

A Close and Curious Vote Upholds the New UN Mandate on Sexual Orientation and Gender Identity

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☞ General Assembly resolutions; Mandates; Prejudice relating to sexual orientation or transgender identity; Sexual orientation discrimination; UN Human Rights Council

Abstract

In June 2016, the Human Rights Council established the office of the Independent Expert on Sexual Orientation and Gender Identity (SOGI), a great leap forward to protect and advance the human rights of those under its mandate. However, on November 2016 this progressive development was close to derailed by an exceptional resolution moved by Botswana on behalf of the African Group. This thoughtful article tracks this development, and analyses the voting patterns against domestic protection for human rights protection. Finally, it outlines the obstacles and needed action of this important new office.

On 21 November 2016, the Third Committee of the General Assembly of the United Nations met to determine an exceptional resolution moved on behalf of the African Group by Botswana.

Under former President Festus Mogae, Botswana was an enlightened nation which took forward-looking positions on HIV/AIDS. (It also withdrew diplomatic relations with DPRK (North Korea) following the receipt by the Human Rights Council (HRC) of the report of the UN Commission of Inquiry, which I chaired, concerning violations of human rights and crimes against humanity in that state.)

However, the resolution advanced by the African Group in November 2016 sought to suspend action on an earlier resolution of the UNHRC establishing the office of Independent Expert on Sexual Orientation and Gender Identity (SOGI).¹ The creation of a new human rights mandate on SOGI issues was consistent with a number of steps that had been taken by the HRC in the past decade. The outgoing Secretary-General of the United Nations (Ban Ki-moon) had been a resolute and consistent supporter of initiatives in the United Nations to protect and advance the human rights of persons everywhere, including those fitting into the categories of SOGI vulnerability.² In 2002 resolutions of the HRC and reports of United Nations bodies (such as the UNDP Global Commission on HIV and the Law of which I was also a member)

¹ UN Human Rights Council, Resolution 32/2 Protection against violence and discrimination based on sexual orientation and gender identity, 30 June 2016, UN Doc. A/HRC/RES/32/2, http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/32/L.2/Rev.1, [Accessed 26 January 2017]. The mandate is occasionally described as “SOGIE” issues, and includes gender identity *or expression*. However, as this additional phrase does not appear in the UN resolutions the “SOGI” appellation is retained.

² See Ban Ki-moon, UN Secretary-General video message to the Human Rights Council Meeting on Violence and Discrimination based on Sexual Orientation and Gender Identity, 7 March 2012, available at <http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBTSpeechesandstatements.aspx> [Accessed 9 January 2017].

strongly advocated UN responses to the widespread evidence of abuses of human rights on SOGI grounds, and specifically violence and discrimination against members of SOGI minorities.³

Following the establishment by the HRC of the office of Independent Expert on SOGI issues, Professor Vitit Muntarbhorn (Thailand) was appointed in September 2016 by the President of the HRC to the first mandate-holder.⁴ In November 2016, pursuant to the HRC resolution and his appointment, Professor Muntarbhorn established his office within the Office of the High Commissioner for Human Rights (OHCHR) in Geneva. However, the resolution of Botswana immediately threatened the continuance of his work.⁵

The resolution was based on the contention that “sexual orientation” and “gender identity” were not found explicitly in United Nations treaty or other law. Nor were these grounds accepted by many countries, reflecting their religious beliefs and cultural values. Accordingly, so it was argued, such subjects remained within the sovereign powers of the member nations of the United Nations and were no business of that organisation. It was necessary to halt action on the HRC resolution to allow member countries to consider further the adoption of the new mandate. In terms, the resolution before the Third Committee of the General Assembly was designed to delay implementation of the mandate of the Independent Expert on SOGI ostensibly to permit further the reflection and consideration requested. In form, it proposed an amendment to reject the report of the HRC to the General Assembly containing reference to the SOGI mandate. In reality, it was an attempt to kill the initiative in its tracks and to set back indefinitely the cause of progress in the rights of LGBTIQ persons through the intervention of the United Nations. The consequence of the resolution by Botswana was a furious round of lobbying both by the supporters of the motion and by opponents—amongst LGBTIQ-friendly member states⁶—and a large array of civil society organisations, national and international, that mobilised a joint campaign of resistance.⁷

The vote on the motion before the Third Committee was taken at just before midday in New York on 21 November 2016. It was extremely close. Eighty-four countries voted in favour of the report of the HRC and thus continuation of the mandate. Seventy-seven countries voted against. Seventeen countries abstained. No vote was recorded on the part of several countries which deliberately, or accidentally, were absent or did not vote when the vote was taken.

The purpose of this article is to record a number of features of the vote in the Third Committee of the General Assembly. Formally, it concerned a proposed amendment to draft resolution A/C.3/71/L.46. It is also to record the immediate follow-up to the outcome and to reflect on the size and patterns of the voting for future progress in this area. Finally, it is to note the possibility of further challenges to the SOGI mandate and the need for continuing vigilance.

Commonwealth members’ votes

For several years special concern has been expressed in many quarters about the concentration of hostility on SOGI grounds of a large proportion of the Member States of the Commonwealth of Nations.⁸ The sharp

³ United Nations Development Programme, *Global Commission on HIV and the Law: Rights, Risks, Health*, Report July 2012, pp.44–50.

⁴ The announcement by the President of HRC of the appointment of Professor Vitit Muntarbhorn: <http://www.ohchr.org/Documents/HRBodies/SP/CallApplications/HRC33/LetterPresident30Aug2016.pdf> [Accessed 9 January 2017].

⁵ The draft resolution proposed by Botswana was to “stop action” on the SOGI mandate: http://www.un.org/ga/search/view_doc.asp?symbol=A/C.3/71/L.46 [Accessed 9 January 2017]. See the statement of the African Group on the presentation of the annual report of the United Nations Human Rights Council, delivered by the Ambassador of Botswana: <https://www.outrightinternational.org/sites/default/files/BotswanaonbhlfofAfricanStates.pdf> [Accessed 9 January 2017].

⁶ The result of the vote on the resolution proposed by eight countries in Latin America to prevent the draft resolution proposed by the African Group being adopted: <https://www.outrightinternational.org/sites/default/files/VotingforSOGIreso.pdf> [Accessed 9 January 2017].

⁷ Human Rights Watch, “Civil Society Joint Statement to the Third Committee: Defend Independence of the UN Human Rights Council” (21 November 2016) signed by 799 organisations from 156 countries around the world.

⁸ Commonwealth of Nations, Eminent Persons Group, *A Commonwealth of the People—Time for Urgent Reform* (Perth, October 2011) p.102 (Recommendation 60).

division within the Commonwealth is reflected in the votes by Member States, in their capacity as members of the United Nations. The voting by Commonwealth states was as follows:

In favour of the mandate:

Australia; Bahamas; Belize; Canada; Cyprus; Fiji; Kiribati; Malta; New Zealand; Samoa; Seychelles; South Africa; Sri Lanka; Tuvalu; United Kingdom; Vanuatu (16).

Against the mandate:

Antigua; Bangladesh; Botswana, Brunei; Cameroon; [Gambia]; Ghana; Guyana; Jamaica; Kenya; Lesotho; Malawi; Malaysia; [Maldives]; Mauritius; Namibia; Nauru, Nigeria; Pakistan; Swaziland; St Kitts and Nevis; St Lucia; St Vincent and the Grenadines; Singapore; Uganda; United Republic of Tanzania; Zambia; [Zimbabwe] (26 + 3).⁹

Abstain or no vote:

Barbados; Dominica, Grenada; India; Mozambique; Papua New Guinea; Rwanda; Sierra Leone; Solomon Islands; South Sudan (10).

Votes of the Islamic conference

Virtually all members of the Organisation of the Islamic Conference (OIC) that have majority Islamic populations voted against the mandate except Albania (which voted for). Indonesia (which has no general criminal provision in its Penal Code, derived from the Netherlands) voted against the mandate. There is a more recent criminal provision against homosexual acts in the province of Aceh in Indonesia which observes Shari'a law. A recent proceeding has been initiated before the Constitutional Court of Indonesia requesting the court to provide for a crime in this respect in the general criminal law. This application was purportedly based on constitutional provisions referring to belief in God.

Russian Federation and CIS/China votes

Most of the countries within the sphere of influence of the Russian Federation (or with historical and cultural links) voted against the mandate, including the Russian Federation itself and China (both Permanent Members of the Security Council).

Surprises in this category included several countries in the orbit that voted in favour of the SOGI mandate including: Cambodia; Georgia; Mongolia; Venezuela; Vietnam.

Surprises in the votes

There were a number of pleasant but also some unpleasant surprises amongst the countries voting on the resolution. For various reasons the pleasant surprises included the following votes in favour of continuing the mandate: Bahamas; Belize; Cambodia; Fiji; Kiribati; Georgia; Marshall Islands; Mongolia; Palau; Samoa; Seychelles; Sri Lanka; South Africa; Timor-Leste; Tuvalu; Vanuatu.

However, there were also disappointments in the votes of countries that might have been expected to at least abstain but voted against the mandate: Botswana; Indonesia; Jamaica; Jordan; Kenya; Malawi; Mauritius; Nauru; Surinam; Trinidad and Tobago.

⁹The Gambia left the Commonwealth on 3 October 2013. Maldives withdrew from the Commonwealth on 13 October 2016. Zimbabwe's membership was suspended in 2002 and its government withdrew in 2003. There is a theory that Commonwealth citizens remain members whatever their nations do about membership.

Abstention and non-voting

Amongst the other disappointments in the voting were the decisions of the following countries to abstain or to be absent from the vote: Ecuador; India; Granada; Mozambique; Solomon Islands; South Sudan; Tonga.

Initially, South Africa appeared to support the “no action” resolution of the African Group. However, in the end it voted to continue the mandate. In one view this was unsurprising given the constitutional provisions in South Africa’s post-apartheid constitution providing express protection of the grounds of sexual orientation. However, South Africa treats as important its role as a leading member of the African Group. The abstention of Papua New Guinea (which has generally adopted a hostile stance on this issue) was to be welcomed.

Further analysis

The voting patterns of the nations that sought to halt the mandate of the Independent Expert of the HRC to explore and respond to worldwide violence and discrimination against LGBTIQ people deserve further analysis. A general impression is that countries generally voted consistently with a scale that would be reflective of their overall attention to human rights protection as against a tendency towards a record of human rights neglect and abuse, although there are some exceptions. Likewise, on the scale of observance of the rule of law and access to independent courts, although here too there were exceptions (e.g. Singapore).

Another scale worthy of comparison to the emerging voting patterns would involve a comparison between countries that have generally tackled successfully the HIV/AIDS epidemic and countries that have not. Those that have effective HIV policies in place generally voted to maintain the SOGI mandate of the HRC (with its clear relevance to the pursuit of effective HIV strategies). Those that voted for “no action” on the mandate have generally poor records on HIV strategy. A noteworthy feature of the response to the proposal of the African Group was the extremely swift and effective response to the “no action” move on the part of international and national civil society organisations. A joint statement endorsed by organisations from 157 countries around the world condemned the procedural motion of the African Group. It emphasised the needs for Member States in the United Nations both to respect the authority of the HRC and to uphold the integrity of international human rights law as it relates to violence and discrimination against SOGI minorities.

Denouement

In consequence of the vote of the Third Committee of the General Assembly and confirmation of his mandate, Professor Vitit Muntarbhorn was cleared to continue his important international work without interruption and hopefully with the provision of proper resources from OHCHR to tackle the large, urgent and global character of the mandate. It will be important that the mandate-holder and OHCHR should not feel obliged to curtail their activities to avoid upsetting countries hostile to the mandate. Violence and discrimination on SOGI grounds constitute serious derogations from universal human rights law.

Immediately after the vote in the Third Committee, Professor Muntarbhorn spoke in November 2016 at the International World Conference of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) held in Bangkok, Thailand. He called for a global partnership to clear the key hurdles that stand in the way of achieving full human rights for the LGBTIQ minority. He identified the obstacles and needed action as follows¹⁰:

¹⁰ V. Muntarbhorn, “Equality for All” in a report on the ILGA Conference by Achara Ashayagachat in *Bangkok Post*, Asia Focus, 5 December 2016, p.4.

- **Discrimination:**
Scrap laws that criminalise consensual same-sex conduct and criminalise transgender people on the basis of their appearance. Pending reform, authorities should desist from applying such laws and adopt a moratorium;
- **Pathology reform:**
Reform the classification of lesbian, gay, bisexual, trans and intersex (LGBTI) people as suffering from illness or disorder; work with medical and scientific professionals to delist LGBTI people from such classifications; and end the practice of aversion therapy and conversion therapy (wrongly) aimed at changing people's orientation and identity;
- **Status recognition:**
Recognise in law and practice the desire of people to change their gender identify on official and other documents; discard the condition that they must undergo surgery before they can change gender;
- **Gender-diverse cultural inclusion:**
Identify and disseminate all-inclusive interpretations of religious and other beliefs with space for gender diversity; work with religious, political, community and opinion leaders to advocate respect for and protection of LGBTI people, and enable LGBTI people to associate and participate fully in family life and societal change; and
- **Increased empathy:**
Promote a human rights-sensitive and less binary (or non-binary) educational and socialisation process to address violence and discrimination from childhood onward; prevent bullying from a young age; and involve teachers, parents, communities and young people in nurturing an all-inclusive understanding of those with different sexual and gender identity.

Summing up the purpose of his mandate, Professor Muntarbhorn said:

“... [W]e seek simply to be what we are, in our love, friendship, privacy and intimacy, under the protection of international law.”

On the same page as the foregoing heartening report by the UN Independent Expert supporting the objectives of his office under the HRC were reports of initiatives of global business corporations, educational leaders and cutting-edge initiatives of the United Nations Development Programme (UNDP) and new actions by the World Bank explained by its newly appointed SOGI adviser, Mr Clifton Cortez. However, just to make sure that advocates of reform in Asia keep their feet on the ground, a separate report outlined setbacks and religious opposition to moves towards marriage equality rights and SOGI equality in Taiwan.¹¹ The UN vote on the SOGI mandate in the Third Council demonstrated, once again, that this is a topic of human rights where there is often a step forward, but sometimes the risk of a step back. Systemic sources of human rights abuses based on SOGI grounds need to be identified and corrective action secured with a proper sense of efficiency and urgency. It is also to be hoped that the incoming UN Secretary-General, António Guterres, will show the same leadership on this issue as did the outgoing Secretary-General, Ban Ki-moon. The recent votes in the Third Committee demonstrate that the UNHRC's Independent Expert on SOGI will need all the help he can secure to achieve the global progressive agenda he has outlined.

¹¹ Kensaku Ihara, “Taiwan's march to LGBTI rights stumbles”, *Bangkok Post*, Asia Focus, 5 December 2016.

The saga of the vote in the Third Committee of the General Assembly was not the end of the challenge to the SOGI mandate. Further attempts to close off this new initiative were quickly presented by the same opponents in the plenary session of the General Assembly (on the confirmation of the Third Committee record) and then, as a last resort, in the Fifth Committee of the General Assembly (Budget) and later the plenary session of the General Assembly (on confirmation of the record of the Fifth Committee). The crucial plenary votes were taken respectively on 19 and 23 December 2016. The vote for the amendment to the record of the Third Committee was rejected by the plenary General Assembly on 19 December 2016: 77 in favour; 84 against; with 16 abstentions.¹² The final plenary vote in the General Assembly to amend the record from the Fifth Committee was taken on 23 December 2016. It resulted in 65 in favour; 81 against; with 15 abstentions.

Whilst diplomatic circles do not expect the last challenge to be attempted once again, and whilst the tide of human rights history appears to favour the survival of the SOGI mandate, the hostility and energy of the opponents cannot be underestimated. Their persistence in the face of repeated defeats shows the level of their determination and hostility. This hostility remains to be tackled in their countries and doubtless elsewhere in the world. But on this occasion, the United Nations stayed the course. The General Assembly defended the decision of the HRC. It upheld universal human rights, as reflected in the mandate of the SOGI Independent Expert. The mandate survives. The hard work now begins.

¹² United Nations, General Assembly, Item 63A/71/479; Draft Amendment A/71/L.45.GA, 65th Plenary Committee A/71/479. See also item A/C.3/71/L.52 Amendment to draft resolution A/C.3/71/L.46.