



**Economic and Social
Council**

Distr.
RESTRICTED

E/CN.4/Sub.2/1988/SR.35/Add.1
19 December 1988

ENGLISH
Original: FRENCH

COMMISSION ON HUMAN RIGHTS

SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND
PROTECTION OF MINORITIES

Fortieth session

SUMMARY RECORD OF THE SECOND PART (CLOSED)* OF THE 35th MEETING**

Held at the Palais des Nations, Geneva,
on Thursday, 1 September 1988, at 10.55 a.m.

Chairman: Mr. BHANDARI

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* The summary record of the first part (public) of the meeting appears as document E/CN.4/Sub.2/1988/SR.35.

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The closed meeting was called to order at 10.55 a.m.

CONSIDERATION OF DRAFT RESOLUTIONS AND DECISIONS (continued)

Draft resolution E/CN.4/Sub.2/1988/L.28 (Situation in Haiti) (continued)

1. Mr. CHERNICHENKO said that he had no objection in principle to draft resolution E/CN.4/Sub.2/1988/L.28, which he was prepared to adopt as such under the public procedure since no one contested the fact that the situation in Haiti was characterized by flagrant and mass violations of human rights. However, that draft resolution created a procedural problem, in so far as the situation in Haiti had already been the subject of a decision taken on 26 August at a closed meeting. To avoid any duplication, he thought that the Sub-Commission should reconsider that decision and not transmit the communications concerning Haiti to the Commission. Rule 55 of its rules of procedure, which stated that when a proposal had been adopted or rejected, it could not be reconsidered at the same session unless the Sub-Commission so decided, allowed for that possibility.
2. Mr. EIDE felt that the procedure suggested by Mr. Chernichenko was very sensible and he recalled that the problem of double jeopardy had already been discussed in the Sub-Commission. That problem also applied in the case of one other country, Iraq, and it might be better to adopt the same procedure in both instances. However, the members of the Sub-Commission would undoubtedly want to discuss the situation in Iraq beforehand. That being so, he wondered whether the Sub-Commission might not be able to hold another public meeting in order to adopt - as presumably it would - draft resolution E/CN.4/Sub.2/1988/L.28. That would mean that the confidential decision it had taken to transmit the communications concerning that country to the Commission would be annulled, thus avoiding the problem of double jeopardy. It could follow the same procedure for Iraq.
3. Mr. ILKAHANAF pointed out that the Sub-Commission had examined the confidential communications relating to the situation in Haiti after draft resolution E/CN.4/Sub.2/1988/L.28, of which he himself was a co-sponsor, had been prepared. The Sub-Commission therefore found itself in a very difficult situation and its decision would affect its future work.
4. The CHAIRMAN said he was not sure that rule 55 of the rules of the procedure was applicable in the present case.
5. Mr. EIDE wondered whether the Sub-Commission should not try to develop customary law. Some way out of the impasse certainly had to be found. Pending the elaboration of an adequate procedure at the next session, the Sub-Commission could perhaps already make a start in breaking new ground.
6. Ms. WARZAZI said that the Sub-Commission was not meant to introduce innovations in the procedures guiding it or attempt to institute customary law. She was inclined to accept the solution suggested by Mr. Joinet at the public meeting with regard to the draft resolution concerning Haiti, provided that it was done on an exceptional basis and that the same procedure was not applied in the case of the draft resolution concerning Iraq.
7. Mr. AL KHASAWNEH said that Mr. Eide's proposal had no basis in the rules of procedure. The Sub-Commission had already taken decisions in respect of

both Haiti and Iraq, namely to transmit the communications concerning those two countries to the Commission. He and other experts had indicated at the time that they would go along with that decision, provided the issue of double jeopardy was avoided. The only solution was therefore not to take a decision under the public procedure.

8. Mr. DIACONU thought that it was difficult for the Sub-Commission to take a decision at a public meeting on the draft resolution under consideration since the results of the vote at a public meeting were likely to cancel the decision already taken at a closed meeting. He too felt, therefore, that the decisions taken should be respected and, accordingly, that no decision should be taken at a public meeting on a situation which had already been the subject of a decision taken at a closed meeting.

9. Mr. van BOVEN said that Mr. Chernichenko had raised a difficult problem. Because of the organization of work, the Sub-Commission examined some situations first under the confidential procedure and then under the public procedure. All the same, he failed to see why there should be any objection to the idea of taking a decision at a public meeting on a draft resolution on which a decision had already been taken at a closed meeting. The public procedure responded to the urgency of certain situations and to public opinion. He therefore proposed that the Sub-Commission should continue to examine the draft resolutions concerning the situation in Haiti and in other countries at its public meetings and should take action in them, even if that meant meeting again afterwards privately to review the decisions it had taken previously under the confidential procedure.

10. Mrs. DAES said that the Sub-Commission was the ruler of its own practice and could at any time develop a customary law to make up for the absence of ad hoc rules. She therefore supported Mr. Eide's proposal.

11. The CHAIRMAN pointed out that customary law could not overrule substantive law.

12. Mr. YIMER recalled that, under rule 55 of its rules of procedure, the Sub-Commission could not reconsider proposals already adopted or rejected unless a motion was introduced to that effect, in which case permission to speak was accorded only to two representatives opposing the motion, after which it should be put to the vote immediately. If no such motion was introduced, the discussion would be irregular and should be ruled out of order.

13. The CHAIRMAN said that he would prefer the Sub-Commission not to take any action likely to dilute the powers conferred on it by Economic and Social Council resolution 1503 (XLVIII), which constituted one of the foundations of the Sub-Commission's very existence.

14. Ms. PALLEY, speaking on a point of order, wished to know whether Mr. van Boven had introduced a formal motion.

15. Mr. ALFONSO MARTINEZ, speaking on a point of order, said that in his view no motion had been introduced under rule 55 of the Sub-Commission's rules of procedure. There was a list of speakers, on the other hand, and it should be respected.

16. Mr. van BOVEN, speaking on a point of order, formally proposed that the Sub-Commission should continue its consideration of draft resolution E/CN.4/Sub.2/1988/L.28 as it stood at a public meeting and that it should meet again privately after the public meeting to reconsider certain proposals in accordance with the procedure set out in rule 55 of the rules of procedure.

17. Mr. EIDE, speaking on a point of order, said that, as Mr. Alfonso Martínez had already observed, no motion had been submitted under rule 55 of the rules of procedure. Until such a motion was introduced, the discussion could therefore continue without impediment. He understood the concern of some experts that nothing should be done to jeopardize the future work of the Sub-Commission, yet the problem had still not been resolved in the way suggested by Mr. Chernichenko, namely by annulling the decision taken under the confidential procedure. The Sub-Commission should therefore meet again in public and then attempt to find a solution to that problem.

18. However, he could not accept a situation in which a decision taken at a particular stage in the proceedings could block a decision at another stage. That was a procedural problem which it would be dangerous to minimize. When the Sub-Commission had decided to meet privately to consider the situation in the country mentioned above, several observers had pointed out to him that it had thereby been revealed that the situation in Haiti had been considered by the Sub-Commission under the confidential procedure. It would therefore seem wiser for the Sub-Commission to consider all the draft resolutions submitted to it and then to determine at a later stage how it could reconcile the decisions taken at public meetings with those taken at closed meetings.

19. Mr. JOINET said that when it came to adopt the provisional agenda for its next session, the Sub-Commission might perhaps consider the possibility of examining the communications submitted to it in future under the confidential procedure at the end of the session. Thus, if the Sub-Commission decided at a public meeting not to refer a situation in a particular country to the Commission, it could continue to examine the communications relating to that country under its confidential procedure; if, on the other hand, the Sub-Commission decided publicly to draw the Commission's attention to a particular situation, that situation would no longer need to be examined under the confidential procedure. The solution suggested by Mr. Chernichenko was very valuable, provided that the agenda allowed for it and the Chairman of the Commission was in agreement. If it was not possible to find a solution along those lines, he would maintain his very subsidiary suggestion concerning draft resolution E/CN.4/Sub.2/1988/L.28 to enable the expert designated by the Commission to act on the basis of a decision that was not controversial in nature and concerned exclusively his mandate.

20. Mr. YIMER wished to know whether the Sub-Commission was discussing draft resolution E/CN.4/Sub.2/1988/L.28 on the situation in Haiti, or whether it was reconsidering decisions that had already been taken.

21. Mr. AL KHASAWNEH said that the only logical solution was quite simply to avoid duplication by taking once again, in public, a decision already adopted under the confidential procedure.

22. Mr. CHERNICHENKO said that Mr. van Boven's suggestion - which involved taking up once again, in public, a question already considered at a closed meeting, even if that meant reviewing thereafter the decision taken under the confidential procedure - seemed totally illogical from the legal standpoint.

Furthermore, the problem he himself had raised concerned only draft resolution E/CN.4/Sub.2/1988/L.28, since the draft resolution relating to the situation in Iraq had not yet been introduced and the two situations were very different.

23. Ms. KSENTINI, speaking on a point of order, protested at the way procedural motions were being used and abused by some, especially to prevent other experts from speaking or taking the floor before them. She therefore requested the Chairman to remind the other members of the Sub-Commission that the list of speakers should be respected.

24. The question of overlapping between the public procedure and the confidential procedure was a very important one and she hoped that the Sub-Commission would consider it in depth at its subsequent sessions. There were two aspects to the problem. On the one hand, opinions diverged as to the possibility of submitting, at a public meeting, a draft resolution which dealt with situations already covered by a confidential decision. Unfortunately, the procedure provided for under resolution 1503 and in the Sub-Commission's rules of procedure offered no definitive answer. On the other hand, if the Sub-Commission decided that such a possibility did indeed exist, what would be the solution for cases where there was both a confidential decision and a decision taken at a public meeting?

25. She thought that it was premature to speak of customary law at the current stage, as Mr. Eide had done, since customary law implied a usage which did not obtain in the present case. Whatever solution was adopted by the Sub-Commission, it should not constitute a precedent. It was also impossible to speak of substantive law, since the resolutions forming the basis of the Sub-Commission's procedure could be interpreted in various ways. She could therefore associate herself with a compromise solution to resolve the dilemma in which the Sub-Commission found itself, but the question of overlapping would remain unsolved.

26. Mr. JOINET pointed out that he had proposed a few days earlier that a working document should be prepared on that question, possibly with the assistance of the secretariat. However, the question had already been resolved in the case of Paraguay in the Commission on Human Rights, which had deemed it unnecessary to engage in a public discussion of matters already considered under the confidential procedure unless new developments occurred. In the case of Paraguay, for example, reference had been made under the confidential procedure to torture and other serious violations of human rights, whereas only the lifting of the state of siege and the amnesty had been discussed in the public procedure.

27. It seemed, however, that the situation was not sufficiently ripe at the current session for the solution suggested by Mr. Chernichenko to be adopted. If the Sub-Commission decided at a public meeting not to accept the draft resolution as originally submitted, it could simply consider a draft decision relating only to the mandate of the expert of the Commission on Human Rights.

28. Mr. ASSOUMA said that the entire discussion was extremely confused. He would therefore like the Chairman to apply a solution to the dilemma facing the Sub-Commission.

29. Mr. ALFONSO MARTÍNEZ wished first of all to point out that there was no rule which prohibited the Sub-Commission from examining publicly a question

already considered under the confidential procedure, or even a question already covered by a decision under that procedure. Since the Sub-Commission was responsible for its own procedures, it could quite easily review in a public meeting decisions already taken under the confidential procedure, provided that it did so on a case-by-case basis. No one could prohibit a member of the Sub-Commission from submitting a draft resolution under agenda item 6, but the Commission should show wisdom and determine whether or not, in the specific case under consideration, it wished to take a decision on a question already examined under the confidential procedure, but without setting a precedent, since each case was different.

30. If the Sub-Commission decided to take no action on a draft resolution submitted under agenda item 6, it was implying that the question had already been the subject of a decision under the confidential procedure. He felt that draft resolutions under agenda item 6 should therefore be considered publicly, even if that meant determining what should then be done at a later stage.

31. Mr. CHERNICHENKO said that he regretted having initiated a discussion which was leading nowhere and proposed, accordingly, that the discussion should be closed. He would very much have liked draft resolution E/CN.4/Sub.2/1988/L.28 to be adopted at a public meeting but, in view of the situation, he would not participate in the decision that would be taken thereon under the public procedure.

The closed meeting rose at 11.40 a.m.