UNITED NATIONS **E**

Economic and Social Council

Distr.
GENERAL

E/C.12/1996/SR.43
5 December 1996

Original: ENGLISH

COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Fifteenth session

SUMMARY RECORD OF THE 43rd MEETING

Held at the Palais des Nations, Geneva,
on Thursday, 28 November 1996, at 10 a.m.

Chairperson : Mr. ALSTON

CONTENTS

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

Draft optional protocol

GE.96-19384 (E)

The meeting was called to order at 10.15 a.m.

SUBSTANTIVE ISSUES ARISING IN THE IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (agenda item 3)

Draft optional protocol (E/C.12/1996/CRP.2/Add.1)

1. The CHAIRPERSON drew the Committee's attention to the paper which he had prepared on the question of an optional protocol providing for the consideration of communications (E/C.12/1996/CRP.2/Add.1). The document contained a revised version of his 1994 report (E/C.12/1994/12) and took account of points which had been raised by members in the interim and on which consensus had already been reached. He suggested that the Committee should accordingly focus on those issues where the views of members had diverged, as highlighted in the text and for which a number of options were proposed. He hoped that a final revised version reflecting the outcome of the current session's discussion could be prepared in English by the middle of the following week for adoption by the Committee. Although it would be desirable to reach agreement on as many of the pending issues as possible, the Committee could, in his opinion, forward a text to the Commission on Human Rights, indicating remaining areas of disagreement and spelling out the options available for the Commission's further review and decision.

2. Regarding the substance of the draft optional protocol, he believed that although the Committee should not prejudge political decisions, any body which considered itself expert must take account of the political environment. In one much-respected lawyer's view, there were basically two ways in which major advances could be made at the international level. One was by the revolutionary route - when the timing was right and there was overwhelming political support. In the current economic climate, that approach seemed inappropriate. The second was through incremental change, in which the door could be wedged open, allowing for further progress over time. In his view, the Committee should submit a set of proposals that were likely to attract the support of a broad range of Governments committed to economic, social and cultural rights, rather than a solution which it found satisfactory from an academic or activist standpoint but had little prospect of ever obtaining the necessary support. He firmly believed that the time had come for an optional protocol to the Covenant. The delay in the Committee's deliberations - for which he accepted his share of responsibility - had ultimately proved beneficial, since it had afforded members further time for reflection, while creating greater awareness regarding the Committee's proposals in government circles.

3. There were a number of reasons why the Committee needed a complaints procedure, a fundamental consideration being that economic, social and cultural rights had to be treated on an equal footing with civil and political rights. One of the arguments put forward by opponents of an optional protocol to the Covenant related to budgetary constraints owing, inter alia, to the globalization of economies. The Committee should present its proposals for an optional protocol as the appropriate response to those very pressures of globalization and not allow it to be portrayed as an effort to resist or reject such realities.

4. From the Committee's viewpoint an optional protocol was essential as it would allow its work to be taken onto a more specific plane. By dealing with concrete cases in detail, the Committee would have more time to seek information, examine the issues and reach clearer conclusions regarding the situation in respect of the Covenant. The provisions of the International Covenant on Civil and Political Rights could be much more readily applied precisely because such a process had been under way for decades. A further reason was to establish the relevance of economic, social and cultural rights from a governmental standpoint. Domestic courts would never take the Covenant seriously until it had an optional protocol whereby their decisions could be reviewed by another body. As matters stood, Governments failed to view economic, social and cultural rights as a tangible policy constraint on specific issues and that situation had to be changed.

5. In conclusion, he wished to stress that by adopting the revised report the Committee would by no means be taking a final decision on the matter. It would, rather, be submitting a set of general policy proposals on which the views of Governments, United Nations specialized agencies and non-governmental organizations would be sought before the Commission on Human Rights commenced its consideration. The formulations in the revised report could justifiably be regarded as the result of a joint enterprise in which all the Committee's members had participated. He invited members to make general comments on the draft.

6. Mr. ALVAREZ VITA said that he was particularly interested in the question of an optional protocol, having been the original proponent of the idea at the Committee's third session. In that regard, he failed to understand why even the revised report (para. 2) referred to the Committee's consideration of the issue as of only its fifth session. He had already drawn attention to that point in connection with the 1994 report, as borne out by the relevant summary records. Other interested parties outside the Committee had also subsequently commented on the mistake. Why, therefore, had it not been rectified?

7. The CHAIRPERSON said it was his recollection that, although a proposal to draft an optional protocol had been made at the third session, it had not led to any decision owing to lack of support. In his view, paragraph 2 as currently worded, was correct in so far as the Committee had not actually begun to consider the drafting of an optional protocol until its fifth session. He could, however, agree to an amendment along the lines that the question had first been raised at the third session.

8. Mr. ALVAREZ VITA said that he would follow up the matter with the Secretary of the Committee, consulting the records to clear up any doubts that might remain. He thanked the Chairperson for agreeing to his proposal. In general, he found the Chairperson's oral presentation and the text of the draft itself rather too pessimistic and conservative in tone. Some optimism needed to be injected into the proceedings so that the Committee, as an expert body, could work towards achieving a more revolutionary text, which would be more in line with what was required and expected of it. Regarding the action that might be taken on the draft in the Commission on Human Rights, there were points in the text that he found surprising. Rejecting the concept of an inter-State complaints procedure struck him as strange, since it ran counter

to the trend in many other human rights instruments. The fact that States did not avail themselves of the procedure owing to political circumstances was not a good reason for failing to include it in the optional protocol.

9. As to the reference to the canvassing conducted at the World Conference on Human Rights in Vienna, more up-to-date information might be required in order to ascertain how much support there was for the Committee's proposals. Referring to paragraph 25 of the revised report, he expressed surprise that, unlike in other similar agreements, no mention was made of the principle of universal jurisdiction, which was extremely valuable in the protection of human rights. That constituted a limitation since the area of competence was bounded by the territory of the State where the violation was committed. He wondered if other members shared his concern regarding such matters.

10. As for the communications that would be received under the optional protocol, it might be useful to invite the member of the Human Rights Committee responsible for communications to attend a meeting of the present Committee and provide it with more information on the subject. For there was a body of case law that the Committee would undoubtedly find interesting.

11. Mr. KOUZNETSOV said that the draft text admirably reflected the issues on which agreement had been reached. He was not opposed to further general discussion - it was not surprising that members, as experts in their field, held strong views on particular issues - but the Committee had been talking about an optional protocol for five years and there was general agreement that it was worthwhile. He therefore thought that the Committee should start considering specific questions so that a text could be prepared in time for the next session of the Commission on Human Rights. There was no need to strive for full consensus. Making clear that there had been differences of opinion, albeit minor ones, within the Committee would not invalidate the text.

12. Mrs. JIMENEZ BUTRAGUEÑO praised the realism of the draft text. Her inclination would be to adopt a pragmatic approach and to go through the text paragraph by paragraph. On the question of when the optional protocol had first been considered, she recalled that her interest in the protocol had preceded her involvement with General Comment No. 6 (1995) on the economic, social and cultural rights of older persons. She suggested that the Committee should be recorded as having been interested in the protocol since its third session.

13. Mr. GRISSA said that he had doubts as to the practicality of an optional protocol that gave individuals the opportunity to communicate with the Committee. Economic rights were different from other rights: there was nothing in the draft to stop a significant number of the 20 million unemployed in Europe, for example, from protesting that their Governments were not providing them with work.

14. Mrs. BONOAN-DANDAN said that the draft text was such a careful reflection of all the opinions expressed within the Committee that there was a danger of its main thrust being weakened. She agreed with Mr. Alvarez Vita

that the text could be bolder, and therefore thought that there should not be an insistence on practicality at all costs; it was more important not to dilute the original spirit of the Covenant.

15. Mr. WIMER ZAMBRANO said that the text, carefully drafted as it was, should not be labelled either radical or conservative. He welcomed it as an excellent overview that fully reflected the members' diverse views. If the right of communication was to be extended to individuals, it was important that the Committee should define what practical effect the optional protocol could have. In that context, he wished to reiterate his long-standing view that the Committee should undertake a classification of rights, because one right might be more or less crucial than another, more or less easily categorized or more or less justiciable.

16. Mr. SIMMA agreed with Mr. Kouznetsov that there was no point in covering old ground. Over the years a consensus on the desirability of an optional protocol had emerged. The important question was to agree on the approach to be adopted. Temperamentally, he would prefer the “revolutionary” approach, but his discussions with diplomats from various countries had convinced him that such an approach would be unacceptable in the current climate of opinion. He therefore favoured the “incremental” approach. In that regard, the Committee would have to decide whether or not to follow the Additional Protocol to the European Social Charter in being open to communications on a collective basis, rather than from individuals, and also in referring to a failure to ensure the satisfactory application of a provision rather than to a “violation”. The weaker wording was, he thought, to be explained by the fact that the Additional Protocol took economic, social and cultural rights less seriously than civil and political rights. He would prefer to retain “violations” for the sake of consistency.

17. Mr. MARCHAN ROMERO applauded the Chairperson's thoroughness in detailing the various strands that would enable the Committee to formulate a politically viable optional protocol. That was the great challenge confronting the Committee. The text would have to carry States parties with it. There was no point in a perfect text if it could not be implemented. The criterion should be neither conservatism nor radicalism, but realism, combining the theoretical and the specific. Individual sensitivities should, however, be taken into account. He recalled the Committee's consideration of one country report, in relation to which a member had objected to the use of the word “violation” to characterize the treatment of children in that country, on the ground that the treatment concerned had occurred in a private capacity. He added that he could not agree with Mr. Wimer Zambrano that rights should be categorized; although it was easier to identify some more than others, it was dangerous to try to put them in order of priority.

18. Mr. CEAUSU said that the draft text took a middle way, between the more radical approach advocated by some and the blander approach favoured by others. The result would surely be accepted by the majority of the Committee. He agreed with Mr. Marchan Romero that the optional protocol should be acceptable to a large number of States. The Committee should adopt a responsible attitude and produce a politically viable draft. To do otherwise would be harmful to the cause of human rights. With regard to the question of whether individuals could address allegations, communications or complaints to

the Committee or whether that possibility should be restricted to groups, he suggested that States could be given the right to choose which articles they wished to accept, and that the Committee should act on complaints based on those articles only when all domestic remedies had been exhausted. He recalled that General Comment No. 3 (1990) on the nature of States parties' obligations stated that there were a number of articles - namely 3, 7, 8, 10, 13 and 15 - that could be immediately applied by judicial bodies. For the sake of consistency, that distinction should be retained, thus enabling individuals to appeal directly to the Committee on justiciable rights.

19. That approach would be satisfactory for those members who had reservations about articles 11 and 12, for example, and would also respect the spirit of the Covenant. Indeed, he would be in favour of including in the Preamble to the optional protocol a reference to article 2, paragraph 1, of the Covenant in order to make the connection between the two crystal clear. Allowing States to choose which articles they supported would also allay the concerns of members who feared that the Committee might be overwhelmed by a tide of individual communications. The draft text provided a good basis for amendments that would elicit the support of as many members of the Committee as possible.

20. The CHAIRPERSON reassured previous speakers that in interpreting the optional protocol the Committee would follow the same jurisprudence as it followed in its consideration of reports submitted by States parties, without requiring any State party to take measures in situations where resources were simply not available. The Committee had never insisted that States parties had an obligation to provide every single individual with work, for example, or with adequate housing. On the other hand, it had emphasized that States parties should refrain from carrying out forcible evictions.

21. Although the Committee had in the past attached greater importance to some rights than to others, no hierarchy of rights could be drawn up. Mr. Ceausu's suggestion in that connection was very attractive, but the problem was that almost every right had both a justiciable and a non-justiciable aspect. For instance, in a case in which a Government demolished the homes of 100,000 persons without providing them with alternative accommodation, the Committee would no doubt find that the right to housing had been violated, but it would not reach such a conclusion in a case in which a Government had failed to upgrade a basically adequate housing stock. The same was true of the right to health care. The Committee was opposed to any action tending to reduce the provision of basic health services, but it was as unlikely that the Committee would expect the Government of a developing country to provide kidney dialysis machines for all patients that could benefit from them as it was that the Human Rights Committee would maintain that in the contemporary world any prison conditions that did not include access to television, telephone and the Internet were inhuman. Governments, however, might have misgivings regarding what action the Committee might take. It was therefore imperative that it should not act irresponsibly, because if it did so its findings would be ignored and it would quickly become discredited. If the Committee had been successful thus far in its work, that had been because in its decisions it had consistently taken account of what was possible and of what was not.

22. Mr. SIMMA said the average diplomat's view was that an optional protocol to the Covenant would make no sense because economic, social and cultural rights were not justiciable, especially in developing countries. Even in a highly developed country such as Switzerland, the Supreme Court had ruled that the introduction of fees for university and some forms of secondary education was not a justiciable issue.

23. The question then arose as to whether the Committee should adhere to a "black-and-white" view of the justiciability of economic, social and cultural rights. Mr. Ceausu had stated that an important number of those rights were immediately justiciable. However, in considering the question of accession, Governments were aware that the range of rights that might be violated in the case of the International Convenant on Economic, Social and Cultural Rights was broader than in the case of the International Covenant on Civil and Political Rights and that there was consequently a danger that the present Committee might arrive at some surprising decisions. The Committee should therefore determine which economic, social and cultural rights could be immediately applied. In that connection, it was noteworthy that although article 11 of the Covenant was the least susceptible to justiciability, some of the very first cases in which the Committee had found that Governments were failing to comply with their obligations had been in respect of that article. Consequently, while the Committee itself could not designate a priori which articles of the Covenant were more and which were less justiciable, States parties could be given some latitude of choice.

24. Mr. GRISSA said that no consensus had ever existed on the subject of the optional protocol for the simple reason that he had always differed from all of his colleagues. A basic fact of economic life was that unlimited demands were made on limited resources, with the result that priorities had to be established. Unfortunately, the Committee had no means of determining resource availability. In the case in which people had their lawfully occupied homes demolished by the authorities, the courts might hear claims for compensation or alternative accommodation, but not for enforcement of a vague "right" to housing. Even if a Government did have faith in the Committee, other bodies would not know what were the limits to such faith and might ask the Committee to do more than that faith - which might well change as the Committee changed - permitted it to do. In any event, Governments had their own problems, and thus their own criteria and value judgements.

25. Mr. ADEKUOYE said that many individuals who were aware of the Covenant's existence were under the erroneous impression that the Committee had power to compel Governments to remedy situations by taking specific action. The true picture, however, was quite different, especially as far as the issue of resource availability was concerned. If States parties had doubts regarding the justiciability of various provisions of the Covenant, many would probably feel reluctant to accept an optional protocol to it. The situation was particularly difficult in developing countries, where Governments were expected to realize all kinds of rights for which the means were not available. In some cases, the right to free universal primary education had had to be sacrificed to the requirements of structural adjustment. He wondered what the Committee's attitude would be, for example, to a case in which a Government, having printed large amounts of money in order to win an election, then attempted to stabilize the economy through policies entailing

substantial unemployment. All in all, an optional protocol would be premature in most cases, although the Committee might consider establishing rules to be applied by some developed countries having sufficient resources.

26. Mr. WIMER ZAMBRANO said he assumed that all Committee members were in favour of an optional protocol in principle, their differences being due to varying assessments of how to make it acceptable to States parties. It was generally thought that any hierarchical classification of the rights set forth in the Covenant would weaken the instrument as a whole, but in fact the opposite was true. Although the rights proclaimed in article 15 might conceivably be justiciable in many years time, at present they represented only a desirable manifestation of goodwill. Other rights, however, were justiciable, and violations of them could be active or passive. While he was aware that some members of the Committee were opposed to an optional protocol covering all the rights set forth in the Covenant and while he did not wish to assert that some rights were more important than others, he considered that it should not be too difficult to arrive at a flexible, straightforward classification that would reduce the element of subjectivity in the Committee's work. Mr. Ceausu's suggestions were very helpful in that connection. In any case, it would be necessary to establish rules to be applied in actual practice.

27. The CHAIRPERSON said that the Committee attached great importance to the achievement of a consensus, especially in the adoption of conclusions with respect to specific countries. There were, however, limits to the need for consensus, as in the matter under consideration, in which the Committee's work should not be held up because one or two members did not share the majority view. The report to be transmitted to the Commission on Human Rights would contain a number of options. The document which he had prepared did not reflect his own preferences but the diversity of views which had been expressed. At the current stage, it was important that members having proposals to make should submit them in the form of specific texts.

28. Mrs. AHODIKPE observed that much time had already been devoted to the subject under consideration. Economic, social and cultural rights were undoubtedly difficult to quantify, but the Committee had the necessary expertise to assess whether or not they were being implemented. It should now move on in its discussion.

29. The CHAIRPERSON said that he did not wish to discuss the issue of an inter-State procedure in the absence of Mr. Alvarez Vita, who held strong views on the matter, and requested the Secretary of the Committee to seek him out. Summarizing the main points made in the relevant part of the draft report (E/C.12/1996/CRP.2/Add.1), he noted that in practice the inter-State procedures under other United Nations instruments had virtually never been used, not even in ILO. Moreover, Governments would probably find the provision of such a procedure unattractive, regarding it as a means whereby one State could submit a complaint against another for political or other reasons. The Committee might merely indicate that the majority of its members were in favour of omitting such a provision, although others had expressed a different opinion, thus leaving it for the Commission on Human Rights to decide. In the continued absence of Mr. Alvarez Vita, he invited comments from other members.

30. Mr. SIMMA said that it made no sense to include a procedure that was highly unattractive to States in the optional protocol. Although complaints mechanisms had been included in other United Nations instruments, they had never been used. A number of cases involving such a procedure had been brought under the European Convention on Human Rights, but they had all had a substantial political content, as with Greece v. the United Kingdom over Cyprus, Austria v. Italy over South Tyrol, and Ireland v. the United Kingdom over the behaviour of British troops in Northern Ireland. The problem could be mentioned, but it should be left to the Commission on Human Rights to decide whether or not to include such a provision.

31. Mr. MARCHAN ROMERO said that the Committee had to be realistic. Introducing the inter-State procedure would merely provide States with a ready excuse for not subscribing to the protocol. His position differed slightly from that of the previous speaker, since he felt that the report to the Commission on Human Rights should indicate the Committee's preference for the provision not to be included, and should not simply leave the matter open. The Committee had reached a stage in its deliberations where, in his view, it could give a clear opinion.

32. Mr. WIMER ZAMBRANO observed that the majority was clearly not in favour of the procedure being included, but that posed the problem of how to take account of dissenting views. He would agree with those who felt that the issue should not be mentioned at all, and that no other body should be asked to resolve it on behalf of the Committee. Perhaps those dissenting could come up with a formula along those lines. If not, the customary wording “A majority considered that ...” should be used.

33. Mr. KOUZNETSOV said that the report could state that a majority of the experts opposed the inclusion of an inter-State procedure. His position was not based on political considerations of any kind but on the fact that States evidently did not yet feel the need for such a procedure in practice. That being the case, it might be even simpler not to mention the procedure at all in the report.

34. The CHAIRPERSON remarked that the Commission itself provided the appropriate venue for inter-State complaints in relation to economic and social rights. He summarized the discussion held thus far on the inter-State procedure for the benefit of Mr. Alvarez Vita, noting the agreement that account should be taken of minority views, and invited him to state his position.

35. Mr. ALVAREZ VITA said he was pleased to learn that account would be taken of minority views. As members would recall, during the drafting of the Committee's rules of procedure, he had been one of those in favour of reflecting dissension. Consensus, as understood in the United Nations, was surely not true consensus while any one individual disagreed. For the reasons already stated earlier, he was in favour of the inclusion of the inter-State procedure. He was working to promote human rights and political questions were not his concern. That position should be duly reflected.

36. The CHAIRPERSON said that the term “consensus” nearly always masked differing viewpoints and emphases, and could even embrace extreme reluctance

in some members. Consensus was usually reached in the belief that it was desirable for the Committee to present a unified position in its concluding observations. However, it had been agreed that a different approach should be adopted for the current exercise, whereby viewpoints on issues that were clearly contested would be reflected accurately and as members wished.

37. Mr. ALVAREZ VITA said he was anxious that the silence of those members who had not spoken should not be misinterpreted: they might simply not have had enough time to acquaint themselves with the text in their own language and to formulate a considered opinion. To those who had spoken against the procedure, he would say that he was open to persuasion, should any member wish to discuss the issue informally.

38. Mr. WIMER ZAMBRANO assured Mr. Alvarez Vita that although no expert member had shared his viewpoint, they had all felt it should be reflected. There was no need for informal discussion.

39. The CHAIRPERSON asked whether, in the light of the discussion, the Committee could approve the wording: "The great majority of members of the Committee considered that an inter-State procedure would not be appropriate at this stage in the context of such a proposal. One member disagreed strongly with this viewpoint."

40. Mr. ALVAREZ VITA said the statement left out the fact that others had not expressed an opinion.

41. The CHAIRPERSON said that members not taking the floor were assumed to share the majority view.

42. Mr. SIMMA remarked that he had always understood the words "a great majority" as implying the existence of a minority consisting of more than one person. He proposed an alternative formulation: "With the exception of one expert member, the Committee was of the view that ...".

43. Mrs. JIMENEZ BUTRAGUEÑO, recalling that the Committee had always sought to achieve consensus, said that she had not voiced her opinion in Mr. Alvarez Vita's absence but now wanted it to be known that, despite usually sharing his views, she was against an inter-State procedure and felt that such a provision should not appear in the draft protocol. She appealed to Mr. Alvarez Vita's customary flexibility and urged him to reconsider his position.

44. Mr. ADEKUOYE said that silence surely indicated lack of objection. Although it could be stated in the report that one member had not agreed, he appealed to Mr. Alvarez Vita to allow the Committee to proceed by consensus.

45. Mr. GRISSA agreed with the Chairperson that consensus was less vital to the current issue than to country observations. He would therefore go along with the wording proposed by Mr. Simma.

46. The CHAIRPERSON, noting that agreement, said that he wished to take the opportunity to express his appreciation to Mr. Grissa for his willingness to permit the strong majority view to go forward for the sake of consensus during the consideration of concluding observations. That had always been crucial to the Committee's effectiveness.

47. Mr. CEAUSU proposed the formulation: "While one member insisted that the protocol cover also ..., this view was not supported by other members of the Committee."

48. Mr. ALVAREZ VITA welcomed Mr. Ceausu's proposal, which should enable the Committee to arrive at a consensus on that particular wording. Regarding the substance of the matter, he was still open to dialogue. He would appreciate clarification of the legal reasons why the Committee did not wish to include a provision that had been accepted by other treaty bodies. That omission would lessen the force of the protocol. Also, he failed to see the logic behind Mr. Simma's interpretation of the term "majority", which contained no information as to the size of the minority; it would be useful to establish which members had not expressed an opinion.

49. The CHAIRPERSON asked whether there were any objections to Mr. Ceausu's proposed formulation: "While one member insisted that the protocol should contain a procedure allowing for inter-State complaints, this view was not supported by other members of the Committee."

50. Mr. ALVAREZ VITA remarked that Mr. Ceausu's own wording had been slightly different, and somewhat less blunt.

51. After a procedural discussion in which the CHAIRPERSON, Mr. SIMMA and Mr. ALVAREZ VITA took part, Mr. MARCHAN ROMERO proposed that the matter should be dealt with informally.

The meeting rose at 1 p.m.