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COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Thirty-second session

SUMMARY RECORD OF THE 18th MEETING

Held at the Palais des Nations, Geneva,
on Thursday, 6 May 2004, at 3 p.m.

Chairperson: Ms. BONOAN-DANDAN

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

SUBSTANTIVE ISSUES ARISING IN THE IMPLEMENTATION OF THE
INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Meeting with the Chairperson-Rapporteur of the Commission on Human Rights
open-ended working group to consider options regarding the elaboration of an optional
protocol to the International Covenant on Economic, Social and Cultural Rights

1. Ms. DE ALBUQUERQUE (Chairperson-Rapporteur of the open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights) thanked the Committee for appointing one of its members to participate in the first session of the open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights. The Committee member's assistance had proved extremely useful. It had enabled the working group to address a number of legal questions related to the elaboration of an optional protocol and to benefit from the Committee's practical experience in the field of economic, social and cultural rights.
2. Over the course of the session, two panels of experts, one composed of Special Rapporteurs and another composed of members of treaty monitoring bodies that had optional complaints procedures, had addressed the working group. The experts had spoken on issues relating to the implementation of economic, social and cultural rights and questions pertaining to their experience with individual complaints. Following their presentation, an interactive dialogue with participating delegations and Committee members had ensued.
3. Debate had focused on the justiciability of economic, social and cultural rights; the nature and scope of States parties' obligations under the Covenant; and the benefits, "value-added" and practicability of an optional protocol to the Covenant.
4. The question had been raised of whether an optional protocol that provided for complaints mechanisms would be the most effective means of enhancing the implementation of the Covenant rights and of providing a clearer definition of those rights.
5. There had been discussion as to what remedies would be recommended to a State party found to be in violation of Covenant rights and on the exact meaning of the formulation "maximum extent of its available resources". Some participants had raised the issue of the potential risk of overlap and inconsistency between the decisions of different organs, given that a number of mechanisms existed for monitoring the implementation of economic, social and cultural rights. There had also been concern that the Committee's decisions might constitute undue interference with government policy-making.
6. Concern had been expressed, too, as to whether the adoption of a protocol with a complaints mechanism might lead to a flood of complaints. The potential lack of predictability in the Committee's views and interpretations, given the vagueness of certain provisions contained in the Covenant, had also caused concern. In addition, the question of international obligations to provide development assistance had been discussed.

7. Technical concerns relating to the content of a future optional protocol, as well as questions regarding the legal status of the Committee, had been addressed in detail. Some participants had questioned whether the Committee would be competent to receive complaints under an optional protocol since, unlike the other United Nations human rights treaty monitoring bodies, it lacked a treaty basis and did thus not enjoy the same legal status.
8. The working group envisaged holding a series of briefings with experts on specific issues related to the discussions that had taken place during its first session. It would be advantageous for those briefings to coincide with other meetings of human rights bodies in Geneva. The briefings would allow for more in-depth discussion of the issues raised during the first session and facilitate substantive and procedural progress.
9. The working group would welcome participation by Committee members in an informal meeting to share their expertise as part of a constructive dialogue between the two bodies. With a view to facilitating cooperation, the Commission on Human Rights had mandated a resource person from the Committee. The group would greatly appreciate the appointment of a member to participate in its next session. It would also be helpful if the Committee were willing to reply to written questions on its work and experience.
10. The CHAIRPERSON said that the Committee would be glad to elect a resource person and would welcome any opportunity to be of assistance and to collaborate with the working group in every possible way.
11. The Committee was keenly aware of the issues raised, as many of them had been under discussion during the elaboration of the original draft optional protocol of 1996. However, the context in which issues relating to international cooperation and technical assistance were debated at present was now considerably more complex.
12. Mr. TEXIER expressed his appreciation for the substantive work carried out at the working group's first session. Progress in the elaboration of an optional protocol was crucial and the group's well-thought out working plan was reason to be optimistic.
13. The Committee members were well placed to provide expert advice, particularly regarding the important question of justiciability. Cooperation between the various parties was the only way to make substantive progress, particularly in the light of the reservations entered by certain States.
14. The provisions of the International Covenant on Economic, Social and Cultural Rights were no less precise than those contained in a number of other human rights instruments. Civil and political rights, for example, had benefited from years of interpretation at the international, regional and national levels. He was convinced that the concerns about a lack of predictability of Committee decisions relating to individual complaints experience would ease over time.
15. Mr. SADI said that the fundamental idea behind the adoption of an optional protocol was to focus attention on the rights contained in the Covenant. While certain parties remained convinced that economic, social and cultural rights were insufficiently precise to establish clear obligations, the Committee was of the view that those rights were concrete concepts and thus enforceable.

16. While the world remained divided as to the justiciability of the Covenant rights as a whole, an increasing number of countries recognized the justiciability of certain core rights. It might therefore be advisable to first consider some of the clearly justiciable rights and subsequently discuss the more contentious areas with a view to progressive realization.

17. The general comments elaborated by the Committee gave a clear indication of its position in relation to a number of core rights. In addition, the Committee's consideration of State reports was indicative of its position on many issues related to the implementation of the Covenant rights, and could be used as a guideline to eliminate doubts as to the predictability of its decisions.

18. Complaints mechanisms existed for many treaty bodies and a flood of complaints had never been a problem in the past.

19. An optional protocol would promote the justiciability of economic, social and cultural rights. Rapid progress in the matter was called for, since many countries had come to recognize that the root of many human rights-related problems lay in the failure to guarantee economic, social and cultural rights. Enforcement of those rights was thus crucial to the promotion of other human rights.

20. Mr. MALINVERNI asked whether the Chairperson-Rapporteur of the working group could describe the prevailing attitude regarding justiciability, the nature of State responsibility and "value-added". Justiciability clearly existed in terms of discrimination and retrogressive measures and he wondered what the outcome of the debate had been in that regard.

21. He would be interested to learn whether States parties favoured adopting a comprehensive approach so that the complaints procedure would cover all substantive rights of the Covenant, or an "à la carte" approach of giving each the possibility of identifying the provisions under the Covenant to which the complaints procedure would apply.

22. Since the idea of individual complaints met with opposition in a number of States parties, he asked whether the interim solution of creating a mechanism to examine collective complaints lodged, for example by a trade union, as provided for in the European Social Charter, had been considered as a possibility.

23. Given the special characteristics of the Covenant rights, it might also be useful to contemplate giving States the option to lodge complaints, particularly in the context of article 1, paragraph 2, of the Covenant.

24. It was always difficult to establish that a "violation" of a certain right had been perpetrated. He wondered whether it might be advisable to change the wording and use more flexible terminology, such as "the State fails to discharge its responsibility to the Committee's satisfaction" or "not all necessary measures have been taken", as such wording might be more acceptable for States parties.

25. Mr. KERDOUN said that many States parties were reluctant to adopt an optional protocol, because they feared assuming the obligation to fully implement the Covenant rights. A number of countries argued that full implementation was to be seen in the context of their economic and social capacity. He asked whether most States were nevertheless in favour of an optional protocol, and whether there were sufficient arguments to convince hesitant States parties.
26. He stressed that certain rights, such as the right to health, the right to education and the right to work, were recognized by Governments worldwide. Existing domestic case law on economic, social and cultural rights could therefore be used to substantiate arguments in favour of the adoption of a complaints mechanism. He asked whether the working group thought the adoption of an optional protocol possible and, if so, within what time frame.
27. He also wondered to what extent such a protocol would be compatible with the Committee's mandate since it did not have the same legal status as other treaty bodies. It was to be seen whether the Economic and Social Council would take the adoption of an optional protocol as a reason to review the status of the Committee.
28. Mr. KOLOSOV asked to what extent, when dealing with individual complaints, Committee members should be guided by, or had the right to incorporate in decisions, the Committee's general comments, and the general comments of other treaty bodies relating to issues that were closely related to economic, social and cultural rights. On the question of what forum would have the legal right to adopt the draft optional protocol, he believed that the Commission on Human Rights should draft the optional protocol, but that only States parties were entitled to make amendments to the Covenant, and therefore to adopt an optional protocol.
29. Mr. TIRADO MEJÍA said it would be useful to incorporate the experiences of the regional human rights systems into the deliberations of the working group. The Inter-American Court of Human Rights, for example, had had experience in adjudicating issues similar to the ones that would arise in a complaints procedure established under the Covenant.
30. Ms. DE ALBUQUERQUE (Chairperson-Rapporteur of the open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights) thanked Mr. Texier for his suggestion that the Committee members could provide expert advice on the justiciability of economic, social and cultural rights. The working group concurred with the view expressed by Mr. Sadi that some economic, social and cultural rights were immediately applicable. She acknowledged that many of the issues being discussed by the working group, such as the insufficiently precise nature of certain provisions, were questions that had already been dealt with by the Human Rights Committee, as they were common to both International Covenants and to other human rights instruments as well.
31. Replying to questions put by Mr. Malinverni, she said that the issue of retrogressive measures had been raised during the first session of the working group and differing opinions had been expressed. A consensus had been reached on the immediate applicability of the principle of non-discrimination and on the justiciability of the obligations to respect and protect economic, social and cultural rights. Opinions had, however, been divided as to whether the fulfilment of those rights should be justiciable. Participants had been in agreement on the

justiciability of economic, social and cultural rights at the regional and national level, but not at the international level. With regard to the question of whether the optional protocol should include an “à la carte” approach, some participants believed that such an approach would encourage the broader ratification and quicker entry into force of an optional protocol, while others were concerned that it would undermine the principle of the universality of human rights. The working group had not yet addressed the question of whether the optional protocol should consider individual or collective complaints with regard to what approach the Committee might take after having examined a complaint, the working group had discussed at length the option of declaring that a State party had committed a violation or had not adequately discharged its duties, but had not reached any conclusions.

32. It was premature to answer many of the questions raised by Mr. Kerdoun. She agreed that more attention should be given to examining the domestic case law of States parties. The working group had considered the question of the legal status of the Committee and was generally of the view that, despite its status as a subsidiary organ of the Economic and Social Council, it should be possible to give the Committee the mandate to examine complaints under an optional protocol.

33. Regarding Mr. Kolosov’s question as to what forum should adopt an optional protocol to the Covenant, perhaps the best solution would be for the draft optional protocol to be considered first by the Commission on Human Rights, then by the Economic and Social Council and finally by the General Assembly. Mr. Kolosov’s suggestion of convening a conference of States parties was another option that could be explored. In her view, it was not advisable to amend the existing provisions of the Covenant since that might establish a dangerous precedent.

34. The working group concurred with Mr. Tirado Mejía’s point about the usefulness of examining the experience of the regional human rights mechanisms. The Commission on Human Rights had, in fact, adopted a resolution that invited the representatives of regional mechanisms to attend upcoming sessions of the working group to explain the functioning of their systems.

35. Mr. MALINVERNI said that the frequently advanced argument that certain provisions were justiciable at the national level, but not at the international level, did not make sense from the legal standpoint. A provision had to meet specific criteria in order to be enforceable, but those criteria were the same whether the provisions were to be enforced by national or international bodies. In many areas, domestic law was more advanced than international law, as demonstrated by the findings of certain high courts, such as those of South Africa and India, for example.

36. Mr. SADI said that perhaps one way of promoting the optional protocol among States parties would be to remind them that the optional protocol would not become effective until a certain number of States parties had ratified it and that only States parties that had ratified the optional protocol would be subject to its provisions.

37. Mr. RIEDEL said that, given the number of developments that had taken place since the drafting of the original optional protocol in 1996 (E/C.12/1996/CRP.2/Add.1), that document would be best used as a reference when the time came to draft the new version of the optional protocol. It was not advisable to renegotiate the provisions of the Covenant as it would be very

difficult to reach a consensus on their content. Furthermore, all the other treaty bodies had adopted individual complaints procedures without having renegotiated the terms of their treaties, so there was no reason why the Committee should not do likewise. An optional protocol would serve as a useful tool for implementing the rights of the Covenant and would lead to an improved definition of such rights, as had been the experience of the Human Rights Committee. That Committee had used its general comments to support the positions it had taken in its complaints procedure.

38. The Committee on Economic, Social and Cultural Rights would have to decide whether the decisions arrived at through its complaints procedure would be judicial or quasi-judicial in nature, keeping in mind that even the decisions handed down by international courts were rarely enforceable and it was usually for States parties to decide whether or not to enforce them.

39. He agreed with Mr. Malinverni that the obstacles to the justiciability of the rights contained in the Covenant were not as substantial as was often claimed. Although an optional protocol might lead to an overlap or duplication of procedures among treaty bodies, the desire to avoid the extra work involved in administering a complaints procedure might provide the needed impetus to streamline the procedures used by the treaty bodies as a whole. It was not likely that the introduction of a complaints procedure would generate a flood of complaints, but if that situation were to arise, the Committee would have to apply strict admissibility criteria. He did not share the concern expressed by some that the introduction of an optional protocol would reduce the policy choices and limit the discretion of States parties, since individual complaints decisions would likely take the form of quasi-judicial recommendations, which left to States parties the decision of whether or not to implement them.

40. With regard to concerns over a potential lack of predictability in the Committee's views and interpretations, he pointed out that a review of the Committee's general comments and those of other treaty bodies would help to offset those concerns. The issue of the legal status of the Committee as a subsidiary organ of the Economic and Social Council was one that would have to be addressed in the event an optional protocol were introduced. An optional protocol should not be adopted by means of an Economic and Social Council resolution, but by a conference of States parties. That would provide an additional incentive to the approximately 50 States that had still not ratified the Covenant to do so if they wanted to have access to the Committee's complaints procedure.

41. The time was ripe for the adoption of an optional protocol. The Committee should use all the means at its disposal to expedite the process; it would require much hard work on the part of the working group, as well as on the part of interested non-governmental organizations (NGOs) and States parties.

42. Ms. DE ALBUQUERQUE (Chairperson-Rapporteur of the open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights) said that the secretariat of the Commission on Human Rights had submitted numerous examples of national and regional case law to the working group for its consideration. The participants in the working group had found it very useful to have practical examples of such experience, which had served as a basis for their discussions.

The meeting rose at 4.30 p.m.