

# THE ROLE OF THE YOGYAKARTA PRINCIPLES

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The United Nations is a large and complex set of institutions. It has three great mandates: peace and security, development and human rights.

On the human rights of lesbian, gay, bisexual, transgender and intersex people (LGBTI) the UN is divided. In the political bodies many States oppose recognition, but the ground is shifting, if slowly, underneath their feet. In the meantime progress has been occurring in two other parts of the UN system – the treaty bodies and the special procedures. There has not yet been any critical analysis of the use of the identity category ‘homosexual’ or the phrases ‘sexual orientation,’ ‘gender identity’ or ‘gender expression.’

## THE TREATY BODIES

The leading “treaty body” is the UN Human Rights Committee, established to monitor what countries are doing to implement the *International Covenant on Civil and Political Rights*. It is an “expert” body, not a “political” body. It has 16 members. It receives periodic reports from countries, and reviews those reports with country representatives in public sessions. It can also, in some situations, make decisions on specific cases.

The breakthrough in the treaty bodies came with the decision of the Human Rights Committee in 1994 in *Toonen v Australia*. The case challenged an old British-style anti-homosexual criminal law. In 1981 the European Court of Human Rights had struck down the same kind of law in the famous *Dudgeon* case involving the law in Northern Ireland. Decriminalization of homosexual acts had already begun in the West by that time. The old law had been repealed for England and Wales fourteen years earlier.

By the time of the *Toonen* case, anti-homosexual criminal laws were gone in all parts of Australia except the state of Tasmania. With legislative reform already in place in most of the West, the Human Rights Committee would have looked out of touch if it

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supported the old law. It ruled that the criminal provision was in conflict with the right of personal privacy set out in the *Covenant*. It also ruled that discrimination on the basis of sexual orientation was a form of discrimination on the basis of “sex.” The criminal law was in breach of the *Covenant* for that reason as well.

Since 1994 the Human Rights Committee has regularly questioned countries on their laws and policies on sexual orientation discrimination. Other treaty bodies, including the Committee on the Elimination of Discrimination against Women, also has questioned governments on this basis.

The principle that discrimination on the basis of sexual orientation is a violation of the *Covenant* has been upheld in two subsequent cases decided by the Human Rights Committee, *Young v Australia*, and *X v Colombia*. These decisions hold that same-sex couples must be accorded equal rights to those granted to opposite sex couples. Both cases dealt with survivor pension rights.

## **THE SPECIAL PROCEDURES**

The Human Rights Commission (now Council) established the special procedures back in the 1960s, initially concerned with racism and apartheid. Special rapporteurs (or special representatives or independent experts, terminology varies) are appointed to investigate specific issues and report to the Commission and the General Assembly. Some of the mandates are country specific, such as the mandate on human rights in North Korea. Most now are thematic, dealing with issues such as violence against women, extrajudicial executions or the right to health.<sup>2</sup>

In 2001 the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions included in her report information on extrajudicial killings of members of sexual minorities. Some member States in the Human Rights Commission objected to this coverage and forced the deletion of language referring to such matters in the resolution renewing her mandate. But later in the year six thematic special rapporteurs indicated their willingness to receive and consider information on human rights violations against LGBTI individuals, when the violations came within their mandates. The High Commissioner for Human Rights, Mary Robinson, had organized this agreement among rapporteurs.

The motion to censure the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions in the Commission session the following year was defeated. The resolution granting the mandate has, since 2002, continued to authorize a concern with LGBTI cases. This was the first victory in a “political” body for LGBTI rights.

Other special rapporteurs have taken up LGBTI issues, most notably the Special Rapporteur on the Right to Health in his 2004 report.

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<sup>2</sup> There are currently 28 thematic mandates and 13 country specific mandates.

## ACCREDITING LGBTI NGOS

The *United Nations Charter* authorizes the granting of “consultative status” to non-governmental organizations to allow them to participate in the work of the UN. Thousands of NGOs have been accredited. But essentially no organizations representing LGBT individuals or issues had consultative status. Attempts at accreditation were voted down in the Economic and Social Council. This discriminatory pattern was publicly criticized by the Special Representative of the Secretary General on Human Rights Defenders and by the UN High Commissioner for Human Rights, Louise Arbour. In December, 2006, the Economic and Social Council reversed its self and began accrediting such organizations.

This was the second decision by a political body within the UN system to support LGBTI rights.

## THE LESSONS FROM THE BRAZILIAN RESOLUTION

In 2003 Brazil tabled a resolution in the Human Rights Commission supporting LGBTI rights. The motion came as a surprise, and spurred instantaneous opposition from members of the Organization of the Islamic Conference and most countries from Sub-Saharan Africa. Pakistan and other countries moved multiple amendments, blocking any consideration of the motion. The matter was put over to the next year. Brazil did not press for a debate the following year, and in 2005 indicated it was dropping the motion.

Germany had strongly supported the Brazilian resolution and welcomed the fact that leadership on the issue had come from a country outside the Western bloc. Germany was unwilling to take over sponsorship of the resolution, fearing that would label the initiative as Western.

The lesson seemed to be that passage of supportive resolutions in political bodies was unlikely. Even if a bare majority could be attained, the process would make the situation much more polarized than it already was. International diplomacy strongly favors consensus. Everything is negotiated. We will have to wait, it seems, for some support to develop in the two problem groupings – the Islamic bloc and black Africa. Activists say there are no plans for another resolution. They do not want a motion that would force a vote.<sup>3</sup>

New Zealand began a pattern of simply making an annual statement in the Commission, more recently with Norway as the lead state. Many states, members of the Commission/Council or not, have been signing onto the annual statement. 54 States

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<sup>3</sup> At the panel discussion on the Principles with members of the Human Rights Committee in Geneva on October 23<sup>rd</sup>, 2007, panelists were asked if there were plans for another resolution. Panelists said there were currently no such plans. Katrine Thomasen, ISHR, Briefing to the Human Rights Committee on the Yogyakarta Principles, email of October 29, 2007. When France stated in May, 2008, that it would take an initiative at the UN calling for full decriminalization of homosexual acts, Scott Long of Human Rights Watch reacted that forcing a vote would be “catastrophic.” Other activists concurred.

supported the statement in 2006. This shows growing support in the political bodies for addressing LGBT issues, while not forcing a vote and avoiding confrontation. South Korea has signed on. Thailand has not.

## **THE STRATEGY OF THE YOGYAKARTA PRINCIPLES**

At one point, Louise Arbour, the UN High Commissioner for Human Rights, said to representatives from LGBT NGOs that support could come from a high level meeting of academics and UN experts. Her office perhaps could be supportive, but would not be the organizer of such an event. Her caution was understandable. Her support was a stimulus to key actors.

Madam Arbour gradually decided to do more. She attended the large international LGBT Rights conference in Montreal in 2006. Her speech supported LGBT equality rights, relying mainly on the *Toonen* decision. As her term was nearing its end, she authorized a study on sexual orientation rights to be done within her office. For this, of course, she received some criticism.

The idea of a high-level experts meeting fit with a particular pattern in international law. One of the recognized sources of international law lies in the work of prominent scholars and judges. So there is a tradition of academics being recognized as able to define and elaborate international law. Academics and judges could be invited to the conclave.

Since the 1960s, we have had a second group – the “experts” who are either members of treaty bodies or special rapporteurs.

Also since the 1960s we have had the development of a third group, that is representatives of human rights non-governmental organizations. Amnesty International was formed in 1961. Human Rights Watch in 1978. Both were slow to take up sexual orientation issues, but are now committed to including LGBT cases. Now a dozen international human rights NGOs include LGBTI issues in their work.

Early NGOs were often confrontational. Gradually they became better funded, more established and more used to working with governments, intergovernmental bodies and even with business. Government and international intergovernmental organizations also changed, taking human rights more seriously and relying on the knowledge and assistance of particular NGOs. The lack of research support in the UN system made the work of NGOs invaluable for the treaty bodies and the special rapporteurs, creating strong links.

Since late 2006 the Economic and Social Council, as earlier noted, began accrediting LGBTI NGOs. In a sense there was no longer any reason to keep them out, for LGBTI voices were already being heard under a few existing accreditations, and the major general human rights NGOs were now speaking on the issues.

The meeting in Yogyakarta in November, 2006, brought these groups together – academics, judges, UN experts and representatives of NGOs. But was this a UN meeting? No. Was it an academic meeting? No. Was it an NGO meeting? No. None of the above and all of the above.

So who organized the Yogyakarta meeting? The LGBTI NGOs were new on the UN scene, and none had an office in Geneva (where most human rights meetings take place). There was probably only one full-time representative of those organizations based in Geneva at the time.

Two well established general human rights NGOs took the lead – the International Service for Human Rights and the International Commission of Jurists. The movers were Chris Sidoti and Philip Dayle. Michael O’Flaherty, a member of the Human Rights Committee, was a driving force. Other organizations and individuals played supporting roles. The co-chairs were from Thailand and Brazil. Careful organization ensured representation from outside of the West and Latin America – with people from Botswana, China, India, Indonesia, Kenya, Nepal, Pakistan, South Africa, Thailand and Turkey. Participants came from 25 countries.

The location was well planned. As co-chair Sonia Onufer Correa of Brazil said later at a launch in her country, it was south of the equator, in a Muslim majority country and in a jurisdiction ruled by a Sultan. The exact venue was Gadjah Mada University, a leading educational institution.

There have been a number of specialized gatherings, under varying auspices, that have sought to develop standards or principles or define ‘best practices.’ Sometimes their work is very influential. They fill in gaps. They are not in competition with the UN system. They are complementary. They are supportive. Their conclusions may be relied on. Only time will tell if their conclusions will be influential.

We can think of the Paris Principles on National Institutions for the Protection of Human Rights. Thailand followed those principles when it decided on the structure of the National Commission on Human Rights. There are the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights. There are the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights. There are the 1998 International Guidelines on HIV/AIDS and Human Rights. There are the standards developed by the Harry Benjamin International Gender Dysphoria Association (now the World Professional Association for Transgender Health) that are relied on internationally.

The group that put together the Yogyakarta Principles did not want an aspirational document. They did not want to produce a “where we should be going” sermon. The Principles are a statement of what international human rights law says at this point in time on LGBTI issues *if we take the basic principles of universality and non-discrimination seriously.*

We are not starting from scratch. There have been positive developments to guide us, found in the work of the treaty bodies and the special rapporteurs. There is also strong support in the European human rights system, with a dozen leading decisions on sexuality issues. And there has been legislative reform throughout the West and Latin America. We have come a long way even since 2003, when the Brazilian resolution was first proposed.

The basic premise is that lesbians, gay men, bisexuals, transgendered people and intersexuals are all human beings and are equally entitled to human rights. The development of international human rights law has largely ignored them – as racial minorities were once ignored – as women were once ignored – as the disabled were once ignored. So it is logical to state established international human rights principles and suggest how those principles apply to the situation of LGBTI people.

This explains the pedantic, repetitive, boring character of the Yogyakarta Principles. As you read through the document, you can see the logical framework, and how it is applied over and over again. To those unfamiliar with transsexualism or intersexuality, some parts will be new. But the principles are old and familiar. The didactic character of the document is designed to show that no “new rights” are being proposed, only the application of existing principles to the situation of LGBTI individuals. The argument that activists are proposing “new rights” has been a major argument of the opponents, particularly those from the Organization of the Islamic Conference.

The most controversial parts of the Principles may not be the most visible. Adoption is an example. Equality principles were applied to adoption for the first time by the European Court of Human Rights in *E.B. v France* only in early 2008. Here we see the Yogyakarta Principles anticipating, correctly, the proper application of non-discrimination principles.

## **“LAUNCHING” THE YOGYAKARTA PRINCIPLES**

The Yogyakarta Principles were translated into the six official UN languages. Three events were held in 2007 to introduce the principles in a formal way to key parts of the United Nations system.

The first, March 26<sup>th</sup> and 28<sup>th</sup>, targeted the Human Rights Council with two lunch time panel discussions and an evening reception. After the event, seven states specifically referred to the Yogyakarta Principles in sessions of the Council: The Czech Republic, Switzerland, Denmark, Finland, Iceland, Sweden and Norway (the last five in a joint statement).

The second was a lunch time ‘briefing’ with members of the Human Rights Committee in Geneva on October 23<sup>rd</sup>.

The third event was a panel on November 7<sup>th</sup> in New York, at the time of a meeting of the Third Committee of the General Assembly. The November event had sponsorship from eight NGOs and Argentina, Brazil and Uruguay. Former UN High Commissioner for Human Rights Mary Robinson spoke. A statement from the current High Commissioner, Louise Arbour, was read by a representative of her office:

**Human rights principles, by definition, apply to all of us, simply by virtue of having been born human. Just as it would be unthinkable to exclude some from their protection on the basis of race, religion, or social status, so too must we reject any attempt to do so on the basis of sexual orientation or gender identity.**

**The Yogyakarta Principles are a timely reminder of these basic tenets.**

**Excluding lesbian, gay, bisexual, transgender and intersex persons from equal protection violates international human rights law as well as the common standards of humanity that define us all.**

**And, in my view, respect for cultural diversity is insufficient to justify the existence of laws that violate the fundamental right to life, security and privacy by criminalizing harmless private relations between consenting adults.**

**As such, I wish to reiterate the firm commitment of my Office to promote and protect the human rights of all people regardless of their sexual orientation or gender identity.**

Sonia Correa spoke at the November meeting, noting that 2,000 copies of the Principles had been distributed in Portuguese, and Brazilian lawyers had held a seminar to study the Principles. Four launches were held in Brazil in August, 2007, in Porto Alegre, Rio de Janeiro, Nova Igauçu and Sao Paulo.

## **HOW HAVE THE PRINCIPLES BEEN RECEIVED?**

Predictably, the Yogyakarta Principles have been supported by human rights NGOs, by the governments of Western and Latin American States and by expert or functional bodies within the UN system. There have been some critical commentaries by one or two Western pro-family religious NGOs. Generally there has been silence from developing countries in Africa and Asia. No debates on the Principles have taken place within the political bodies of the United Nations.

The skillful handling of the Yogyakarta meeting and of the multiple ‘launches’ of the Principles have meant that the document has achieved a quite respectable visibility. We can note some of the examples of the recognition of the document:

- The November 7, 2007, statement of the UN High Commissioner for Human Rights, Louise Arbour (noted above).

- The endorsement by the European Parliament Intergroup on Gay and Lesbian Rights (also read out at the November event).
- Launches in Brazil with support from a Rio de Janeiro state government department and the Federal Public Attorney's Office in Sao Paulo. The national government is reprinting the Principles for distribution at the First National Brazilian GLBT Conference, June 5<sup>th</sup> to 8<sup>th</sup>, 2008, in Brasilia. 600 people will attend, 60% from civil society, 40% from government agencies.
- Publication of the Principles in International Legal Materials, a quarterly published by the American Society of International Law. The Principles appear in the regular section entitled International Law Documents of Note. This publication makes the document available in major law libraries.
- Reference to the Principles by the New Zealand Human Rights Commission in their November, 2007, report To Be Who I Am, on transgender rights.
- The statement by the Foreign Minister of the Netherlands, Maxime Verhagen, on April 25<sup>th</sup>, 2008, supporting the principles, following support in the parliament.
- A reference to the Principles in the handbook published in January, 2008, on the protection of women and girls by the UN High Commission for Refugees.
- The government statement in the German Parliament in February, 2008, supporting the Principles.

The European Parliament publishes an annual report on Human Rights in the World. The report for 2007, approved in Parliament on May 8<sup>th</sup>, 2008, includes mention of the Yogyakarta principles. In paragraph 141 the Parliament:

**Calls on the Commission and the Council to take European Union initiatives at international level to fight persecution and discrimination based on sexual orientation and gender identity, e.g. by promoting a resolution on this issue at United Nations level and granting support to NGOs and actors who promote equality and non discrimination; ... fully supports the Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity...**

Thomas Hammarberg, the Commissioner for Human Rights of the Council of Europe, strongly supported the Yogyakarta Principles in a statement dated May 14, 2008:

**It is sometimes said that the protection of human rights of lesbians, gays, bisexuals and transgender people (LGBT) amounts to introducing new rights. That is a misunderstanding. The Universal Declaration of Human Rights and the agreed treaties establish that human rights apply to everyone and that no one should be excluded. What is new is there is now a stronger quest for this universal principle to be applied consistently. ... This is the main message of the Yogyakarta Principles on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity. ...**

**I recommend all governments of the Council of Europe member states to study the document and build on its principles through concrete action. In fact, some of**



**the member states have already made them an integral part of their human rights policies. For my part, I fully endorse the Principles.<sup>4</sup>**

On March 19<sup>th</sup>, 2008, Commissioner Naiyana Supapung of the National Human Rights Commission of Thailand stated that the commissioners used the Yogyakarta Principles in their lobbying work on the new constitution in 2007. The Thai Commission has been involved in three public events publicizing the Principles, two at their offices in Bangkok, once at a regional LGBTI conference in Chiang Mai.

We are still at an early stage in judging the impact of the Yogyakarta Principles. The organization of the Yogyakarta meeting and the content of the document are both impressive. They were followed by well organized launches of the Principles at the UN in Geneva and New York in 2007. Public launch events have been held in a number of countries. The International Lesbian and Gay Human Rights Commission is coordinating a series of launches in Asia. They will culminate in a celebration on Human Rights Day, December 10<sup>th</sup>, 2008, back in Yogyakarta. The authors and organizers have added a hopeful buoyancy to the campaigns for reform.

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See [www.coe.int/t/commissioner/viewpoints](http://www.coe.int/t/commissioner/viewpoints).