to proceed modestly by summarising States' proposals made during the session rather than trying to reach conclusions. The report of the session containing this summary will be presented to the Council at its next session in March 2010.

While the US demanded that a formal action plan be put in place and Syria requested the development and adoption of a new road map, it remains to be seen how the work of the Ad Hoc Committee will proceed. It will be particularly interesting to see to what extent the newly

<sup>31</sup>

The US, Indonesia, Sweden, Saudi Arabia, Canada, Italy, and Brazil.

<sup>32</sup>

Rwanda and Nigeria supported the establishment of a 'committee on the prevention of genocide' to monitor implementation of the Convention.

formed cross-regional group will be able to foster an environment in which greater consensus can be found on how to address current challenges related to racism, racial discrimination, and intolerance.

