UNITED
NATIONS

E

Economic and Social
Council

Distr.
GENERAL

E/C.12/1996/SR.20
17 May 1996

Original: ENGLISH

COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Fourteenth session

SUMMARY RECORD OF THE FIRST PART (PUBLIC)* OF THE 20th MEETING

Held at the Palais des Nations, Geneva,
on Monday, 13 May 1996, at 3 p.m.

Chairperson: Mr. ALSTON

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* The summary record of the second part (closed) of the meeting appears as document E/C.12/1996/SR.20/Add.1.

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GE.96-16252 (E)

The meeting was called to order at 3.15 p.m.

GENERAL DISCUSSION: "DRAFT OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS" (agenda item 5) (continued) (E/C.12/1994/12)

1. Mr. KOUZNETSOV said that as the Committee approached the concluding stages of its consideration of the draft optional protocol, it was important to decide to what extent its text should take account of the "government factor" and of the experience acquired with previous international procedures. In his view, the second approach should be adopted as far as possible, without overestimating what could be done or the degree to which influence could be exerted over Governments. The Committee should take account of the possible reaction of Governments to individual provisions of the draft optional protocol, but its main task was to ensure that the instrument was commensurate with other international procedures already in effect.

2. It was also important to define those who would be able to use its procedures. There were some legal systems in which one's personal rights must be affected before one could institute legal proceedings; there were others in which it was sufficient merely to want to see law and order maintained and there was no need for one's own rights to be directly affected. He preferred the latter approach, which in his view was more democratic, more advanced and more in keeping with the spirit of the Committee's work. However, it must be borne in mind that NGOs also had the right to use the procedure. Provision should be made for individuals and groups of individuals to submit complaints if they felt that their rights had been infringed.

3. What the Committee was considering was an optional protocol to the Covenant as a whole; it should relate to all parts of the Covenant, and not only to articles 6-15. It was, in any event, fairly easy to predict which Governments would take a positive view of the Optional Protocol and which would adopt a more reserved approach and enter reservations. He agreed that the Committee needed to set aside time at its fifteenth session for an article-by-article consideration of the text, so that it could be submitted to the Commission on Human Rights by the end of the year.

4. Mrs. JIMENEZ BUTRAGUEÑO said she no longer had any concern about the inclusion of articles 1 and 2. The introduction to the draft optional protocol should not fail to take account of the Beijing Platform for Action. However, she was not happy with the wording of the proposed text of article 1 contained in paragraph 18.2 of the draft optional protocol (E/C.12/1994/12), which seemed to give the Economic and Social Council the opportunity to designate another body to carry out the functions assigned to the Committee.

5. Mr. DIENG (International Commission of Jurists) said that the principle of non-discrimination contained in article 2 of the Covenant was fundamental, and he had been somewhat concerned to hear mention made of States being given the opportunity to choose or restrict the scope of certain rights. The Committee should be careful about such a step. Economic, social and cultural rights were still the poor relations of human rights, and more than half of mankind did not fully enjoy them, because of either a lack of political will or the inequality in international relations.

6. The Chairperson had referred to the possible exclusion of NGOs from the complaints procedure, the classification of rights and limitation of their scope, and their justiciability. He had suggested that the Commission on Human Rights might not accept a maximalist position on the optional protocol, but surely the Committee's strength was that it was a body of independent experts, while the Commission was a political body and one that had not always done justice to economic, social and cultural rights. It would be wiser for the Committee resolutely to draft an optional protocol which was not minimalist but realistic and which sought to obtain as much as possible. It was extremely important for the Committee to resist the temptation to retreat. Sometimes regional bodies were bolder than universal bodies; the Committee should be mobilizing all NGOs in order not to betray the aspirations of one half of mankind. Even the African Commission for the Promotion and Protection of Human Rights was now able to receive complaints from individuals and groups regarding violations of economic, social and cultural rights; he cited a recent decision by the Constitutional Court of Benin on the right to work in which the reference had been made to the Covenant.

7. The issue of reservations was even more difficult for the Committee than it was for the Human Rights Committee, because article 2 of the Covenant stated that the rights recognized therein should be realized progressively and to the maximum of available resources. In his view, resources were often not used effectively enough, and the wording of article 2 should be made more specific. The Committee should maintain the revolutionary spirit for which it was renowned. There was no denying that there were still many countries in which economic, social and cultural rights were not justiciable; the Committee should be a source of inspiration for regional human rights bodies and take the revolutionary path that had the support of the NGO community.

8. Mr. AHMED agreed with what Mr. Simma, Mr. Rattray and Mr. Adekuoye had said at the previous meeting, but he had always had doubts about the necessity of the optional protocol and its timeliness. The Covenant was a good instrument which was functioning very well, and, apart from anything else, he doubted whether the Committee could cope with the added work and scrutiny involved in an optional protocol. He had a number of troubling questions to which he had received no satisfactory answers.

9. If those States parties that had presented reports in which they had acknowledged violations of the Covenant were to sign the optional protocol, they would run the risk of being called before the Committee to answer accusations of those violations. The only real option for a country that acknowledged violation of the right to work, for example, would be to refrain from signing the optional protocol in the first place, which left it effectively non-existent. He fully expected that there would be very few signatories, and possibly none at all; if that happened where would it leave the Committee? What inducements or benefits were there to States, which were neither altruistic nor chivalrous but selfish and realistic, when there was the possibility of the optional protocol being manipulated by inimical political hands in order to exert pressure on them? Any disgruntled group of persons with legitimate complaints about violations of rights under the Covenant could bring any country before the Committee at six-monthly intervals. Why would States parties to the Covenant take on the unnecessary

burden of acceding to the optional protocol? It was not absolutely necessary; it was impractical and unrealistic, and fraught with pitfalls. States had serious misgivings about it, and their fears needed to be alleviated. If the Committee simply had to adopt the optional protocol because it needed to win some kind of competition with other human rights committees, it should tread lightly and take the minimalist approach, and not scare off States parties.

10. Mr. THAPALIA said that the sooner the Committee adopted the draft optional protocol the better, if it was to avoid losing its position as leader among the human rights bodies. However, a number of points remained to be considered. Not all States had ratified the Covenant and even some of the States parties had not yet submitted reports. It was not the Committee's business to make States reluctant to ratify the Covenant; the goal was to make it universal. Although it was easy for Governments to make commitments, in the case of the developing countries the fulfilment of their obligations was often made difficult, by their inefficient bureaucracies, heterogeneous societies and hard-pressed economies. Some qualification should be agreed on in the case of NGOs, which should be committed to the development of their national societies, and especially the more vulnerable groups. Finally, priority should be given to the right of non-discrimination.

11. Mr. SIMMA said he had been impressed by some of the arguments put forward by Mr. Dieng but felt he had to play the devil's advocate with regard to access by NGOs. The only solution would be one that called for NGOs to be direct victims before they had access to the individual petitions procedure. Any wider access would lead to an absolute refusal by Governments to subscribe to the procedure. A distinction must be made between legal and political procedures, and in such a context open access by NGOs in the manner outlined at the previous meeting was simply impossible.

12. With regard to the question of the liability of international organizations, especially the international financial institutions, they could not regard themselves as being under no commitment with regard to human rights, because the International Bill of Human Rights informed and guided the entire United Nations system and every institution within it. However, in the context of the draft optional protocol, the matter must be dealt with in a legal fashion: in other words, it must be established beyond doubt that the policy of an international organization was in open and clear contradiction to human rights; it would not suffice if the international organization had through its policy contributed to government action which had in turn violated human rights.

13. The International Law Commission had spent many years debating the circumstances under which States could be held responsible for infringements of international law by other States, and in the course of its deliberations had steered a somewhat restrictive course; if the Committee were to take up the question in its optional protocol it would have to do likewise. From the standpoint of political feasibility, the question of non-discrimination could be made justiciable only with respect to those rights in relation to which a State had subjected itself to the procedure, and not across the board. The acceptability of the optional protocol would be endangered if it encompassed across-the-board non-discrimination.

14. The discussion of the coverage of articles 1 to 5 really turned on whether the right to self-determination could be covered by the optional protocol only in so far as violations entailed very specific infringements of economic, social and cultural rights by individuals who might then bring individual communications. If, by including article 1 in the scope of the optional protocol, the entire question of self-determination was included, there would be a grave danger of the procedure being alienated and used for other purposes. Like Mr. Ahmed, he would see nothing wrong if, instead of developing an optional protocol which was then ratified by no State parties, the Committee developed further its quasi-judicial procedures by focusing on more efficient follow-up to State reports and on methods by which it could more constructively take up such issues as housing problems. Rather than drawing up an optional protocol, handing it to the Commission on Human Rights and then to Governments which would dilute it, the Committee could on its own develop further the incremental approach through which it had achieved a good deal in recent years.

15. Finally, he did not see how it would be possible at the fifteenth session to find time to discuss the draft optional protocol thoroughly; it might be better to reduce the list of reports by one or two so as to create time to conclude a discussion which had been under way since 1988.

16. Mr. TEITELBAUM (American Association of Jurists) said that, despite the obvious risks and difficulties of framing an optional protocol, his organization was strongly in favour of pressing forward with it, basing its provisions on existing international legal provisions, the general principles of international law, the various declarations and conventions already adopted, and international and national jurisprudence.

17. Five fundamental themes had been raised during the discussion. The first was whether or not NGOs should be empowered to act as complainants and, if so, in what circumstances. His organization was strongly in favour of allowing both national and international NGOs to lodge complaints. Concern had been expressed that NGOs might be used by States as an instrument for interfering in the affairs of other States. That was entirely possible, as proceedings in the Commission on Human Rights had demonstrated. Nevertheless, the risk was worth taking in order to allow civil society to participate in the debate on economic, social and cultural rights.

18. Another point at issue was whether States themselves could bring complaints. His organization strongly believed that States, as signatories of the Covenant, had the right to do so. Similarly, given their responsibilities to the international community, the specialized agencies should not be prevented from acting as complainants. Articles 18 and 19 of the Covenant made their position clear.

19. A further question was which rights under the Covenant were to be covered by the optional protocol? His organization could not support the idea of a protocol à la carte. States parties to the Covenant had an obligation to honour all the rights set forth in it and, likewise, the protocol should cover all those rights. States were, of course entitled to establish priorities among rights, but not to the extreme, for example, of depriving their populations totally of one basic right to the benefit of another.

20. The last point to be dealt with was whether the complainant should be under the jurisdiction of the State against which the complaint was brought. His organization thought that he should not. The notion of co-responsibility, rather than being his organization's invention, was founded on several international instruments, including the Universal Declaration of Human Rights, the Charter and the Covenant itself. If the issue was avoided, there was the risk of leaving a wide opening for impunity in situations where violations of human rights were flagrant. In some countries, such violations were the outcome of policies imposed from outside. The requirement that the complainant must be subject to the jurisdiction of the State against which the complaint was brought was not found in most other cases. The developed countries were fast becoming the arbiters in respect of economic, social and cultural rights, but their own responsibilities should be borne in mind. While the rich countries might violate fewer human rights than the poor countries, they must not be allowed to shirk their own responsibility for violations in the latter. The legal solution to the problem was to make the power to bring complaints universal.

21. Ms. BONNER (International Baccalaureate Organization) said that NGOs were sometimes accused of being Western-oriented and out of touch with people's daily lives. Most large NGOs, however, were made up of national organizations which had grass-root contacts wherever they had members. All the international NGOs had national bases of that kind and had developed an effective procedure whereby they took the list of countries with which the Committee would be dealing, contacted their members in those countries and saw that any relevant information was relayed to the Committee through national groups from the country concerned.

22. Mrs. BONOAN-DANDAN said that the Committee undoubtedly needed to do something about a situation in which, every year, more and more NGOs came to make presentations about the violation of economic, social and cultural rights in particular countries. She did not agree that an optional protocol making provision for complaints by individuals about the violation of human rights would drive Governments away from the Committee. Articles 2 and 3 of the draft optional protocol made it very clear who would be allowed to claim that a right recognized in the Covenant had been violated. In her view, a complaints procedure must be adopted, and she did not think that the countries opposed to it would stay away for very long. They would be subject to internal political pressures as well as persuasion from outside. Unless the Committee had the courage to take the risk of preparing an optional protocol, no one would pay attention to it.

23. Ms. PONCINI (International Federation of University Women) said her organization believed that the optional protocol was important and, furthermore that it was essential that it should cover the provisions of article 2 of the Covenant regarding non-discrimination. She had been somewhat concerned about suggestions that the complaints procedure should be limited to persons, or the representatives of persons, identified as victims. While it was true that legal instruments in the form of ILO Conventions abounded for the protection of the economic and social rights of all people, it was also true that the financial crisis and the constraints ensuing from it had resulted in increasing forms of indirect discrimination, in particular against women, who bore the double burden of paid and unpaid work. Given

the difficulty of pinpointing specific victims in that case, it was of the utmost importance to give priority in the optional protocol to the necessity of having gender-disaggregated data for all social and economic indicators. Only that would make it possible to identify the victims of discrimination and thus allow them access to the complaints procedure.

24. Mr. WIMER ZAMBRANO said that while no disrespect was intended towards NGOs, it must be accepted that it was necessary to distinguish between them for the purposes of the optional protocol. The protocol was intended to serve, not as a memorial of the Committee for future generations, but rather as an effective means of promoting human rights through a judicial procedure. Its content would determine whether or not it was effective. In his view, the protocol should cover only those articles, or parts of articles, of the Covenant which were justiciable. For example, article 15, because of its very general nature, should not be included. That was not to deny the validity of the more general rights, but the optional protocol should be centred on rights that could be defended in law.

25. Mr. CEAUSU said that the Committee's aim was to construct an optional protocol that would be acceptable to as many Governments as possible; the purpose of the current discussion was to solve the controversies that had appeared in the process of drafting it. The future usefulness of the protocol should not be exaggerated but nor should its inherent risks. The only real danger of a protocol with too many defects was that it might discredit the Committee.

26. One of the remaining points of controversy was whether NGOs should be accepted together with individuals as having the power to bring complaints. There was no question of denying the right of the NGOs to be involved in the Committee's proceedings, but care should be taken not to diminish the rights granted to individuals under the Covenant by granting human rights to entities not recognized as having such rights. The right of NGOs in the case in point should be to act on behalf of individual victims, but not on their own behalf.

27. On the question which articles of the Covenant should be covered by the optional protocol, it was his belief that articles 1 and 2 should be included. Self-determination, in article 1, was a right of peoples and peoples were made up of individuals. Non-discrimination, in article 2, should be covered by the optional protocol to the extent that it referred to other rights which Governments had accepted.

28. Although grave doubts had been expressed about the usefulness of the text proposed, he hoped that enough Governments would sign and ratify the optional protocol for it to enter into force and make all Governments aware that individuals had the right to complain to the Committee about violations of their economic, social and cultural rights. The Committee should stop speculating about the risks or usefulness of the draft protocol and concentrate on the issues that remained to be solved. He had been very impressed by the work done by the open-ended working group of the Committee on the Elimination of Discrimination against Women on their optional protocol. Some very interesting ideas had been put forward in the course of a frank and serious exchange of views. It was important that the Committee should complete the task of drafting the optional protocol by the next session.

29. Mr. WIMER ZAMBRANO asked how the Committee would ensure that the various written and spoken proposals were taken into account in the final document? He asked Mr. Teitelbaum how his important idea of classifying the different degrees of application of the various rights was to be incorporated in the final protocol, thus enhancing the Covenant?

30. Mr. ALVAREZ VITA stressed that he would fight for the primacy of the law and ethics. He expressed his wholehearted approval of the comments made by the NGOs; they should be fully taken into account when the protocol was drafted.

31. Mr. RATTRAY said he wished to attempt to elucidate the conceptual framework of the draft protocol. He hoped that it would at a later stage be possible to reconcile divergencies and identify areas of agreement. The draft protocol would need to be examined paragraph by paragraph. The Covenant was not intended to be legally binding, but rather to be used as a tool of persuasion. The draft did contain some inconsistencies. Although the Committee was entitled to take an interest in the interim measures taken by Governments following consideration of their reports, States parties were surely not obliged to abide by the Committee's recommendations if the Covenant was not legally binding. What legal weight did those obligations carry? It must be established whether the Committee's views were exhortatory, recommendatory, persuasive or politically compelling. Some flexibility currently existed, since States could claim that they disagreed with the Committee's recommendations or that they did not have sufficient resources to implement them.

32. Although there seemed to be a consensus that the primary object of rights was the individual, NGOs still had a vital role to play in representing persons whose rights had been violated and in helping to identify false claims. Claims examined by the Committee must have exhausted all local remedies, and that must be verified. How was that to be reconciled with a claim made by an NGO which had no locus standi under domestic jurisdiction? The requirement for locus standi on matters of public interest was being relaxed, but much remained to be done. The establishment of a more comprehensive conceptual framework should allay some of the fears expressed regarding the drafting of the protocol. The protocol's scope and access rules must be properly determined, as must its impact on the open, constructive dialogue held with States parties. Once the judicial nature of the Committee's views was determined, the protocol might not appear so Draconian.

33. Mrs. AHODIKPE supported the draft protocol. She was encouraged by the fact that it seemed to have more supporters than opponents. It was, however, dangerous to permit States to select those rights to which the protocol might be applied. The human rights bodies had, after all, always accorded equal value to all the rights contained in the Covenants. She wondered how the Committee should approach confessions of violations of rights on the part of States parties during the consideration of their reports.

34. In reply to Mr. Wimer Zambrano, Mr. TEITELBAUM (American Association of Jurists) pointed out that the title of a document issued by his organization last December might incorrectly have appeared to suggest that there were some rights which should not be covered by the optional protocol. The issue which

had been debated at an earlier date was how the Committee should address violation by omission to implement measures or to legislate. The following wording might be added: "All rights in the Covenant should be the object of recourse in the framework of the protocol." The protocol should accord equal priority to all rights.

35. Responding to Mr. Rattray, he said that the Committee's function must be non-jurisdictional. It would simply make recommendations of a moral nature and note violations of human rights by particular States parties.

36. The participation of NGOs should not be conditional upon the exhaustion of internal remedies, especially in cases of widespread violation of rights. NGOs must be allowed to bring complaints before the Committee without always needing to represent particular individuals.

37. The CHAIRPERSON observed that important new ground had been covered, but numerous issues remained to be addressed. Regarding Mr. Wimer Zambrano's question on procedure, he suggested that the Committee should initially engage in an informal discussion. A consensus must be reached before the finished protocol was submitted to the Commission, or the differences of opinion must be acknowledged in a commentary annexed to a largely unchanged report to give the Commission an indication of the debates which had taken place since the report had first been published in 1994.

38. The proceedings had been characterized by a note of optimism. Speaking in a personal capacity, he said he was committed to the optional protocol. One effect of the protocol would be to increase States parties' willingness to grant domestic remedies. As Mr. Ahmed had pointed out, complaints would only be referred to the Committee if no domestic forum existed, or if it proved to be unsatisfactory, since countries would prefer some matters not to be referred to the Committee. If the optional protocol was adopted, the relatively few complaints examined by the Committee would have considerable repercussions. The Committee had expressed its willingness to proceed, but the competent political organs would have to reach their own decision. In the meantime, the Committee was able to provide an opportunity for debate.

The public part of the meeting rose at 5.15 p.m.