

UNITED NATIONS  
ECONOMIC  
AND  
SOCIAL COUNCIL



GENERAL

E/CN.4/515/Add.6  
26 February 1951

ORIGINAL: ENGLISH

COMMISSION ON HUMAN RIGHTS  
Seventh session  
Item 3 of the provisional agenda

OBSERVATIONS OF GOVERNMENTS OF MEMBER STATES ON THE DRAFT INTERNATIONAL  
COVENANT ON HUMAN RIGHTS AND MEASURES OF IMPLEMENTATION, AS DRAFTED  
AT THE SIXTH SESSION OF THE COMMISSION ON HUMAN RIGHTS, RECEIVED  
BY THE SECRETARY-GENERAL UNDER GENERAL ASSEMBLY RESOLUTION  
421 G (V) AND ECONOMIC AND SOCIAL COUNCIL RESOLUTION  
303 I (XI)

7. Israel

(Note dated 16 February 1951 from the  
Permanent Representative of Israel to  
the United Nations)

The Government of Israel would submit that the Draft Covenant be amended in  
the following respects:

1. Article 1, paragraph 3, sub-section (b)

It is proposed that the words "competent authorities, political  
administrative or judicial" be deleted and that the following words be  
substituted therefore: "a court of law or by a tribunal whose decisions have  
the force of law".

It is considered that the function of adjudging any claim in respect of an  
alleged violation of human rights is essentially judicial, and should be exercised  
exclusively by a judicial body. It is not held desirable that any such claim,  
which in the nature of things will normally be directed against political and  
administrative authorities, should be determined by other political or  
administrative agencies of that State.

2. Article 2, paragraph 2

It is proposed that Article 10 be included among those from which no  
derogation may be made.

There appears to be no reason why, even during a state of emergency, accused  
persons should not receive a fair hearing by an independent and impartial tribunal  
established by law. The Article provides in any case that in the interest of

/public order  
E/CN.4/515/Add.6

public order or national security, the press and the public may be excluded from all or part of the trial. There is, therefore, no need for any derogation on the ground that a public hearing of the case might be to the detriment of national security or public order. All other safeguards provided for in the Article for the defence in criminal proceedings can be fully maintained even during a state of emergency without this involving any risk to national security or public order. Equally, the requirement of compensation in case of a miscarriage of justice provided for in paragraph 3 need not be set aside during a state of emergency.

3. It is further proposed that a provision be inserted in Article 2, paragraph 2, to the effect that the prohibition of measures of discrimination on grounds of race, colour, sex, language and religion, contained in Articles 1 and 17, should not be susceptible to derogation in a state of emergency.

The Charter specifically lays down the principle of non-discrimination in respect of race, sex, language or religion (Articles 1 (3), 55 (c), 62 (2) and 76 (c)). Article 56 of the Charter imposes on all Member States an obligation to promote the observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. Hence, any derogation from the principle of non-discrimination on these grounds would be repugnant to the express terms of the Charter. There may be need, in time of war, for suspending the principle of non-discrimination on grounds of "political or other opinion, national or social origin, property, birth or other status". There can, however, be no justification, even in a state of war, for the suspension of the freedom of religion and language, or for measures of discrimination on grounds of race or sex.

#### 4. Article 3

It is submitted that this article be amended to read as follows:

"1. Everyone's right to life shall be protected by law.

2. Capital punishment may be inflicted only as a penalty for the most serious crimes, pursuant to the sentence of a competent court of law pronounced in accordance with law not contrary to the Universal Declaration of Human Rights.

3. Anyone sentenced to death shall have the right to appeal and to seek amnesty, or pardon, or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

4. To take life shall be a crime save when it results from:

/(a) the execution

- (a) the execution of a sentence of death pronounced by a competent court in accordance with law not contrary to the Universal Declaration of Human Rights;
- (b) the use of force which is no more than absolutely necessary
  - (i) for the defence of any person or group of persons from unlawful violence; or
  - (ii) for effecting a lawful arrest or preventing the escape of a person lawfully detained; or
  - (iii) for any action lawfully taken for the purpose of quelling a riot or insurrection; or
  - (iv) for preventing unlawful entry to a clearly defined place or area to which access is forbidden on grounds of national security and in respect of which a public and clearly discernible warning has been issued."

The amendment is designed to meet the criticism expressed by several delegations concerning the drafting of this Article.

In paragraph 3 the right to appeal has been added to the right to amnesty, pardon and commutation of sentence.

Paragraph 4 is based on the proposals of the United Kingdom delegation and is designed to define in exact terms the cases in which the taking of life is not to be regarded as a crime. The words "in respect of which a public and clearly discernible warning has been given" have been inserted with a view to preventing danger to innocent persons who may be unaware that access to the area in question is prohibited.

#### 5. Article 5

It is proposed to delete sub-section 3 (c) (ii) and to substitute therefore the following words: "Any service of a military character or any work or service imposed by law as part of, or as an alternative to, military service."

The purpose of this amendment is to extend the scope of the exception beyond compulsory national service exacted in lieu of military service to include other forms of national service imposed as part of military service. A case in point is the provision of the Israel Security Service Act of 1949, section 6, of which requires that part of the period of military service shall be devoted to "agricultural training."

6. Additional Article

It is proposed that the following new Article be inserted after Article 7:

"The dwelling of every person is inviolable and shall not be entered or searched except in accordance with the law and in the manner therein prescribed. Private correspondence, as well as telegraphic and telephonic communications, shall not be intercepted, except when authorized by law in the interests of national security, public safety and the economic well-being of the country."

It is further proposed that this Article shall not be included among those which under Article 2 (2) are not susceptible to derogation in a state of emergency.

This Article corresponds to some extent to Article 12 of the Universal Declaration of Human Rights. It does not, however, cover the prohibition of attacks upon a person's honour and reputation contained in that Article. It is considered that the object of the Covenant is to protect the individual from incursions into his private sphere by organs of the State, not from attacks by his fellow-citizens, against which he is protected by the ordinary civil law. Otherwise every conceivable rule of civil law might have to be inserted into the Human Rights Covenant.

7. Article 8

It is proposed that the opening clause of sub-section 1 be amended to read as follows: "Subject to any restrictions consistent with this Covenant."

Sub-paragraphs (a) and (b) secure rights and freedoms. If the intention of the provision is to limit these rights and freedoms, it should not subject them to any "general law consistent with the rights recognized in this Covenant" but to such "restrictions as are not inconsistent with the Covenant." Such rephrasing, it is submitted, would make the legal import of the provision more clear.

8. It is further proposed that sub-section 2 (b) be amended to read:

"Anyone not lawfully exiled shall be free to enter the country of which he is a national."

The sub-paragraph is designed to secure the right of entry to the country of which one is a national. The introductory words are intended to permit of some restriction of this right. But that restriction cannot be found in the "preceding sub-paragraph" which, in its turn, secures a right by prohibiting

/arbitrary exile.

arbitrary exile. It should, instead, be made subject to a lawful derogation from the right secured in the preceding sub-paragraph (a). This is brought out in the proposed amendment.

9. Article 10

It is proposed that in the first sentence of sub-section 1 the words "judicial tribunal" be inserted in place of "tribunal".

The term "tribunal" is not free from ambiguity. In the Convention on the Declaration of Death of Missing Persons it has been defined as including administrative authorities. The amendment is suggested to exclude the possibility of any doubt under this head.

10. As regards sub-section 3, it would appear that prior to the payment of compensation "the new or newly discovered facts" would have to be established by legal proceedings in a retrial of the case based on such new material.

It is accordingly proposed that the first sentence should be amended to read as follows: "In any case where by a final decision a person has been convicted of a criminal offence and where subsequently a retrial of the case, based on a new or newly discovered fact, has proved conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated."

11. Article 11

It is proposed that sub-section 1 be amended to read as follows:

"No one shall be convicted of any infringement of the law which did not constitute an offence, under national or international law, at the time when it was committed. Nor shall any amendment of the law increasing the penalty for any offence or altering the rules of evidence to the detriment of the accused have retrospective effect. If subsequent to the commission of the offence provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby."

The purpose of the proposed amendment is to extend the benefit of the prohibition of ex post facto legislation to all offences, and not merely to those which are of a "criminal" nature in the technical sense of that term.

In the second place, the amendment is designed to prevent the position of the accused from being changed for the worse by an ex post facto change of the judicial rules of evidence. Experience has shown this matter to be fraught with grave consequence.

12. Article 41

It is proposed that after the word "facts" in line 2, the following words be inserted: "and suggest such remedies as it deems advisable."

The purpose of the amendment is to require the Committee not merely to ascertain the facts and offer its good services for the solution of the matter, but to propose remedies of its own towards such a solution.

13. New Article

It is proposed that the following new Article be inserted after Article 41:

"(a) The right to bring cases of non-compliance with the provisions of the Covenant to the attention of the Human Rights Committee shall be granted also to such non-governmental organizations enjoying consultative status with the Economic and Social Council as are included in a list to be drawn up for this purpose by the Secretary-General in conjunction with the Chairman of the Human Rights Committee.

(b) The provisions of articles 38-41 shall be applicable to such cases mutatis mutandis."

This new Article is designed to ensure that the right to bring cases of non-compliance with the provisions of the Covenant to the attention of the Human Rights Committee shall be vested not only in member States but also in authoritative and recognized non-governmental organizations. It is evident that the raising of such a complaint by one State against another is likely to be interpreted by the latter as an unfriendly act, and that for this reason States will feel most hesitant to take such action even when they are convinced that an infringement of human rights has taken place. They will, on the other hand, readily do so if relations between them and the State accused of such infringement are strained. In some cases such complaints may be used in order to encourage irredenta among the heterogeneous part of a population. This would, in fact, mean that the Covenant, whose purpose is essentially humanitarian, would be turned into an instrument of international strife and controversy. The effect of limiting the right to lodge such complaints before the Human Rights Committee to member States would thus be either to reduce the implementation section of the Covenant, in practice, to a dead letter, or to turn it into a means by which States may carry their controversies into the international sphere. This is clearly the opposite of what is intended by the Covenant. For these reasons it is proposed that the

/right to

right to submit such petitions should be vested also in a limited number of non-governmental organizations which enjoy consultative status with the Economic and Social Council and are included in a list to be drawn up for this purpose by the Secretary-General in conjunction with the Chairman of the Human Rights Committee. Such limitation, it is submitted, will obviate the possibility of this right being abused by irresponsible agencies.

14. New Article

It is proposed that after Article 41 a second additional Article be inserted reading as follows:

"(e) The Human Rights Committee may by decision reached in accordance with article 33 (b), be seized of cases of non-compliance with the provisions of the Covenant by parties thereto on its own motion when the facts before the Committee appear in its view to warrant such consideration.

(b) The provisions of articles 38-41 shall be applicable mutatis mutandis."

The purpose of the Article is to make it possible for the Human Rights Committee to take action in cases of non-compliance with the provisions of the Covenant when the Committee itself has become aware of the facts without any action having been taken by any member State to draw its attention to it. This is motivated by the same consideration as stated in the preceding paragraph, viz., that member States may be reluctant to draw the attention of the Committee to infringements by fellow members even though the facts are public and within the knowledge of the Committee itself. In such cases it is proposed that the Human Rights Committee may take action on its own motion by a decision reached in accordance with the provisions of Article 33 (b) of the Draft Covenant.

15. New Article

It is proposed that after Article 41 a third additional Article be inserted reading as follows:

"(a) In urgent cases the Human Rights Committee may deviate from the provisions of articles 39 and 41 and may recommend to the State or States concerned the adoption of measures designed to give immediate effect to the provisions of the Covenant.

(b) As urgent within the meaning of the foregoing provision shall be considered cases in which the lives, liberties and other rights of persons enumerated in Article 1, paragraph 1, are directly threatened by the action

/or non-action

or non-action of persons and authorities referred to in article 1, paragraph 3 (a) or 3 (b)."

The purpose of this Article is to enable speedy and effective action to be taken in cases of grave urgency in order to stop an infringement of the Covenant. The procedure envisaged in Articles 38-41 of the draft Covenant is clearly very slow and cumbersome. The complaint has in the first instance to be brought to the attention of the State which is alleged to be guilty of an infringement of the Covenant. Thereafter a period of six months is allowed to that State to adjust the matter. When that period has elapsed without any action having been taken, the matter goes to the Human Rights Committee. It may even then take no action until all domestic remedies have been exhausted. The Committee has to ascertain the facts and use its good offices with a view to a friendly solution of the dispute. Then another eighteen months may pass before the Committee draws up its report to the States concerned and to the Secretary-General for publication. This means that practically two years may elapse from the time of the infringement to the authoritative publication of the matter by the Human Rights Committee. It is well known that cases of this kind may involve the lives, rights and liberties of individuals and groups, and by the time this period has elapsed, the harm done by the infringement may be beyond repair and redress. For this reason, it is proposed that in the urgent cases specified in the resolution the Human Rights Committee may recommend to the State or States concerned the adoption of measures designed to give immediate effect to the provisions of the Covenant.

-----