

**INTERNATIONAL
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ON CIVIL AND
POLITICAL RIGHTS**



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SUMMARY RECORD OF THE 272nd MEETING

Held at Headquarters, New York,
on Monday, 30 March 1981, at 3 p.m.

Chairman: Mr. TOMUSCHAT

later: Mr. MAVROMMATIS

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The meeting was called to order at 3.25 p.m.

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 40 OF THE COVENANT (continued)

Kenya (continued) (CCPR/C/1/Add.47)

1. Mr. SADI considered the report submitted by Kenya to be incomplete and expressed the hope that the Kenyan Government would submit a complete report on the basis of the comments made in the Committee.
2. The question of self-determination, among others, was not mentioned in the report. Kenya's position on that issue was strong and honourable but, in accordance with article 1, paragraph 3, of the Covenant, it should be described in writing.
3. He asked whether the provisions of article 2 of the Covenant which, in his opinion, was crucial, were fully reflected or incorporated in the laws of Kenya. If so, he asked how such laws were being put into practice. To judge from the report, the provisions of article 2 did not seem to be fully covered in the relevant laws.
4. With regard to article 4 of the Covenant, which stipulated the conditions under which public emergency laws could be invoked, he did not think that the Kenyan Government had answered all the questions raised in that connexion. For example, neither the report nor the Kenyan Constitution referred to the need to inform the other States parties to the Covenant when such emergency laws were invoked (art. 4, para. 3). He also asked whether Kenya had ever invoked its Preservation of Public Security Act, when it had done so, for how long, how often that had occurred, for what reason and in accordance with which articles of the Covenant. That question was particularly important, because public emergency laws could be used in ways that were contrary to the spirit of article 4.
5. He pointed out that neither the Kenyan Constitution nor the report made any mention of article 20 of the Covenant, which prohibited any propaganda for war. Neither did they mention provisions to protect families. In that connexion, he asked whether such provisions made any distinctions on the basis of sex: for example, when a Kenyan woman married an alien man, were the provisions governing the granting of resident status the same as when a Kenyan man married an alien woman? Referring to article 27, he also asked whether there were any ethnic, religious or linguistic minorities in Kenya and what protection they enjoyed.
6. With regard to article 32 of the Covenant, he pointed out that under section 42 of the Kenyan Constitution, the country was to be divided into constituencies having an equal number of inhabitants, each of which would elect one member to the National Assembly. However, section 42 later seemed to imply that such constituencies might not have an equal number of inhabitants. He pointed out that, as a result, political power might vary from one constituency to another. That situation appeared inconsistent with Kenya's position in favour of the "one-man-one-vote" system at the United Nations.

7. Section 82 of the Kenyan Constitution on protection from discrimination, in particular subsection 4 (a) - which was strikingly similar to the same provisions in the Constitution of Barbados - raised the question as to whether such non-discrimination applied to non-Kenyans as well as to Kenyans. Under the Covenant all persons were entitled to such protection, whether or not they were citizens. Accordingly, it was important for that matter to be clarified.
8. By the same token, he asked whether section 80 on citizenship, particularly subsection 2, made any distinction between the sexes, and pointed out that such distinctions were not acceptable under the Covenant.
9. Mr. PRADO VALLEJO noted that Kenya's interest in promoting respect for human rights and in complying with the Covenant was reflected in the presence of its representative in the Committee. He stressed that the comments made by members of the Committee were directed not towards judging any particular country, but towards the promotion of human rights. It was therefore essential for Governments to report fully on the situation with regard to human rights in their countries.
10. Accordingly, he asked whether the provisions of the Covenant were applied by judges in Kenya. For example, if a Kenyan citizen felt that his human rights were being violated in any way, could he go before the competent judge and request that the relevant provisions of the Covenant should be applied to him? He also asked whether the Covenant had become incorporated in the laws of Kenya, since that country did not have legislation enacting the Covenant as such. However, he noted that the provisions of the Constitution concerning the protection of human rights were consistent with the Covenant.
11. He asked what effective recourse was available to ensure respect for human rights in cases where a secondary legal authority failed to respect an individual's human rights under the Constitution. In that connexion, he asked what the status was of the Covenant and the Constitution, respectively, in Kenya. In Ecuador, the Covenant was considered to be a special law, after it had been approved by the Congress. He asked what specific measures were taken to implement the Covenant in Kenya and whether it was considered to be in force or merely accepted there. Moreover, he wondered what procedures were available for adopting provisions of the Covenant as part of the laws. That question was particularly important in connexion with the recourse available to an individual in cases where a secondary legal authority failed to respect his rights under the Covenant.
12. The second paragraph of the quotation from section 74 of the Constitution (CCPR/C/1/Add.47, page 2) was particularly important for ensuring that human rights were respected in practice. Accordingly, he asked how such incompatibilities between a law and the Constitution were interpreted and eventually resolved.
13. He asked what the legal remedies mentioned in the last paragraph on page 2 of the report entailed and what laws governed them. He also requested more specific details on that subject.

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(Mr. Prado Vallejo)

14. With regard to the Preservation of Public Security Act, referred to on page 3 of the report, he noted that such laws were a particularly sensitive issue in Latin America, because they could endanger respect for human rights. Although it was stated that that Act could only be put into operation by the President, he asked whether it could be applied by judges as well. That question was important in view of the fact that such laws might be applied in political situations and might jeopardize guarantees for the protection of individual rights. Unfortunately, public security laws generally had a very negative effect on the protection of human rights. In that connexion, he asked what recourse an individual might have if the President applied the Preservation of Public Security Act in an arbitrary manner. He pointed out that article 4 of the Covenant permitted the suspension of certain civil rights in particular cases. Since the definition of "the preservation of public security" in the third paragraph of page 3 of the report could perhaps be applied to situations not covered by the Covenant, he asked how the Kenyan Public Security Act could be brought into line with article 4. For example, in the light of article 4, what were the implications of the fact that only the President could apply the Preservation of Public Security Act? He also asked whether Kenya had applied such emergency laws and, if so, how were they applied, what rights were restricted and whether reference was made to the relevant provisions of the Covenant. Moreover, the fact that the provisions of the Preservation of Public Security Act were so general might lead to their arbitrary application and to restrictive practices with regard to political rights. Moreover, he inquired whether there were currently any political prisoners in Kenya, since that was frequently the case in countries with public emergency laws.

15. In conclusion, he agreed with previous speakers that the report submitted by Kenya was incomplete and did not follow the guidelines set forth by the Committee. Accordingly, he expressed the hope that the Kenyan Government would submit an additional report providing a complete picture of the human rights situation in Kenya together with information concerning legislation adopted to overcome existing problems.

16. Mr. LALLAH said that the people of Kenya had been obliged to fight for their independence and that the notion of repression was therefore implicit in their recent history. The Constitution had made provision for a strong executive presidency although the country was a democracy. The question therefore arose as to what checks and balances existed which might act as restraints on executive power and in particular how the system might affect compliance with article 25 of the Covenant. He asked whether Kenya had a one-party system and, if so, what the impact of that system was on articles 18, 19, 21 and 22. He also inquired whether criticism of the Government was possible and whether such criticism required to be institutionalized, for example, through a party, or could be freely expressed in meetings or through the press.

17. He had compared the Constitution of Kenya with the constitutions of other Commonwealth countries and had found one main difference, which centred on sections 83 and 85. In particular, the Constitution of Kenya seemed to treat the state of emergency as if it were the norm. The terms used in section 83 provided that nothing done under the authority of an act of Parliament should be held to be

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(Mr. Lallah)

inconsistent with various sections of the Constitution, namely, those which related to personal liberty, freedom from search and entry, and freedom of expression, association and movement; all those rights were therefore subject to limitations when extraordinary measures were taken under the authority of any provision of part III of the Preservation of Public Security Act. It therefore seemed that derogations from all those rights were possible under two procedures, namely, by acts of Parliament or by the Preservation of Public Security Act which presumably had the force of a law of Parliament but was triggered by an order of the President under section 85 of the Constitution. The Act was not described as an emergency act but as a security act and was therefore presumably of everyday application unless suspended. Article 4 of the Covenant imposed serious obligations on a State party which derogated from the rights which he had enumerated. It was not therefore sufficient for the President simply to make an order under part III of the Preservation of Public Security Act; he must also give effect to the obligations Kenya had undertaken under article 4 of the Covenant. He would also like to receive information as to the extent to which limitations on those rights were possible under the ordinary law under, for example, a public order act or a special gatherings act, which might impose restrictions on the freedom of association or freedom of movement. He would like to know of any such legislative measures in order to ascertain the extent to which they complied with the Covenant. The Supreme Court had broad powers to look into cases in which rights under the Constitution had been abridged. He would like to have information on the laws which gave effect to such limitations. In the event that an individual or group wished to call a public meeting, he would like to know the laws which must be complied with.

18. On the issue of discrimination, he considered that section 70 of the Constitution was of a purely declaratory nature and conferred no substantive rights. In that connexion, he would appreciate information as to whether the Government of Kenya might envisage adding sex as a ground for the prohibition of discrimination under section 82, subsection 3, of the Constitution and, if not, what factors prevented such action.

19. In the area of industrial rights, he would like to receive information regarding certain aspects of the act relating to the authority of chiefs, regarding, in particular, what the powers of the chief were, whether such powers were administrative or judicial, how a chief was appointed and whether a woman could become a chief; the last point was relevant to article 3 of the Covenant. It seemed to be possible for the chief in certain circumstances to order forced labour as an exceptional measure. In the light of the prohibition on forced labour in article 8, paragraph 3, of the Covenant he would like to be informed as to the extent and circumstances in which forced labour might be imposed. He would also like to receive information regarding the extent to which the freedom of association, including the right to form trade unions, pursuant to article 22 of the Covenant, might be limited. Under the act relating to the registration of societies, the registrar had wide powers to refuse registration of associations or societies when the interests of peace and good order would be likely to suffer prejudice by reason of such registration or where the Minister had declared the

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(Mr. Lallah)

association to be a threat to the good government of the country. In that connexion, he would like to know the extent to which executive judgement was subject to judicial review.

20. Section 71, subsection 2, of the Constitution listed a number of circumstances in which human life might be taken by the administration or by private persons. In that connexion, there seemed to be a conflict between the primacy of law enforcement and the primacy of human rights, in particular, when the provisions of article 14, paragraph 2, of the Covenant were borne in mind. He would welcome the comments of the Government of Kenya on the possible need for a law which would limit the right of officials and others to take human life and also on article 2, paragraph 3, subparagraph (a). He would also like to receive information regarding any decisions of the Supreme Court bearing upon the subject of breaches of fundamental rights.

21. Mr. Mavrcmmatis took the Chair.

22. Mr. ORTEGA pointed out that the Committee had sent States parties a series of guidelines to help them in preparing their reports. Presumably that document had not reached the Kenyan Government before it drafted its report. He hoped that future reports would be prepared in accordance with the guidelines.

23. The Committee had to decide whether the Kenyan Constitution, particularly sections 70, 74 and 80, met the requirements of the Covenant. He was therefore concerned that the Constitution provided no information on the kind of law which could be included under the heading provided by article 12, paragraph 3, of the Covenant, beyond the Preservation of Public Security Act mentioned in the report. He had found no indication that Kenya had incorporated the rights recognized in the Covenant into its legislation, as required in article 2, paragraph 2: the Committee must be told of the appropriate provisions.

24. Although section 74 of the Constitution seemed clear in its prohibition of torture, the General Assembly continued to urge States to make unilateral declarations against torture and other cruel, inhuman or degrading treatment or punishment, and had had a questionnaire sent out on the subject of torture: he hoped that the Kenyan Government would include information on the matter in its following report.

25. The lack of detail in the report on the circumstances in which the Preservation of Public Security Act could be invoked made it difficult to decide whether the Government was necessarily acting to protect the nation when it invoked the Act. He found it remarkable, moreover, that only one person had the right to decide whether any given organization was dangerous to public order. It should be borne in mind that the Secretary-General was supposed to be informed of any derogation from the provisions of the Covenant, and the reasons for the derogation, under article 4, paragraph 3, of the Covenant, while article 4, paragraph 2, prohibited derogations from the provisions of articles 6, 11, 15, 16, and 18 inter alia.

26. He wondered, since Kenya had apparently enacted no legislation under the

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Covenant, whether the fact of its accession to the Covenant had been publicized; how Kenyan citizens could invoke the Covenant; and whether there existed national or private human rights organizations as called for under General Assembly resolution 33/167.

27. Mr. DIEYE said he wondered whether some developing countries, when they acceded to an international instrument, were fully prepared to comply strictly with its provisions. Countries must ensure that the agreements they ratified were applied within their borders. He believed that the Committee would gain a better understanding of the situation which developing countries faced, while those countries would become better acquainted with the Committee and the way it worked, if the Committee were to hold a session in a developing country.

28. The Committee was aware of the problems hindering Kenya from putting all the provisions of the Covenant into practice. Nevertheless, there were some things which the Kenyan Government could do, and the Committee could help it in its task. He wondered what steps Kenya had taken to publicize ratification of the Covenant in its territory, particularly in the languages spoken by the bulk of the Kenyan people.

29. Kenyan legislation was based on the principle of constitutional supremacy. He wondered, therefore, whether the Constitution would be amended should it prove incompatible with the provisions of the Covenant. He wondered also how an individual should set about having a confession annulled on the grounds that it had been obtained by violence or torture; was it sufficient to make a statement to that effect before a court?

30. He was a little skeptical of the freedom of expression available in a country which had only one political party: did a person holding political views divergent from those of the Government really have a chance to express them? Again, one indication that human rights were respected in a given country was the existence of an independent judiciary, in which an examining judge could reach a legal decision without having to take account of political factors. Regarding the constitutional provision requiring a person to be informed of the reasons for his arrest or detention, he asked whether a specific time-limit for such notification had been established. Moreover, given that the President of the Republic could invoke the Preservation of Public Security Act and declare a state of emergency, the Committee should be informed of the exact scope of the President's powers under a state of emergency.

31. Sir Vincent EVANS pointed out that Kenya had been one of the first States to ratify the Covenant, a fact which in itself reflected the importance which the independent Kenyan Government attached to human rights. Kenya had generally set a very high standard for the observation of human rights, which was not, unfortunately, reflected in the report. Furnishing reports to all the international organizations which called for them was a heavy burden for any administration; he suggested that the Kenyan Government should, in preparing its future reports, draw on the resources of the law faculty of Nairobi University.

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(Sir Vincent Evans)

32. The current report contained no information on the Kenyan judicial system, yet the courts had an essential role to play in the protection of human rights in any free State. Section 84 of the Constitution conferred on the High Court original jurisdiction to hear and determine any application made by any person that any of his rights, as defined in chapter 5 of the Constitution, had been or was likely to be contravened. He wondered, how much use was made of that jurisdiction. Section 65 provided that Parliament could establish courts subordinate to the High Court and courts martial; it would be helpful to have information about their jurisdiction, the judges who served in them, and how their independence and impartiality were guaranteed. Further, the Committee needed to know whether an individual whose rights had been infringed by administrative action or the failure of the authorities to act was entitled to initiate proceedings to secure the protection of his rights.

33. Mr. TOMUSCHAT said he found the report too short to allow the Committee to discharge its responsibilities under the Covenant. Reporting to the Committee provided countries with an excellent opportunity to inform the world of their performance in the general area of human rights. The "discussion" of the Kenyan report had been more of a monologue than a dialogue, but he looked forward to receiving further information from the Kenyan Government in response to the questions asked. It was regrettable that the report did not reflect the fact that Kenya was among the leading nations of Africa where human rights were concerned.

34. Any country ratifying the Covenant must look carefully at its legislation to check that it was consistent with all articles of the Covenant. The Kenyan Government had not yet done so, it appeared, and it would be useful for it to set up a body specifically for that purpose. One minor discrepancy that he had noted was in the constitutional provision that persons should be notified of the reasons for their arrest "as soon as reasonably practicable". The Covenant, in article 9, paragraph 2, required anyone who was arrested to be "promptly informed" of any charges against him.

35. Section 74 of the Constitution, which set forth a general reservation concerning torture, needed to be expressed more fully as it might create problems under the Covenant, which allowed of no restriction on the prohibition of torture. He requested more information on section 82, paragraph 8, which placed serious restrictions on the rights guaranteed under the Constitution. He was not quite clear as to its purpose for it appeared that it might do away with the greater part of the otherwise impressive guarantees provided in the Constitution.

36. He asked how many political parties there were in Kenya. Even in a one-party system some political freedom was necessary in order to comply with article 2, paragraph 1, of the Covenant which banned discrimination inter alia on the basis of political opinion. Secondly, he asked how many newspapers there were in Kenya and whether they could criticize government actions openly as that was the essence of free journalism.

37. He noted with deep satisfaction that, according to information provided by

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Amnesty International, there were no political prisoners in Kenya and expressed the hope that that fact would be confirmed by the Government in its next report.

38. Finally, he said that the Committee should receive a detailed new report, in writing. As preparation of such a document would, obviously, take some time, the Government should inform the Committee when it could expect to receive it.

39. The CHAIRMAN suggested that the representative of Kenya should communicate to his Government the fact that the Committee had considered its report brief and that it would take some time to prepare the answers to a number of questions which had been raised. He also suggested that the new report be forthcoming within a period of six months.

40. Mr. MATHANJUKI (Kenya) replied that he would communicate that information to his Government.

ORGANIZATIONAL AND OTHER MATTERS

41. Mr. BOUZIRI said that he had been unable to obtain copies of all the press releases issued so far at the current session. He also pointed out that the releases in English were much fuller than those in French. Steps should be taken to have a translation of the full text of releases in all the languages used in the Committee. Perhaps back copies could be made available to members so that they could ensure that they had not been misquoted as they had been in 1979.

42. Mr. ANABTAWI (Secretary of the Committee) said that he had been informed it was impossible to have the releases made available in the Conference room. They had to be obtained on the third floor.

43. The CHAIRMAN suggested that the Secretariat should find out how many press releases had been issued so far and in what languages and then obtain at least one copy of each.

The meeting rose at 5.45 p.m.