UNITED
NATIONS

E

Economic and Social
Council

Distr.
GENERAL

E/CN.4/Sub.2/1989/SR.13
13 November 1989

ENGLISH
Original: FRENCH

COMMISSION ON HUMAN RIGHTS

SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND
PROTECTION OF MINORITIES

Forty-first session

SUMMARY RECORD OF THE 13th MEETING

Held at the Palais des Nations, Geneva,
on Tuesday, 15 August 1989, at 4 p.m.

Chairman: Mr YIMER

CONTENTS

GE.89-12801/1220B

The meeting was called to order at 4.15 p.m.

DRAFT DECLARATION ON THE INDEPENDENCE AND IMPARTIALITY OF THE JUDICIARY, JURORS AND ASSESSORS AND THE INDEPENDENCE OF LAWYERS (agenda item 10) (continued) (E/CN.4/Sub.2/1988/20 and Add.1 and Corr.1; E/CN.4/Sub.2/1989/23; E/CN.4/Sub.2/1989/NGO/5)

1. Mr. HITAM (Observer for Malaysia) said he wished to clarify the issue of the independence of the judiciary in Malaysia which had been raised by the representative of the International Commission of Jurists at the previous meeting of the Sub-Commission in connection with the dismissal of two judges for misbehaviour.

2. First he would recall that as the Malaysian delegation had had occasion to state at the forty-fifth session of the Commission on Human Rights, the principle of the independence of the judiciary was enshrined in, and guaranteed by, the Federal Constitution of Malaysia.

3. On the question of the dismissal of two Malaysian judges, it should be stressed that the decisions had been made by two tribunals, consisting, as stipulated by the Constitution, of the peers of the judges concerned, including eminent judges from Commonwealth countries with judicial systems similar to that of Malaysia and whose integrity and impartiality both as individuals and collectively was beyond reproach. The Malaysian Government had accepted the decisions of the tribunals that the judges concerned had been guilty of "misbehaviour" in the sense of the Federal Constitution. In the first case, involving the Lord President, the decision of the tribunal had been unanimous and in the second case the finding had been by a majority of five out of seven.

4. Since reference had been made to the fact that both cases had been heard in camera, he wished to make it clear that all the reports were available to the public. In view of the seriousness of cases and of the fact that the tribunals were bound to take their decisions in complete independence, the hearings had to be held in camera in order to avoid interference from outside.

5. Mr. GATAN (Observer for the Philippines), speaking in exercise of the right of reply, said that he wished to put some of the issues raised by the representative of the International Commission of Jurists into their proper perspective.

6. It was not the policy of the Philippine Government to harass, threaten or kill human rights lawyers and Philippine courts were composed of men and women known for their integrity, probity and independence, some of whom were known personally to the representative of the International Commission of Jurists. Furthermore, the Chief Justice of the Philippine Supreme Court had recently instituted a sweeping reform of the judiciary to hasten the course of justice. Similarly, Presidential Decree No. 1850, which gave military courts exclusive jurisdiction over military personnel was being repealed and would be replaced by an act upholding the supremacy of civil courts over military courts. A bill had been submitted to Congress to that effect.

7. Moreover, the Philippine Commission on Human Rights had a large number of lawyers investigating violations of human rights all over the country and their numbers, contrary to what had been alleged, were increasing. There were 30,000 members of the integrated Bar Association of the Philippines, many of whom worked with the Government and with independent groups in investigating human rights cases.

8. Furthermore, the deaths of some human rights lawyers, acknowledged by the Philippine Government, had been thoroughly investigated by the Philippine Commission on Human Rights whose findings revealed that at least two of the victims had been killed for reasons quite unconnected with their human rights activities. The Philippine Government deplored the killings and took exception to the totally unfounded idea that death was the common lot of human rights lawyers in the Philippines.

ELIMINATION OF ALL FORMS OF INTOLERANCE AND OF DISCRIMINATION BASED ON RELIGION OR BELIEF (agenda item 11) (continued) (E/CN.4/Sub.2/1989/31 and Add.1; E/CN.4/Sub.2/1989/32; E/CN.4/Sub.2/1989/44)

9. Mr. van BOVEN introduced his working paper containing a compilation of provisions relevant to the elimination of intolerance and discrimination based on religion or belief and a description of the issues and factors to be considered before the drafting of a further binding international instrument (E/CN.4/Sub.2/1989/32). He said that he had endeavoured to discharge the mandate entrusted to him by the Sub-Commission, so that the latter could submit its conclusions to the Commission.

10. The document should be considered in the light of the stated wish of United Nations policy organs, as articulated by the General Assembly in its resolution 41/120 that "standard-setting should proceed with adequate preparation".

11. The document did not aim to examine in depth the complex substance of freedom of religion or belief; that had already been done in the 1950s by Mr. Krishnaswami and in the 1980s by Mrs. Odio Benito. Like those two Special Rapporteurs, he had used the expression "religion or belief" as including theistic, non-theistic and atheistic beliefs.

12. Stress should be laid on the importance of article 18 of the Universal Declaration of Human Rights, whose provisions were incorporated in a large number of international instruments. Although it was not perfect, the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, proclaimed by the General Assembly on 25 November 1981, had been carefully drafted and could without any doubt constitute the basis for a binding international instrument.

13. The compilation was based only on multilateral instruments and documents; the provisions of bilateral treaties and arrangements had not been included in order to impose certain limits. Neither had reference been made to the provisions of international humanitarian law contained in the four 1949 Geneva Conventions. He had also taken account of the fact, already stressed by Mr. Türk when the right to freedom of opinion and expression was considered, that all human rights were interdependent and could not be considered in isolation.

14. He had thought it would be useful, with a view to the possible drafting of a binding international instrument, to include in his compilation provisions relating to the right to freedom of thought, conscience and religion, the prohibition of intolerance and of discrimination based on religion or belief, the right to bring up children in accordance with the religion or belief chosen by their parents, the right to manifest religion or belief, permissible limitations, religious minorities and groups and the right of some special categories of persons in matters of religion or belief.

15. In Part Two of his working paper, on issues of factors to be considered before any drafting of a further binding international instrument, he had based himself primarily on the provisions of General Assembly resolution 41/120. In that connection, it should first of all be stressed that the process of drafting a new instrument should not in any case serve as an excuse for failure to implement rules already in force and that any new binding instrument must supplement and develop standards already elaborated. Furthermore, Government representatives as well as experts and representatives of non-governmental organizations, including religious movements, should be involved in the drafting process. A dialogue must be established in the search for a common objective and seminars might be organized for that purpose under the Centre's programme of advisory services in the field of human rights.

16. Section B, which dealt with the nature of the instrument, raised complex legal and technical questions, relating to whether it would be advisable to draft a separate convention with its own implementation machinery or to frame a protocol to be attached to an existing instrument, such as the International Covenant on Civil and Political Rights. That would offer advantages in that a supervisory mechanism, namely, the Human Rights Committee, was already stipulated in the Covenant. Furthermore, such a course would also make it possible to recognize that freedom of religion was linked to other fundamental rights and freedoms. Legal complexities might, however, result from the fact that the States parties to the Covenant itself and those States that were parties to the Optional Protocol would not necessarily be the same.

17. The creation of new implementation machinery would involve other complexities arising from the fact that existing treaty bodies faced serious problems as a result of the backlog in the submission of periodic reports by States parties and financial difficulties. Accordingly there had been a suggestion concerning the establishment of one consolidated implementation machinery for all United Nations human rights treaties, along the lines of the supervisory machinery functioning in the framework of the International Labour Organisation. That might be a long-term solution which could well be considered.

18. He then reviewed the guidelines set out in General Assembly resolution 41/120 for developing international instruments in the field of human rights.

19. The first principle, namely that any new instrument should be consistent with the existing body of international human rights law was very important. That condition also stemmed from the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.

20. With regard to the second principle, there was no doubt that freedom of thought, conscience, religion or belief was of a fundamental character as had been reaffirmed in the preamble to the 1981 Declaration. Furthermore, article 18 of the International Covenant on Civil and Political Rights which dealt with that question, was one of the fundamental provisions, mentioned in article 4, paragraph 2, of the Covenant from which no derogation might be made in time of public emergency.

21. The third provision, to the effect that the new instrument should be sufficiently precise to give rise to identifiable and practicable rights and obligations was a basic principle to observe in drafting any instrument. The general comments of the Human Rights Committee on article 18 of the International Covenant would be very helpful in that respect.

22. The realistic and effective implementation machinery that should be provided with any new instrument, according to the fourth principle, might be, as had been mentioned, a comprehensive supervisory machinery, but in the case of an instrument on the freedom of religion, non-legal techniques and methods were also called for, in particular dialogue and education. Broad and intensive programmes of communication and education would have to be launched, within constituencies as well as across national religious and other boundaries.

23. Finally, it seemed obvious that, in conformity with the fourth principle, any new international instrument would need broad international support. Therefore, prior to and during the drafting stages, consultations should be held between representatives of different religions as well as atheists, in order to prepare the ground and mobilize broad support as regards the scope and content of a new instrument.

24. In conclusion, he said that if in the drafting process, the initial input should come from experts, government opinion should also be duly taken into account. The complex issue of implementation merited further study in the light of long-term approaches and solutions. He hoped that the working paper and the various comments on it would help the Sub-Commission to take a decision on the drafting of a binding international instrument on freedom of religion or belief.

25. Mr. KHALIFA said that Mr. van Boven's in-depth study would enable the Sub-Commission to transmit to its parent bodies, particularly the Commission on Human Rights, its views on the steps which could be taken in that area.

26. Part Two of document E/CN.4/Sub.2/1989/32 was a serious analysis of the situation and the arguments for and against the drafting of an instrument on freedom of religion or belief. The question had recently been illustrated by the Rushdie affair which had unleashed passion but which had also made it clear that religious fanaticism was not yet dead at the end of the twentieth century. Of course, it was currently rare for people to torture or kill on religious issues, but hate and intolerance with regard to other religions was always present in men's subconscious and could easily flare up, as that affair had amply proved. Because of a clever and cynical writer who merely wanted to get rich and an elderly man who believed he was serving God by sounding a call for murder, Islam had been taxed with intolerance, but all religions were

intolerant when they were misinterpreted by the ignorant or the stupid. The affair had brought out the extreme complexity of the phenomena of intolerance based on religion or belief.

27. As stated in paragraph 12 of the working paper, one should be aware that religious intolerance were attributable not only to Governments but also to movements, groups and institutions based on religion or belief. That was why he thought that the Sub-Commission was still far from being able to decide on the advisability of drafting a convention or a protocol to be attached to an existing instrument.

28. There was already a Declaration on the subject, and the right to freedom of religion or belief touched on several other rights, such as the freedom of thought and of conscience. The grey areas between freedom of religion or belief and freedom of expression should therefore be studied before specific legal standards were drafted.

29. In conclusion, he suggested that the Sub-Commission should make an in-depth evaluation of the difficulties associated with drafting the proposed instrument at the current stage, before undertaking such work.

30. Mrs. PALLEY said she fully supported what Mr. Khalifa had just said and thought it was not the right time to embark upon the drafting of a new instrument. Before that, it would be necessary to carry out studies to promote a fruitful dialogue between the religions of the world and to safeguard the exercise of that particular right by guaranteeing respect for other human rights which had some bearing on the same areas, namely freedom of expression, opinion and association, and by giving full effect to existing international instruments in the field of human rights.

31. Mrs. MBONU recalled that Commission resolutions 1988/55 and 1989/44 requested the Sub-Commission "to examine the issues and factors which should be considered before any drafting of a further binding international instrument on freedom of religion and belief takes place".

32. Mr.van Boven's working paper (E/CN.4/Sub.2/1989/32) was very useful, not only for the compilation of provisions relevant to the elimination of intolerance and discrimination based on religion or belief appearing in many international and regional instruments but also for its analysis of the subject.

33. Equally important was the Secretary-General's report (E/CN.4/Sub.2/1989/3) containing replies from 22 countries, including Nigeria, on the question of freedom of religion, some of which gave very detailed information on the relevant constitutional and legal provisions. It was not unlikely that many of the States that had not replied might have similar provisions.

34. If the existence of instruments sufficed to ensure automatically the protection of rights, religious intolerance would already have been consigned to the past. Unhappily, that was not the case and the drafting of instruments was only a first step. The next step was their observance by States, and there the situation was very far from satisfactory. The role of Governments was indeed crucial since they could curtail the incidence of violations by individuals or groups under their jurisdiction.

35. If the evidence was that existing instruments were not observed in fact, where was the assurance that a new instrument would not suffer the same fate? She believed that the existing instruments had not proved effective because they had not been provided with effective implemention machinery. Thus, instead of thinking of drafting a new instrument, consideration should be given to putting life into existing instruments. Paragraph 19 (d) on page 29 of the working paper was particularly interesting in that respect.

36. In her view, what was needed was to revitalize existing instruments, especially the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. She was also aware of the need for intensive communication and education campaigns and programmes, including training courses for legislators and persons responsible for applying the law in the field of freedom of religion and belief.

37. Ms. KSENTINI thanked Mr. van Boven for his very useful working paper (E/CN.4/Sub.2/1989/32) and for his most interesting introduction. She wished, in particular, to congratulate him on the objectivity of his study.

38. From the working paper and from the comments which had been made by previous speakers, she concluded: first, that freedom of religion and belief was an extremely complex and sensitive issue; second, that such freedom was linked to the recognition and exercise of other rights and that it was therefore difficult to isolate it and to make it the subject-matter of an international instrument; and third that a new international instrument should necessarily have the effect of raising the level of protection of the right concerned and strengthening the standard which had already been adopted for that purpose.

39. Since the issue was an extremely sensitive one, it would certainly be difficult to finalize an instrument which effectively raised the level of protection. For that reason, she was not much in favour of drafting a new instrument which might even perhaps decrease the protection already offered by other instruments, in particular the International Covenant on Civil and Political Rights which made provision for an international mechanism to monitor and protect that right.

40. Most, if not all, of the international instruments that were already in existence, already included the concept of freedom of religion, and it would therefore be better to leave it to the treaty monitoring bodies to ensure the protection of that right, each in its sphere of application.

41. In addition to the monitoring arrangements provided for in those instruments, there were already systems of institutional protection, such as the Sub-Commission's confidential procedure, which made it possible to take cognizance of violations of the freedom of religion or belief. A Special Rapporteur of the Commission on Human Rights considered cases of the violation of that right throughout the world. Machinery was therefore already available, admittedly ill-matched, but effective enough to consider cases of violation of the right in question and even to ensure its protection.

42. Finally, she noted with interest the idea of consolidated supervisory machinery, such as that in existence in the International Labour Organisation, which would enable the existing machinery to be used. She would take the floor again on the item if the Sub-Commission pursued that idea further.

43. Mr. ROSSI (International Association for the Defence of Religious Liberty) said that Mr. van Boven's working paper (E/CN.4/Sub.2/1989/32) provided much food for thought in respect of the procedure to be adopted in the drafting of an international instrument on freedom of religion or belief.

44. His organization, whose primary objectives were recognition and respect of the right to freedom of religion or belief, wished the international community to draft a convention which would be not merely a relatively effective instrument but would bring a real solution to the problem, in other words, an international convention with a specialized body to monitor its implementation.

45. Freedom of thought, conscience, religion and belief concerned an extremely large number of people and was the source of other freedoms. That freedom, which affected human dignity, was eternal in the sense that it transcended the limits of earthly existence. The man responsible for the creation of the United Nations, President Franklin Roosevelt, had declared on 6 January 1941 that freedom of religion was one of the four freedoms that must be secured throughout the world.

46. It had to be admitted, however, that the right to freedom of religion was being flouted on a large scale. According to statistics published in 1982 in the World Christian Encyclopedia, 50.6 per cent of the world's population, or more than 2.5 billion people in 79 countries, enjoyed only limited religious freedom despite the safeguards laid down in national constitutions. It was true that in the Soviet Union, Poland and Hungary, for example, the situation was improving, but recent years had also witnessed the explosion of unexpected religious fanaticism. It therefore appeared all the more urgent to take effective measures to eliminate intolerance in all its forms so that in every country the law recognized and guaranteed the right to freedom of thought, conscience, religion and belief not only in principle but in its various manifestations. Yet while nearly all States now recognized that right, a large number of them severely limited its realization through legal measures that really constituted forms of intolerance.

47. There was a need, therefore, for an international instrument which would define that right in all its basic implications and which at the same time had binding force. Such an instrument would also help countries to combat religious or ideological fanaticism. It was thus gratifying to note that in 1988 the Sub-Commission had adopted without a vote a resolution recommending to the Commission that it should consider establishing a pre-sessional open-ended working group to draft a convention along those lines.

48. As the drafting of such a convention already enjoyed the support of the socialist countries which were guided by an atheistic ideology, it seemed natural that countries which adhered to a religious faith should also agree to such a project. The convention should be elaborated on the basis of the suggestions made by Mr. van Boven, especially with respect to the drafting process, the standards already adopted by the international community and, in particular, the principles set forth in the 1981 Declaration.

49. Mrs. FARHI (International Council of Jewish Women) said that her organization supported the proposed convention since, in its view, General Assembly resolution 41/120 envisaged an instrument that would maintain or even raise the existing international standards in that area. For that reason her organization had been profoundly disappointed to note that article 14 of the Convention on the Rights of the Child, adopted by the Commission in March 1989, had attached considerably less importance to the right to freedom of thought, conscience and religion, a right proclaimed in article 18 of the Universal Declaration of Human Rights and in article 18 of the International Covenant on Civil and Political Rights, as well as in articles 1 and 6 of the 1981 Declaration. Although the right to profess one's own religion or belief was, according to Mr. d'Almeida Ribeiro, the right most often seriously abused throughout the world and although it was connected with the right to freedom of expression, it was not included specifically in article 14 of the Convention on the Rights of the Child.

50. Caution was therefore needed in considering the question of the merits of the proposed convention, to which her organization could subscribe only if the standards of the 1981 Declaration were maintained, a requirement that Mr. van Boven himself had also deemed essential.

51. The working paper under consideration (E/CN.4/Sub.2/1989/32) also indicated that a satisfactory instrument would have to take into account the complexity of the problem and must enjoy broad international participation. In the view of her organization, political will must also be shown by States, in particular those for which the instrument would entail the introduction of new legal provisions. Lastly, thorough preparatory research would be necessary to find a common ethical ground. The role of the United Nations was precisely to identify principles based on features common to all peoples, regardless of their cultures or ideologies, and to promote a regular and systematic dialogue with a view to defining those principles. That did not mean that consensus should be used by some as a means of exerting pressure to lower existing standards; instead, it must serve the lofty ideal to which everyone aspired.

52. Mr. van Boven rightly emphasized that all religions, and not only the "major" ones, should be associated in that process. While it had been said a few days earlier in the Sub-Commission that excessive uniformatization of the concept of freedom of opinion and expression must be avoided, it could nevertheless be asked on what basis a viable future could be built if there was no agreement on the fundamental principle of freedom of opinion and expression. Did that mean that some were more free than others?

53. Education, which was of course vital in that regard, would have to be geared towards a better understanding of human nature through constant and multidisciplinary analysis. Monitoring implementation of the proposed convention also posed a considerable problem in view of the gulf that separated principles from their practical application. Her organization felt that it would be preferable to make use of the Human Rights Committee rather than to establish a new body, since the right to freedom of thought, conscience and religion should not be treated separately from all the other rights to which it was closely related.

54. The problem would have to be resolved since the right in question was fundamental and indefeasible and article 18 of the International Covenant on Civil and Political Rights could not be interpreted as covering in advance all the most detailed provisions of a convention. Urgent attention must at the same time be given to the problem of treaty monitoring systems, which left much to be desired.

55. Mr. BARSH (Four Directions Council) said that the problem of religious intolerance had always been a concern of his organization, which represented a number of indigenous North American peoples who still practised, or were trying to practise, their own traditional religions. In the past year, the Four Directions Council had transmitted information to the Special Rapporteur of the Commission on Human Rights concerning new threats to indigenous peoples' sacred sites in various parts of the world. The struggle over indigenous lands and the survival of indigenous peoples' religious practices and beliefs were inseparable.

56. Nevertheless, his organization had serious reservations about the drafting of a new convention on religious intolerance. It found it hard to see how a new convention could add, normatively, to article 18 of the International Covenant on Civil and Political Rights, as elaborated by the 1981 Declaration. Experience showed that the precise work involved in drafting a convention generally tended to limit the obligations of States and not to enhance the enjoyment of rights. Greater precision might also be inappropriate in an instrument which dealt with such a diversified phenomenon as religion.

57. The choice was between finding new ways of implementing the 1981 Declaration and concentrating efforts on preparing a new convention, with its associated system of State reports. But as Mr. van Boven had recognized, the establishment of a new system would not necessarily contribute to combating intolerance.

58. It was worth noting that the Special Rapporteur of the Commission on Human Rights, Mr. d'Almeida Ríbeiro, had recently circulated a note verbale requesting proposals for improving the implementation of the Declaration. The fact that relatively few replies had been received indicated not that there was a lack of room for innovation, but that attention had been focused too narrowly on monitoring and reporting mechanisms without considering other possibilities, such as the "inter-religious dialogue" referred to by Mr. van Boven in his working paper (ibid., para. 13). Indeed, it might be felt that the approximately one million dollars that the drafting of a new convention was likely to cost could more effectively be spent on educational and informational programmes.

59. It had been long been established that intolerance and proselytizing increased with internal or external contradictions in ethnic or national communities. In other words, when a community faced a situation of conflict, its convictions solidified. If it was in the majority or had power, it might oppress others; if it was a minority, it would be viewed with increasing suspicion by others. As religious intolerance was generally characteristic of majorities responding to political and economic pressures by consolidating their power over minorities, those pressures must certainly not be ignored.

60. Militant Christianity, from which the world had suffered for a thousand years, was not inherent in the original creed, for example, but had grown in response to the economic and social upheaval in Europe. Christianity had been used by empires, States and interests within States in the same way that other faiths were being used today and still others might be used in future. Religion was an effective method for consolidating power because it could often serve to anaesthetize the awareness of inequalities. It was fundamental, therefore, to distinguish between intolerance as an attribute of religious belief and intolerance as an aspect of the political exploitation of religion. Few religious creeds were intolerant in themselves, but nearly all of them were susceptible to political abuse under certain circumstances. Nazism, after all, had professed to be Christian! To the extent that the roots of intolerance were material rather than intellectual, dialogue alone was not enough and efforts must be focused on the causes and not the symptoms. A further United Nations instrument condemning intolerance would not achieve that purpose.

The meeting rose at 6 p.m.