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# DRAFT INTERNATIONAL COVENANT ON HUMAN RIGHTS AND MEASURES OF IMPLEMENTATION

## THE GENERAL ADEQUACY OF THE FIRST EIGHTEEN ARTICLES (PARTS I AND II)

Memorandum by the Secretary-General

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# I. INTRODUCTION

1. It is the purpose of this memorandum to give a detailed account of the comments of the representatives to the fifth session of the General Assembly and the eleventh session of the Economic and Social Council on the question of the general adequacy of the first eighteen articles of the draft Covenant.

2. Part II of the present memorandum is devoted to the question whether the category of rights contained in the first eighteen articles is complete.

3. Part III is devoted to the adequacy of Articles 1 and 2 dealing with implementation on the national level.

4. Part IV is devoted to the question whether the existing eighteen articles as at present drafted are adequate to guarantee the rights which they refer.

5. Reference is made to paragraphs 12 to 16 of document E/CN.4/513 in which the Secretary-General has submitted a general survey of action taken on the draft Covenant by the General Assembly at its fifth session and the Economic and Social Council at its eleventh and twelfth sessions.

/II. ADEQUACY

## II. ADEQUACY OF THE CATALOGUE OF RIGHTS IN THE FIRST EIGHTEEN ARTICLES (PARTS I AND II) OF THE COVENANT

### A. General considerations

6. By resolution 421 B (V) the General Assembly has declared that it considers that the list of rights in the first eighteen articles of the draft Covenant on Human Rights does not contain certain of the most elementary rights.

7. The under-mentioned rights, other than those of an economic, social, or cultural nature, have been suggested by various representatives in the Economic and Social Council at its eleventh session and in the General Assembly at its fifth session for inclusion in the Covenant. These rights, together with reference, where possible, to the corresponding Articles of the Universal Declaration of Human Rights, are as follows:

| Additional rights | | Corresponding articles of the Universal Declaration |
|---|---|---|
| Right to non-discrimination in economic and social matters | ... | Articles 2, 7 and 23 |
| Right of women to equality with men | ... | Article 2 |
| Right of minorities | ... | --- |
| Right of persons in detention | ... | Article 9 |
| Right to freedom from double jeopardy | ... | --- |
| Right to protection of privacy | ... | Article 12 |
| Right to the inviolability of the home | ... | Article 12 |
| Right to the secrecy of correspondence | ... | Article 12 |
| Right to protection against attacks on honour and reputation | ... | Article 12 |
| Right of asylum | ... | Article 14 |
| Right to a nationality | ... | Article 15 |
| Right to marriage | ... | Article 16 |
| Right to own property | ... | Article 17 |
| Right to participate in government | ... | Article 21, paragraph 1 |
| Right of equal access to public service | ... | Article 21, paragraph 2 |
| Right to vote | ... | Article 21, paragraph 3 |
| Right to petition national authorities | ... | --- |
| Right to self-determination | ... | --- |

8. Some representatives considered that the Covenant should include at least all those rights which were proclaimed by the General Assembly in the Universal Declaration of Human Rights. This was the view of the Chinese representative in the Council who felt that the aim of the Covenant should be to provide for the implementation of the largest number of rights set forth in the Declaration (E/AC.7/SR.149, page 10). A similar view was expressed by the representative of Cuba in the General Assembly who considered that the omission from the Covenant of some of the rights contained in the Universal Declaration would imply that these

/last mentioned

last mentioned rights were not really essential. Adoption of a draft Covenant suffering from such a defect could only be interpreted by public opinion as a retrograde step (A/C.3/SR.291, paragraph 3).

9. The representative of the Union of Soviet Socialist Republics considered that the Covenant did not fulfil its purpose - which was to give full effect to the Universal Declaration of Human Rights - because a whole series of rights recognized as fundamentally necessary in 1948 was omitted altogether. The document was, furthermore, a step backward compared with the constitutions of many states (A/C.3/SR.289, paragraph 31).

B. Individual rights

1. Right to non-discrimination in economic and social matters

10. The representative of New Zealand in the General Assembly stated that it was a matter of regret to his delegation that the draft Covenant did not include any general article barring discrimination in economic and social matters. His delegation would support any motion calling for the inclusion of such an article (A/C.3/SR.288, paragraph 29). This suggestion does not relate to the substance of economic and social rights, because the New Zealand representative clearly expressed the opposition of his delegation to the inclusion of such rights in the Covenant (A/C.3/SR.297, paragraph 11).

2. Right of women to equality with men

11. The representative of the Byelorussian SSR in the General Assembly regretted that the draft Covenant did not include essential provisions to guarantee the equality of rights between men and women in all aspects of the political, economic, social and cultural life of nations (A/C.3/SR.291, paragraph 54 and A/PV.317, paragraph 138).

12. The representative of Iraq in the General Assembly submitted two proposals dealing with the right of women to equality with men. One document (A/C.3/L.107) was in the form of an amendment to a proposal by New Zealand and Greece (document A/C.3/L.83/Rev.1) and was to the effect that the Commission on Human Rights should "state explicitly in all further work of the Commission, the equal rights of men and women, as set forth in the Charter of the United Nations" (document A/C.3/L.107). As the proposal by New Zealand and Greece was not put to the vote, no vote was taken on the Iraqi amendment (A/C.3/L.107).

13. The second Iraqi amendment was in the form of an amendment to the proposal by Yugoslavia (A/C.3/L.92) and was to the effect that the Assembly would decide to

/include in

include in the Covenant "an explicit recognition of equality of men and women on related rights, as set forth in the Charter of the United Nations".

14. The Iraqi amendment to the Yugoslav proposal and the Yugoslav proposal itself were adopted and now form paragraph 7 (a) of resolution 421 (V).

15. The proceedings of the General Assembly relating to this provision are described in detail in paragraph 22 of document E/CN.4/513.

3. Rights of minorities

16. In elaborating his statement that the first eighteen articles of the draft Covenant were far from constituting a complete statement of fundamental human rights and freedoms, the Union of Soviet Socialist Republics maintained that States should guarantee to their national minorities the right to use their own languages and to build their own schools, libraries and other cultural institutions (A/C.3/SR.289, paragraph 34). This deficiency in the Covenant was also commented on by the Polish representative, both in the Third Committee (A/C.3/SR.290, paragraph 4) and in the plenary session of the General Assembly (A/PV.317, paragraph 60). The representative of Yugoslavia in the General Assembly also regretted that the first eighteen articles of the Covenant did not mention such a widely recognized political right as the right of national minorities to use their own language (A/C.3/SR.291, paragraph 21).

17. A proposal was made by the delegation of the Union of Soviet Socialist Republics that the Commission, in drafting the Covenant, was to have in mind the inclusion in the Covenant of the following provision "the State shall ensure to national minorities the right to use their native tongue and to possess their national schools, libraries, museums and other cultural and educational institutions". (A/C.3/L.96)

18. A proposal made by the representative of Yugoslavia that the General Assembly should decide to add to the list of the rights to be defined in the Covenant the right of every member of a minority to make use of its national language and to develop its culture (A/C.3/L.92) was strongly opposed by the representatives of Chile and Uruguay. The Chilean representative pointed out that such a provision might be gravely prejudicial to those countries which had not hitherto hesitated, for humanitarian reasons, to receive European refugees. He felt that its inclusion in the draft Covenant might even lead those countries to impose restrictions on immigration, a consequence which would be regrettable from every point of view (A/C.3/SR.305, paragraph 79). The representative of Uruguay remarked that his

country, which had opened and was continuing to open its doors wide to foreign immigration, could not but view with concern the possible effect of such a provision on its national culture (A/C.3/SR.305, paragraph 78).

19. The action taken by the Third Committee and the General Assembly in plenary session on the resolutions of which both of these proposals formed a part has been described in document E/CN.4/513, paragraph 14.

4. Right of persons in detention

20. The International Group of Experts on the Prevention of Crime and the Treatment of Offenders has suggested an additional article dealing with the rights of persons in detention. The proposed article reads as follows:

> "Any person who is deprived of his freedom shall be treated with humanity. Persons held for trial shall not be subjected to the same treatment as convicted persons. They should at least be detained in separate quarters." (E/CN.4/523, paragraph 8)

21. The Secretary-General suggests that the Commission may wish to consider whether provisions analogous to Articles 6 and 10 of the Covenant which contain comprehensive provisions protecting individuals against arbitrary detention and which stipulate a number of valuable guarantees for those charged with criminal offences should not also be included in the Covenant for the protection of persons whose detention is of a merely preventative character and is not based on criminal charges, a situation which the Covenant does not prohibit in a state of emergency (Article 2) or pursuant to a general law consistent with the rights recognized in the Covenant (Article 8) (A/C.3/534, paragraph 14).

5. Right to freedom from double jeopardy

22. The representative of the Philippines stated in the General Assembly that it appeared illogical to instruct the Commission to include in the Covenant articles on certain political rights without first exhausting the list of civil rights comprising, inter alia, the right to freedom from double jeopardy (A/C.3/SR.304, paragraph 46).

6. Right to protection of privacy

23. The representative of Afghanistan in the General Assembly stated that, although his delegation approved the present text of the Covenant in principle, it would support the addition of an article dealing with the right to privacy (A/C.3/SR.291, paragraph 34). The representative of the Philippines in the General Assembly also stated that some provision should be made in the Covenant against unlawful

interference with privacy (A/C.3/SR.291, paragraph 18).

7. Right to the inviolability of the home

24. The Chinese representative in the Council stated that, as the aim of the Covenant should be to provide for the implementation of the largest number of rights set forth in the Universal Declaration, he regretted that it did not deal with the right to the sanctity of the home which is recognized in Article 12 of the Declaration. The Covenant, in his opinion, should be a comprehensive document in keeping with the lofty ideals embodied in the Declaration (E/AC.7/SR.149, page 10).

25. Included among the rights which he claimed were inherent in the human person as such, without any relation to society, and which should be recognized by everyone everywhere, the representative of Uruguay in the General Assembly mentioned the right to the sanctity of the home. Complete agreement about such a right could be reached comparatively easily and he felt that a considerable degree of international intervention to protect it could be accepted. His suggestion that the first step towards an effective machinery for the international protection of human rights should be the drafting of an article or protocol to put into effect the Universal Declaration would automatically include an international guarantee of the right to the sanctity of the home proclaimed in Article 12 of the Universal Declaration (A/C.3/SR.291, paragraphs 40-1 and 46).

8. Right to the secrecy of correspondence

26. The representative of China in the Council thought that the Covenant should not omit any right which had already been included in the Universal Declaration of Human Rights. Because he considered that the aim of the Covenant should be to provide for the implementation of the largest number of rights set forth in the Universal Declaration, the Chinese representative in the Council regretted the absence from Part II of the Covenant of a provision dealing with the right to freedom from arbitrary interference with correspondence which had been set forth in Article 12 of the Universal Declaration (E/AC.7/SR.149, page 11). The representative of Uruguay in the General Assembly included the right to inviolability of correspondence among those rights inherent in the human person as such, without any relation to society, which in his opinion should be recognized by everyone everywhere. In view of the universal acceptance of this right he saw little difficulty in codifying it into law by inclusion in the draft Covenant (A/C.3/SR.291, paragraph 40).

9. Right to protection against attacks on honour and reputation

27. The Government of the Philippines has proposed that the Covenant should contain a provision guaranteeing the right to protection against attacks on honour and reputation (E/1681, page 26).

10. Right of asylum

28. The representatives of Belgium and China in the Council considered that that omission from the draft Covenant of an article analogous to Article 14 of the Universal Declaration of Human Rights which dealt with the right of asylum constituted a retrograde step (E/AC.7/SR.147, page 9; E/AC.7/SR.148, page 9; and E/AC.7/SR.149, page 10).

29. The representative of Yugoslavia in the General Assembly also regretted that the Covenant made no reference to the right of individuals fighting for the promotion of United Nations principles to enjoy asylum (A/C.3/SR.291, paragraph 21).

30. Speaking with reference to the Yugoslav proposal (A/C.3/L.92) that the right of asylum should be added to the rights already recognized in the Covenant the French representative in the General Assembly considered that the right of asylum deserved careful study, but thought that, if the question were to be dealt with seriously, political rights proper would have to be included in the Covenant (A/C.3/SR.305, paragraph 27). The representative of Guatemala also was not opposed to the inclusion of such an article. He was sure that Latin-American delegations would not fear the inclusion of the right of asylum which had long been cherished by them (A/C.3/SR.307, paragraph 30). The Canadian representative in the General Assembly, although not objecting to the right of asylum, opposed its inclusion in the draft Covenant (A/C.3/SR.305, paragraph 75). In the Council the representative of the United States of America doubted whether agreement could ever be reached in advance on the persons who should be entitled to asylum and in what circumstances such asylum could be claimed. He was uncertain whether those representatives who favoured the concept had in mind the notion of medieval sanctuary. He pointed out that his country had long served as a place of refuge in the absence of any specific law granting asylum (E/AC.7/SR.148, page 18). In the General Assembly the representative of the United States of America thought that the Commission on Human Rights should be given an opportunity to consider the documentation of the International Law Commission which was to deal with the whole question of the right of asylum (A/C.3/SR.304, paragraph 27).

31. In his communication of 30 October 1950 the Director-General of the

International Refugee Organization regretted that the right of asylum, which is mentioned in the Universal Declaration and which he considered of great importance for refugees, was not mentioned in the draft Covenant. For the refugee the right of asylum is a corollary to the right to live. Without being admitted to a country of asylum refugees would not be able to enjoy those human rights and fundamental freedoms which are laid down in the Covenant (E/1800, pages 6 and 7).

11. Right to a nationality

32. This right, which was termed the right to citizenship and characterized as a social right, was mentioned by the representative of the Philippines in the General Assembly for inclusion in the Covenant (A/C.3/SR.291, paragraph 19).

33. In his communication of 30 October 1950 the Director-General of the International Refugee Organization, replying to a request for information sent to him by the Secretary-General in accordance with Economic and Social Council resolution 303 D (XI), regretted that the draft Covenant in its present form does not contain an article dealing with the right to a nationality. Reference was made to the resolution of the Economic and Social Council relating to the elimination of statelessness, which "urges that the International Law Commission prepare, at the earliest possible date, the necessary draft international convention or conventions for the elimination of statelessness" (E/1818), and also to a previous communication addressed to the Secretary-General by the Executive Secretary of the Preparatory Commission for the International Refugee Organization (E/CN.4/41/Rev.1, paragraph 2). The Director-General stated that the provisions contained in Article 15 of the Universal Declaration and various proposals made for the elimination of statelessness reflected the opinion that the right to a nationality could best be secured, if nobody were deprived of his nationality nor allowed to renounce his nationality without acquiring another. Among the refugees within the mandate of the International Refugee Organization, it was said that there are persons who are de jure stateless, but there are also many who have formally retained a nationality but are de facto stateless, because they do not enjoy the protection of the state whose nationals they are. On the basis of the experience gained by his Organization, the Director-General felt bound to point out that measures designed to secure a nationality by eliminating statelessness would, in his opinion, not necessarily prove beneficial to the individual. He thought that, although they would result in a reduction of the number of persons who are stateless de jure, they might at the same time lead to an increase in the number of persons

/who are stateless

who are stateless de facto and whose position, as regards the enjoyment of human rights, is often even more precarious than that of persons without any nationality. The incorporation of such rules, desirable as they may be, must depend on the conclusion of an international convention on human rights and - in his opinion, a most important consideration - its effective enforcement. He felt that the right to expatriation and to immigration should in any case be safeguarded (E/1880, pages 7-8).

12. Right to marriage

34. The omission from the Covenant of an article dealing with the right to freedom of marriage was regretted by the Chinese representative in the Council (E/AC.7/SR.149, page 10). The representative of the Philippines in the General Assembly was also in favour of including the right to marriage among the rights defined in Part II of the Covenant (A/C.3/SR.291, paragraph 19).

13. Right to own property

35. In the General Assembly the representative of Afghanistan declared that his delegation would support the addition to the present articles in Part II of the draft Covenant of an article dealing with the protection of property and safeguards against confiscation (A/C.3/SR.291, paragraph 34). The representative of Belgium in the Council criticized the failure of the Covenant to provide for the protection of property rights (E/AC.7/SR.148, page 9). The representative of the Philippines also regretted the omission of provisions guaranteeing that no one should be deprived of his property without due process of law and that no private property should be expropriated without just compensation (A/C.3/SR.291, paragraph 18 and A/C.3/SR.304, paragraph 46). He pointed out that there was little use in guaranteeing the right to life unless the concomitant rights to the enjoyment of the fruits of individual labour and to protection against expropriation were equally guaranteed (A/C.3/SR.314, paragraph 7).

36. During the discussion in the General Assembly on the desirability of including articles on economic, social and cultural rights in the draft Covenant the representative of the Netherlands made some observations on the right to own property. His delegation's attitude was that the draft Covenant should not include social, economic and cultural rights. An exception should, however, be made of the right to own property which, although a social and economic right, was so closely connected with the human person, that it had to be considered indispensable for the full development of the human personality. The representative

/of the Netherlands

of the Netherlands then referred to a provision relating to the right to own property which was contained in the draft Convention for the Protection of Human Rights and Fundamental Freedoms prepared by the Consultative Assembly of the Council of Europe. That article provided that every person was entitled to the enjoyment of his possessions which could not be arbitrarily confiscated; nevertheless, the state reserved the right to pass necessary legislation to ensure that those possessions were used in accordance with the general interest. Although he did not consider this provision to be the best possible formula, the Netherlands representative hoped that the Commission on Human Rights would take it into account in studying the right to own property (A/C.3/SR.297, paragraphs 27-28).

37. The attention of the Commission is drawn to the fact that the final text of the Rome Convention, as distinct from the Draft adopted by the Consultative Assembly, does not contain any article dealing with the right to own property.1/

14. Right to participate in government

38. The omission from the draft Covenant of a provision which would guarantee the right to participate in government was criticized in the Council by the Belgian representative (E/AC.7/SR.148, page 9), and in the General Assembly by the representatives of the Byelorussian SSR (A/C.3/SR.291, paragraph 54); of Poland (A/C.3/SR.290, paragraph 3); of the Ukrainian SSR (A/C.3/SR.291, paragraph 8); of the Union of Soviet Socialist Republics (A/C.3/SR.289, paragraph 33), and of Yugoslavia (A/C.3/SR.291, paragraph 21).

39. The delegations of Yugoslavia (A/C.3/L.92, page 1) and the Union of Soviet Socialist Republics (A/C.3/L.96, page 1) proposed resolutions which contained a specific direction that the right to participate in the government should be included in the draft Covenant. The Yugoslav proposal provided that the right of every person to participate in the government of the state should be added to the list of the rights to be defined in the Covenant. The proposal of the Union of Soviet Socialist Republics was that the Economic and Social Council should request the Commission on Human Rights in drafting the Covenant to have in mind the inclusion therein of a provision guaranteeing the right of every citizen to an opportunity to take part in the government of the state.

40. Speaking with reference to these proposals the representative of Afghanistan was in favour of the inclusion in the Covenant of such a provision (A/C.3/SR.291, paragraph 34). The representative of France declared that the provision dealing

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1/ For the text of the Rome Convention see document E/CN.4/524.

/with the right

with the right to participate in public affairs was a feature of the Yugoslav proposal which deserved careful study. In his opinion, however, political rights proper would have to be included in the Covenant (A/C.3/SR.305, paragraph 27). The representative of Greece also was in favour of the right of every person to participate in the Government of his country and was therefore not opposed to the rights enunciated in the Yugoslav proposal, although he would vote against it because he wished to indicate his preference for another proposal (A/C.3/SR.305, paragraph 73). The representative of India placed special emphasis on the right to participate in the government of a state. Civil liberties and fundamental freedoms could exist only where people were able to participate in government by means of periodic elections on the basis of universal and equal suffrage (A/C.3/SR.291, paragraph 50).

41. The representative of the United States of America in the Council had expressed the hope that the Covenant would succeed in establishing the basic human rights referred to by the Secretary of State of his Government at the time of the adoption of the Universal Declaration of Human Rights. Among these basic human rights he had included the right of a people to take part in the work of their own government (E/AC.7/SR.147, page 16).

42. The action taken by the General Assembly on the proposals of the delegations of the Union of Soviet Socialist Republics and of Yugoslavia has been described in document E/CN.4/513, paragraph 14.

15. Right of equal access to public service

43. The representative of the Union of Soviet Socialist Republics in the General Assembly stated that the first eighteen articles of the Covenant were far from constituting a complete statement of fundamental human rights and freedoms. His delegation thought that the Covenant should mention the duty of the state to guarantee to every citizen without distinction of race, colour, nationality, origin or social class, property, language, religion, sex, etc. the right to hold any public post in the state and in society (A/C.3/SR.289, paragraph 33). This view was supported by the representative of Poland who cited the omission of the right of citizens to hold any state or public office as a basic deficiency in the draft Covenant (A/C.3/SR.290, paragraph 3). The representative of the Ukrainian SSR in the General Assembly noted that none of the eighteen articles contained a provision that states should be governed in accordance with democratic principles. It was not enough to proclaim in the abstract the right to equal status before

/the law;

the law; it was also necessary to guarantee to each citizen the right, inter alia, to participate in the administration of the state and to equal opportunities with his fellow citizens to occupy governmental positions (A/C.3/SR.291, paragraph 12).

44. Speaking with reference to a proposal of the delegation of the Union of Soviet Socialist Republics that in drafting the Covenant the Commission should have in mind the inclusion therein of a provision guaranteeing the right of equal access to public service (for the text of this proposal see document E/CN.4/527), the French representative in the General Assembly thought that it would be considered by the Commission if there were time, or otherwise it might be the subject of a separate Covenant (A/C.3/SR.305, paragraph 28).

45. The action taken by the Third Committee and by the General Assembly in plenary session with regard to this proposal is described in document E/CN.4/513, paragraph 14.

16. Right to vote

46. The representative of Greece in the Third Committee felt that the issue confronting the General Assembly was clearly above all else a political problem or rather a problem of political organization and of the interpretation of principles of law and liberty. Without the most basic of all human rights, among which he included the right to free elections involving a choice of at least two parties, the building which the United Nations was attempting to erect in the field of human rights would lack a keystone, and there could be no certainty that people would be enabled to live under freedom, law, and justice (A/C.3/SR.298, paragraph 26).

47. As a basic deficiency in the draft Covenant, the Polish representative in the General Assembly cited the omission of an article dealing with the right of citizens to elect representatives to all governmental bodies by universal equal and direct suffrage and secret vote (A/C.3/SR.290, paragraph 3). The representative of the Union of Soviet Socialist Republics in the General Assembly stated that the Covenant should mention the duty of the state to guarantee to every citizen without distinction of race, colour, nationality, origin or social class, property, language, religion, sex, etc. the right to vote in elections on the basis of universal, equal free, and secret suffrage. Electoral laws based on property, educational or other qualifications, which limited the participation of citizens in elections to representative bodies, must be abolished (A/C.3/SR.289, paragraph 33).

/48. The Yugoslav

48. The Yugoslav delegation in the General Assembly proposed that the General Assembly should decide to add to the list of the rights to be defined in the Covenant the right of universal and equal suffrage (A/C.3/L.92). A similar proposal was made by the representative of the Union of Soviet Socialist Republics in the Third Committee and in plenary session of the General Assembly (A/C.3/L.96 and A/1576).

49. The action taken by the Assembly on the two resolutions of which these proposals formed a part is described in document E/CN.4/513, paragraph 14.

17. Right to petition national authorities

50. In accordance with resolution 217 B (III) of the General Assembly which had been transmitted to it by the Economic and Social Council in resolution 191 (VIII) the Commission considered at its last session the right of petition which the Assembly had declared to be an essential human right. The Commission may wish to refer to the observations of the representative of Cuba in document A/PV.224.

18. Right to self-determination

51. The representative of Afghanistan in the General Assembly considered that the absence of an article relating to self-determination would not only be most injurious to the effectiveness of the draft Covenant but, coinciding as it did with inclusion in the Covenant of a clause of application to non-self-governing territories, would lead to a future interpretation to the effect that the Third Committee had not recognized the principle of self-determination as a fundamental human right (A/C.3/SR.302, paragraphs 23, 24).

52. The representative of Syria expressed the regret of his delegation at the omission of the right to self-determination from the Covenant. This serious wrong should be redressed immediately, because the right to self-determination was the first fundamental human right and was essential for the existence of man as well as of society. The omission of that right from the draft Covenant would make it an incomplete instrument (A/C.3/SR.299, paragraph 58).

53. The representative of the Union of Soviet Socialist Republics thought that the right to self-determination should be guaranteed to every people and nation. He stated that the States responsible for the administration of the non-self-governing territories must help in making that right a fact by acting in accordance with the principles and purposes of the Charter (A/C.3/SR.289, paragraph 34 and A/PV.317, paragraph 10).

54. The omission from the Covenant of an article dealing with the right to

self-determination was also criticized by the representatives of the Byelorussian SSR (A/C.3/SR.291, paragraph 54 and A/PV.317, paragraph 138); of Poland (A/C.3/SR.290, paragraph 4 and A/PV.317, paragraph 60) and of the Ukrainian SSR (A/C.3/SR.291, paragraph 8 and A/PV.317, paragraph 73).

55. Speaking with reference to the proposal of the delegation of the Union of Soviet Socialist Republics (A/C.3/L.96) that the Commission should have in mind the inclusion in the Covenant of an article recognizing the principle of self-determination the French representative considered that such a question was not within the competence of the Commission but should be left to the General Assembly.

56. The action taken by the General Assembly on the proposal of the Union of Soviet Socialist Republics (A/C.3/L.96) has been described in document E/CN.4/513, paragraph 14.

57. The delegations of Afghanistan and Saudi Arabia submitted a joint proposal to the General Assembly that the Commission on Human Rights should study ways and means which would ensure the right of peoples and nations to self-determination. This proposal was adopted by the General Assembly and now forms section D of resolution 421 (V). A detailed note on the Afghanistan and Saudi Arabian proposal and the proceedings of the General Assembly devoted thereto is contained in document E/CN.4/516. Pursuant to the General Assembly resolution and resolution E/1927 of the Economic and Social Council, the right of peoples and nations to self-determination has been placed on the provisional agenda of the Commission on Human Rights as item 4 (E/CN.4/510/Rev.1).

## III. ADEQUACY OF ARTICLES 1 AND 2, DEALING WITH IMPLEMENTATION ON THE NATIONAL LEVEL

### 1. General observations on national implementation

58. A number of representatives have stressed the importance, from the point of view of implementing the Covenant, of Articles 1 and 2. Most of the comments on the question envisaged implementation at the national level as only one part of the machinery for implementation of the Covenant, the other part being the international measures of implementation; but certain representatives were of the opinion that implementation of the provisions of the Covenant fell entirely within the domestic jurisdiction of States.

59. The view that implementation should be left entirely to States parties to the Covenant was expressed in the General Assembly by the representatives of the Byelorussian SSR (A/C.3/SR.314, paragraph 17 and A/PV.317, paragraph 43); Czechoslovakia (A/PV.317, paragraphs 108-111); Poland (A/C.3/SR.314, paragraphs 14, 15 and 16; and A/PV.317, paragraphs 64-68); Ukrainian SSR (A/C.3/SR.291, paragraph 10; A/C.3/SR.301, paragraph 43; and A/PV.317, paragraphs 75, 77-78); and the Union of Soviet Socialist Republics (A/C.3/SR.300, paragraphs 42, 43, 44 and 45; A/C.3/SR.314, paragraphs 10, 11, 12 and 13, and A/PV.317, paragraphs 21-25). An account of these observations is contained in document E/CN.4/530, paragraph 10.

60. The relevancy of the first two articles of the Covenant to the problem of implementation was recognized by the representative of Mexico in the General Assembly, who regretted that Article 1 had not been brought into the discussions of measures of implementation, because the obligations which the signatory states would undertake in accepting that article - and undertake in perfect good faith - were the crux of the whole subject of implementation (A/C.3/SR.291, paragraph 61).

61. On the other hand, the contention that implementation of the Covenant was the sole responsibility of the High Contracting Parties was opposed by the representative of the United States of America. In her opinion, the willingness of a government to implement the Covenant within its own territory in accordance with Article 1, paragraph 1, was insufficient, since it was essential that there should also be international machinery for receiving complaints against alleged violations of the Covenant (A/C.3/SR.314, paragraph 20).

62. The action taken by the General Assembly on the proposal of the delegation of the Union of Soviet Socialist Republics to delete from the Covenant Articles 19-41 dealing with international implementation and to confine implementation of the

Covenant to national legislative measures has been described in document E/CN.4/513, paragraph 23. However, although the Assembly rejected this proposal, it has emphasized the importance of implementation on the national level, as is evidenced by paragraph 3 of the preamble of resolution 421 (V), which reads as follows:

> "Considering it essential that the Covenant should include provisions rendering it obligatory for States to promote the implementation of the human rights and fundamental freedoms proclaimed in the Covenant and to take the necessary steps, including legislation, to guarantee to everyone the real opportunity of enjoying those rights and freedoms."

2. Relationship of the Covenant to national law

63. It may be convenient, in connexion with the problem of national implementation, to refer to the question of the relationship of the Covenant to national law.

64. The representative of Canada in the Council referred to a statement submitted by the World Jewish Congress (E/C.2/259/Add.1), which pointed out that the position taken up in the draft Covenant on the question of the validity of national law was that national laws were considered invalid in some instances, if contrary to the Universal Declaration; in others, if contrary to the general principles of law; in yet others, if unreasonable and unnecessary to protect public welfare; in some instances they were fully recognized, even if contrary to all fundamental principles of the Charter or of the Declaration. In his opinion, if such a four-fold distinction were intentional, it should be made clear in the text of the draft Covenant (E/AC.7/SR.148, page 13).

65. The Secretary-General draws the attention of the Commission to the comments reported above (as well as to the statement of the World Jewish Congress), and to the fact that the draft Covenant offers several conflicting solutions to the problem of the relationship between provisions of the Covenant and provisions of national law (Articles 3 (3), 6, 8, 9, 11 (1) and (2), 13, 14, 15 and 16). The attention of the Commission is also drawn to the way in which the problem of the relationship between international conventional law and national law has been treated in the Freedom of Association and the Protection of the Right to Organize Convention, 1948, Article 8 of which reads as follows:

> "1. In exercising the rights provided for in this Convention workers and employers and their respective organizations, like other persons or organized collectivities, shall respect the law of the land.

/"2. The law of

"2. The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention."

The Secretary-General also submits to the Commission the suggestion he made to the General Assembly that it might consider the advisability of including in the draft Covenant a declaratory statement that the observance of the obligations contained in the Covenant "shall be a matter of international concern." (A/C.3/534, paragraphs 9 and 10).

## IV. ADEQUACY OF THE FIRST EIGHTEEN ARTICLES OF THE COVENANT TO PROTECT THE RIGHTS TO WHICH THEY RELATE

### Preamble

#### Drafting change

66. Attention is drawn to the fact that in the preamble the verb "recognize" is used twice in the third paragraph : "recognizing that the rights and freedoms recognized..." (E/L.68, paragraph 13). It is suggested that the present participle "recognizing" be replaced by the word "reaffirming".

### Article 1, paragraph 1

#### The inclusion of the words "within its territory"

67. The representative of France in the Council expressed the view that it was not necessary to add the words "within its territory" to the words "subject to its jurisdiction," in Article 1, paragraph 1, as the provision might be interpreted as allowing a State to evade its duties towards its nationals abroad (E/AC.7/SR.147, page 18).

#### Relationship to other articles in the Covenant

68. Comparing Articles 1 and 17 the Belgian representative in the Council pointed out that they overlapped to a certain extent, especially if paragraph 1 of Article 1 were taken in conjunction with paragraph 2 of the same article. Although paragraph 1 might go beyond the national legislation of any given State, paragraph 2 immediately straightened out the position by providing that States would in due course undertake to adopt legislation and other measures to cover such cases. Article 17, providing for equality before the law, appeared to go beyond the scope of Article 1, paragraph 1, since equality before the law included equality in regard to obligations under the law - in other words, equality of legal status, a proviso not contained in Article 1. On the other hand, Article 1, paragraph 2 appeared to suggest that the rights must be embodied in the law before they could be ensured. He suggested that either Article 1 merely duplicated what was contained in Article 17, in which case it was superfluous, or it added something to the provisions of Article 17, in which case it would be well to specify what it was that was added. It was essential that the exact scope of Article 1 should be made quite clear, since it governed the entire draft Covenant (E/AC.7/SR.148, pages 6-7). The representative of Canada in the Council associated himself with the concern expressed by the Belgian

representative about the relationship between Article 1, paragraph 1 and Article 17, which were so similar in wording as to make it uncertain whether or not they had a different connotation. He himself was of the opinion that Article 1, paragraph 1 related to the obligation of States to ensure the rights defined in the Covenant, whereas Article 17 referred, not to the Covenant, but to the broader concept of protection under law (E/AC.7/SR.148, pages 13 and 14).

69. The Secretary-General draws the attention of the Commission to the following observation which he submitted to the General Assembly. The Secretary-General suggested to the General Assembly that it may wish to consider whether the anti-discriminatory provisions of the Covenant (Article 1, paragraph 1 and Article 17) should not be strengthened by the addition of a provision to the effect that the States parties to the Covenant undertake not to lend the assistance of their judicial, executive and administrative organs for the purpose of enforcing or practising discrimination (A/C.3/534, paragraph 7).

Drafting changes

70. The Secretariat wishes to draw attention to two drafting points:

(a) The English text of the paragraph speaks of "Each State Party hereto," whereas the French uses the plural "Les Hautes Parties contractantes." If the French were to be adjusted to the English, it might read: "Chacun des Etats contractange s'engage à ..." (E/L.68, paragraph 16).

(b) It may be thought desirable to replace the words "without distinction of any kind, such as race ..." by the words "without distinction of any kind, such as to race ..." (cf. Articles 1 (3), 13 (1) (b), 55 (c) and 76 (c) of the Charter of the United Nations (E/L.68, paragraph 17).

Article 1, paragraph 2

National legislation

71. The representative of Yemen in the General Assembly considered that the provision called for certain reservations and that it was necessary to make clear that a State could take the steps stipulated, provided that, in so doing, it did not offend the religious beliefs of the inhabitants of its territory or run counter to the provisions of its national legislation. He pointed out, by way of example, that the adoption of Articles 13 and 17 would raise great difficulties for the Arab countries, the legislation of which was largely religious in origin; Article 17 did not take into consideration the differences between the laws of the various countries, in particular with regard to

/marriage,

marriage, divorce and inheritance. Such differences of legislation, he went on, occurred between European countries as well as between Western and the Arab countries. After citing a number of examples of differences in various national legislations, particularly in the matter of criminal law, he said that in any State the laws must evolve naturally and any amendments that might be made must originate in the State itself and not from a foreign and external sources. It would be impossible to force a State to abandon traditional legislation which it had applied for centuries and which was known to be in conformity with the aspirations and needs of the people (A/C.3/SR.290, paragraphs 62 and 63).

The inclusion of the words "within a reasonable time"

72. Comments were made, both in the General Assembly and the Council, on the inclusion in Article 1, paragraph 2 of the words "within a reasonable time." The United Kingdom representatives in the General Assembly and the Council pointed out that such reasonable time might well extend, in the case of some States, for years, and the provision meant in fact that the date on which the Covenant should take effect within their territories was left at the discretion of the States. This might render the whole effect of accession meaningless, for States might become parties to the Covenant and yet deny to persons within their jurisdiction the enjoyment of a number of rights without violating the Covenant, which was wholly improper and undesirable. It was a general rule of international law that a State on becoming a party to an international agreement was bound to give effect to that agreement in toto from the moment of its accession. There might have been a small number of comparatively insignificant cases in which that general rule had been disregarded and a similar paragraph included in international agreements. Human rights, however, were in a different category. The view of the Government of the United Kingdom was that the Covenant came into effect within a State as soon as that State had ratified it. It was pointed out that the United Kingdom representative on the Commission on Human Rights had proposed that special reservation might be made by States, on ratification, in respect of individual points on which they would be unable to change their domestic law for any considerable time, but that suggestion had been rejected by a large majority in the Commission (A/C.3/SR.288, paragraph 19 and E/AC.7/SR.148, pages 5-6). The Canadian representative in the

/Council,

Council, sharing the concern of the United Kingdom representative on this point, stated that his delegation took the view it had taken when the same problem had arisen in connexion with the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostituion of Others, namely, that States which were able to carry out the obligations entailed should sign the instrument, and that those that were not so able should wait until they were (E/AC.7/SR.148, page 14). The representative of the Netherlands, speaking on the same problem in the General Assembly, considered that it was capable of leading to abuse, and that he preferred a precise time limit of one or two years. Nevertheless, he observed, Article 38 seemed to constitute a palliative, since it entitled any State party to the Covenant to see to it that the other parties fulfilled their obligations; and, if they did not, to address a complaint to the State in question; and, if the matter were not adjusted to the satisfaction of both parties, to refer it to the Human Rights Committee. In his opinion, there was thus a measure of supervision which should enable the expression "reasonable time" to be applied "in an equally reasonable manner" (A/C.3/SR.290, paragraph 23). The representative of France in the Council also observed that the "high authority" (Human Rights Committee) would have to say whether the time-limit provided for in the provision for giving effect to the rights in the Covenant was reasonable or not (E/AC.7/SR.148, page 16). On the other hand, the representative of Pakistan in the Council thought that the criticism by the representative of the United Kingdom of the phrase "reasonable time" was all the more astonishing since the phrase recurred frequently in English law. He contended that the whole law of negligence in that country was based on the standard of care which might be exercised by a "reasonable" man. Admittedly there was no such person but the fiction was a valuable yardstick and could not be rejected as being meaningless in law (E/AC.7/SR.148, page 11).

Drafting changes

73. The Secretariat wishes to draw the attention of the Commission to the present wording of the French text of this paragraph, which does not conform to the English, and, the language of which, furthermore, may be improved. The following wording for the French text is suggested:

"Les Hautes Parties Contractantes s'engagent /chacun des Etats contractants s'engage/, au cas où les mesures d'ordre legislatif ou autre/

/propres

propres à donner effet aux droits reconnus dans le présent Pacte, ne seraient pas prévues dans les dispositions déjà en vigueur, a prendre de telles mesures dans un délai raisonnable, en accord avec leurs procédures constitutionnelles et avec les dispositions du présent Pacte."
(E/L.68, paragraph 18),

Article 1, paragraph 3 (a)

Violation of the Covenant by officials acting in good faith

74. The Indian representative in the Council, referring to the fact that what the Covenant attempted to do was to fuse different systems of criminal and civil law into one single document, commented that that was all the more difficult, because the differences in legislation often reflected differences in economic and social structure. He considered that what would be only right in one country could be utterly inapplicable in another. Speaking with special reference to the provisions of Article 1, paragraph 3 (a), he pointed out that in a large country like India where there was only a very small police compared to the total population, the strict application of such a clause in cases when officials had acted in good faith would seriously hamper the course of justice and the administration as a whole (E/AC.7/SR.149, pages 6-7).

Article 1, paragraph 3 (b)

Nature of authority adjudicating on claim for remedy for violation of the Covenant

75. The representative of Canada in the Council felt that reference to political or administrative authorities in the provision was inexpedient (E/AC.7/SR.148, page 14). The representative of New Zealand in the General Assembly expressed his belief that it would be advisable to make it clear in paragraph 3 (b) that there must be a guarantee of the independence of the authorities deciding whether a remedy should be granted. He considered that the text, although perhaps broader than that of the original article (fifth session), was much weaker, in that it authorized arbitrary action by political or administrative authorities, when a claim for remedy was made. It was essential that, whatever the nature of the tribunal, its independence should be secured (A/C.3/SR.290, paragraph 36).

Drafting changes

76. The Secretariat draws attention to the following drafting points:

(a) The first line in the French text might be changed so as to read

/"Chacun

"Chacun des Etats contractants s'engage ..." (See paragraph 73 above for a similar suggestion).

(b) The French text does not follow the English and may be reworded as follows:

"(b) A guarantir à toute personne exercant un tel recours la détermination de ses droits par les autorités compétentes, politiques, administratives, ou judiciaires." (E/L.68, paragraph 21)

Article 1, paragraph 3 (c)

Drafting changes

77. The Secretariat suggests for consideration whether it may be desirable to omit the word "the" in the English text, since otherwise the sub-paragraph is open to the possible interpretation that the competent authorities which in each individual case shall enforce a remedy must be the same as the competent authorities which, under sub-paragraph (b) have determined the existence of a right to that remedy (E/L.68, paragraph 22).

78. The Secretariat also suggests the following rewording for the French text, which does not follow the English:

"(c) A garantir l'exécution par les autorités compétentes de toute décision reconnaissant le bien-fondé d'un tel recours." (E/L.68, paragraph 21)

Article 2

Emergency powers - right of derogation from certain articles

79. The representative of Belgium in the Council referred to the fact that Article 2 dealt with permissible derogations from the obligations assumed under the Covenant, in the event of emergency or public disaster. Yet in the second paragraph there were set out a number of provisions to which no derogation was admissible, even in such circumstances. The scope of those provisions was extremely wide, and there were many acts which a State might be forced to resort to in war time, if it were to survive threats to life by suppressing risings organized by fifth-columnists; attacks on personal liberty by the more or less arbitrary arrest of enemy aliens; restrictions on freedom of opinion and expression to prevent propaganda likely to assist the enemy, etc. He thought that the opposite procedure might have been followed, and a list given of the cases where derogation or suspension of the Covenant was permissible. Such a list would necessarily be somewhat arbitrary, both in itself and because of the

varying interpretations which would be placed on it; its drafting would also prove virtually impossible in view of the differences in the level of legal and political development in the various countries. The Belgian delegation therefore felt that the principle laid down in Article 2 should allow of no exceptions, since exceptions of that nature could only have the effect of paralyzing honest Governments during an emergency, "while others snapped their fingers at their obligations." Since the safeguarding of human rights would be particularly necessary in case of disturbance, it was important to provide additional guarantees by defining a strict procedure for cases of derogation. In that connexion, paragraph 3 of the article was unsatisfactory. A derogation from the Covenant was in fact a case of non-application, and therefore referred to its implementation. Hence, the Human Rights Committee or some other supreme authority should take up every specific case and examine it, as far as possible by summary procedure. He felt that any State should be required to put before such an authority all the circumstances which had led it to suspend the guarantee of such and such a right, and the body in question would decide whether the derogation or suspension was legitimate (E/AC.7/SR.148, pages 7 to 8 and E/AC.7/SR.150, page 8).

80. The representative of Mexico in the Council expressed the opinion that in Article 2 it should be a question not of derogation but of suspension of the stipulated guarantees. The possibility of derogation should be qualified; while it might be admissible, in cases of exceptional danger or emergency, for a State to refuse certain guarantees to individuals on account of their political or other opinions, it was inadmissible that it should do so for reasons of race, sex, colour or religion. Hence, some distinction must be established between the various motives for discrimination (E/AC.7/SR.149, page 9).

81. The Secretary-General wishes to place before the Commission for its consideration the observation made by him in connexion with this article to the General Assembly. It was suggested that the General Assembly might wish to consider whether part of the anti-discriminatory provisions of the Covenant at present contained in Article 1, paragraph 1 and Article 17 should not be enumerated among those provisions of the Covenant from which no derogation may be made under Article 2 (Article 2, paragraph 2 of the draft Covenant). It was pointed out that it has been submitted that while a state of emergency or public disaster may make it necessary to make distinctions as to nationality, or

/political

political or other opinion, such a situation would not be a reason for distinction as to race, colour, sex or religion (A/C.3/534, paragraph 8).

Article 2, paragraph 1

Drafting changes

82. The Secretariat draws the attention of the Commission to the fact that the French text of this paragraph as at present drafted does not follow and is less clear than the English. The paragraph could be reworded as follows:

"En cas de danger exceptionnel, officiellement proclamé par les autorités /compétentes/ ou en cas de calamité publique, l'Etat peut prendre, dans la stricte mesure où la situation l'exige, des mesures dérogeant à ses obligations decoulant du ler paragraph de l'Article 1 et de la 2e partie du présent Pacte." (E/L.68, paragraph 25)

It may also be desirable in the paragraph to substitute "A State Party" and "tout Etat partie au Pacte" respectively, for "a State" and "l'Etat". (E/L.68, paragraph 26)

Article 2, paragraph 2

Scope of permitted derogations

83. The representative of India in the Council pointed out that Article 2 allowed no derogation from the provisions of Article 3 and asked what were Indian or any other authorities to do when they had no alternative but to proclaim martial law and do their utmost "to stop bloody riots" (E/AC.7/SR.149, page 7).

84. The representative of Czechoslovakia in the General Assembly drew attention to a provision in Article 2, paragraph 2 which referred to "derogation which is otherwise incompatible with international law". The expression was vague and unsatisfactory; in no part of the Covenant was the character of the standards of international law clearly stated. Considering the divergence of views existing - in the matter of property for example - between the socialist and capitalistic states, it would be better in those circumstances to state clearly what was meant by international law (A/C.3/SR.290, paragraph 14).

Drafting changes

85. Other comments relating to this paragraph by Mexico in the Economic and Social Council and by the Secretary-General will be found in paragraphs 80 and 81 above. As regards its drafting the Secretariat wishes to point out that the English text of the paragraph uses the expression "this provision", twice, whereas the French text reads "la disposition precedente". It may be desirable

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to change one of the two expressions so as to make them uniform, perhaps by adopting in the English text the expression "under the foregoing provision" in the first sentence and the expression "under that provision" in the second s sentence. (E/L.68, paragraph 29).

Article 2, paragraph 3

Obligation to submit to the Secretary-General reasons for derogation

86. The New Zealand representative in the General Assembly pointed out that Article 2 no longer contained a provision that States availing themselves of the right of derogation should keep the Secretary-General of the United Nations informed of the measures enacted to that end and the reasons therefor. He considered that it would be advisable to re-establish that text, for the States parties to the Covenant should state the reasons which had led them to take such a serious step (A/C.3/SR.290, paragraph 38).[1/]

Article 3, paragraph 1

Scope of guarantee of right to life

87. The objection raised by the French representative on the Council to the addition of a first clause in Article 3 was that it introduced an idea of doubtful legal validity before the second paragraph which, he declared, was quite sufficient in itself (E/AC.7/SR.147, page 18).

88. The first paragraph of Article 3, which states that "Everyone's right to life shall be protected by law", was included among those provisions of the draft Covenant which, in the opinion of the representative of the United Kimgdom in the General Assembly, contained a definition which was excessively vague (A/C.3/SR.288, paragraph 14).

89. The representative of Lebanon in the General Assembly thought it would be dangerous to make the inclusion or exclusion of certain rights dependent on whether or not those rights were fundamental. Such rights might be fundamental for some and not for others, or unnecessary today and essential tomorrow. In his opinion, the Covenant should not include only those rights which the members of the United Nations already considered themselves able to observe. Everyone

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1/ The provision referred to read as follows:

"Any State party hereto availing itself of this right of derogation shall inform the Secretary-General of the United Nations fully of the measures which it has thus enacted and the reasons therefor. It shall also inform him as and when such measures cease to operate and the provisions of Part II of the Covenant are being fully executed" (E/1371).

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agreed, for example, that the right to life was fundamental and that no one had the right to life was fundamental and that no one had the right to take the life of another person; but when an individual died of starvation, society no longer maintained that a fundamental right had been violated. Hence the topic lent itself to subtle and, he thought, dangerous distinctions (A/C.3/SR.289, paragraph 13).

90. In the General Assembly the representatives of the Ukrainian Soviet Socialist Republic (A/C.3/SR.298, paragraph 51) and Union of Soviet Socialist Republics (A/C.3/SR.297, paragraph 54) stressed the inadequacy of Article 3 as it stood in the draft Covenant. They contended that the mere affirmation of the right to life was inadequate and even meaningless, unless it was supplemented by a guarantee of the right to subsistence - the right to work and receive a wage, the right to social security, leisure, and culture (A/C.3/SR.289, paragraph 32).

Drafting changes

91. The Secretariat wishes to draw attention to the divergence in drafting between the English and French texts of paragraph 1. The English text of the paragraph provides that everyone's right to life shall be protected by law, whereas the French text declares that "tout individu a droit a la vie" and then goes on to provide that "Ce droit sera protege par la loi". If the French text were to be brought into closer conformity with the English, it might perhaps read as follows: "Le droit de chacun a la vie sera protege par la loi" (E/L.68, paragraph 31).

Article 3, paragraph 2

Limitations on right to life

92. In the opinion of the representative of New Zealand in the General Assembly paragraphs 2 and 3 of Article 3 did not sufficiently define the circumstances in which the death penalty might be imposed. The term "self-defence" was singled out for special criticism. As it stood, he contended, it would seem that individual self-defence only was contemplated. He would prefer, however, a clear reference to collective self-defence in the event of war (A/C.3/SR.290, paragraph 39). The drafting lacunae in Article 3 were also criticised by the representative of Uruguay in the General Assembly. He stated that paragraph 2 of Article 3 should contain among the limitations on the prohibition against the taking of life such instances as necessity, and obedience to superior authority, and other exceptions which he pointed out were included in almost all criminal codes. On the other hand, he contended that the faulty drafting of Article 3 lay

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in the fact that an attempt had been made to use a method more appropriate to national legislation (A/C.3/SR.291, paragraph 37).

Article 3, paragraph 3

Capital punishment

93. Paragraph 3 of Article 3 contemplates the continued existence of capital punishment but it declares that this punishment may be imposed only as a penalty for the most serious crimes. The Brazilian representative in the General Assembly suggested that Article 3 should be supplemented by a new paragraph abolishing the sentence of capital punishment for political offences except where required for reasons of national defence (A/C.3/SR.289, paragraph 25).

Article 3, paragraph 4

Amnesty, pardon and commutation of death sentence

94. The vagueness of the drafting of Article 3 was criticised by the representative of Ethiopia in the General Assembly in his comments on paragraph 4. He felt that amnesty, pardon or commutation of the death sentence should be granted not in "all cases", as the draft Covenant envisages, but only "so far as possible" (A/C.3/SR.291, paragraph 66).

Article 4

Inclusion of provision relating to medical experimentation

95. In reply to a question posed by the Belgian representative in the Council about the attitude of the World Health Organization to Article 4 the representative of the Secretary-General stated that the draft of the Covenant prepared in 1949, which had contained a provision that no one should be subjected to any form of mutilation or medical or scientific experimentation against his will, had been submitted to the World Health Organization. That Organization had advised the Commission not to include such an article, as the right would be adequately protected by an article drafted in the same terms as Article 5 of the Universal Declaration of Human Rights (E/AC.7/SR.148, pages 11-12). The representative of India, speaking in the Council, agreed with this view and thought that the adoption of the second sentence, redundant in itself, might even hamper the work of the World Health Organization (E/AC.7/SR.149, page 7).

96. The fears of the World Health Organization that the adoption of such provisions might lead to complications and impede genuine medical progress were repeated by the representative of Yemen in the General Assembly who added that in its present form Article 4 implicitly condemned modern scientific methods for the investigation of crime (A/C.3/SR.290, paragraph 64).

97. The representative of Belgium in the Council felt that the present wording of

Article 4 was by no means satisfactory and required recasting. He was uncertain of the meaning to be given to the phrase "medical or scientific experimentation", and thought that a wide interpretation of the phrase might open the door to practices like euthanasia, which would offend the susceptibilities of the majority o of nations. He asked whether individuals in all circumstances were to be authorized to submit, of their own free will, to medical or scientific experiments calculated to involve bodily risk. It should be noted that even where a surgical operation was necessary or desirable, the consent of the patient was normally required, although a person might be subjected against his will to treatment necessary for safeguarding the public health. For these reasons the article should contain a specific guarantee of the right to physical integrity (E/AC.7/SR.148, page 8).

98. If it is desired to retain reference to medical or scientific experimentation, the Secretariat wishes to draw the attention of the Commission to valuable judicial statements on the permissible extent of such experimentation which are contained in the judgments of military and national tribunals in several war crimes trials. In particular, the Commission may wish to take into account the relevant judicial opinion which has been evolved in the judgments of the Supreme National Tribunal of Poland and a United States Military Tribunal, Nurnberg, in the trials of persons charged with offences involving illegal medical and scientific experimentation (A/C.3/534, paragraph 13).

Application of article 4 to medical "treatment"

99. At its second session in Lake Success in December 1950 the International Group of Experts on the Prevention of Crime and the Treatment of Offenders examined the provisions of the Draft International Covenant on Human Rights relating to the detention of adults prior to sentence, and has suggested certain modifications to Article 4. The text of this article as recommended by the International Group of Experts reads as follows:

> "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected against his will to medical or scientific treatment or experimentation where such treatment or experimentation is not required by his state of physical or mental health."

The Group considered that the introduction of the word "treatment" before the word "experimentation" would emphasize more clearly the necessity of prohibiting

/the use of

the use of certain methods of examination during criminal proceedings, such as examination of the accused while under the influence of drugs, which the Group considered to be contrary to the dignity of the human person.[1] (E/CN.4/523, paragraph 5).

100. Finally, the Group considered that on the occasion of the signature of the Covenant, the various signatory States should be asked to establish a special new offence, viz. the use of torture to obtain confessions or statements, whether in writing or verbally, from a person charged with an offence. States should be recommended to institute this as a special offence subject to severe penalties.[2] Such a special new offence would be a development of the principle affirmed in Article 4 of the draft Covenant on Human Rights; it should be noted that its scope, like that of Article 4, would go beyond the detention of persons prior to sentence since its aim would be the protection of all accused persons, whether held in custody or left at large. (E/CN.4/523, paragraph 9).

Article 5

Scope of prohibition of servitude and forced labour

101. The representative of the Byelorussian Soviet Social Republic in the General Assembly considered that, although it had been carefully drafted, in reality the whole effect of Article 5 was stultified, because the draft Covenant failed to make a solemn declaration of such complementary rights as the right to work and to receive sufficient payment to maintain an adequate standard of living. In his view, persons who depended for their livelihood on their ability to work might be compelled, in the absence of such complementary provisions to place themselves in servitude (A/C.3/SR.291, paragraph 53).

102. In the opinion of the representative of the United Kingdom in the Council, Article 5 furnished a good example of the satisfactory results to be obtained from an objective and analytical approach in the drafting of the Covenant. He approved the carefully defined conception of compulsory labour and also the equally careful definition of the exceptions to the rights enunciated in the Article (E/AC.7/SR.148, page 6).

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1/ Paragraph 30 of the report (E/CN.5/231).

2/ Paragraph 35 of report (E/CN.5/231).

Drafting changes

103. The Secretary-General draws the attention of the Commission to the fact that Article 5 is the only article of the Covenant which has a complicated structure of sub-sub-paragraphs. This could be avoided by making paragraph 3 a separate article in which the sub-paragraphs now marked (a), (b) and (c) would become paragraphs 1, 2 and 3. If such a change is made, it would be preferable to have the second paragraph (now sub-paragraph (b)) commence as follows: "Nothing in this article shall preclude..." (E/L.68, paragraph 44).

Article 5, paragraph 3 (b)

Drafting changes

104. Since the term "hard labour" is an expression embodied in the legislation of many countries, there seems to be no sufficient reason for retaining the inverted commas at present enclosing the words in sub-paragraphs (b) and (c) (i) of paragraph 3 of Article 5 (E/L.68, paragraph 43).

105. The Secretary-General suggests that paragraph 3 (b) of this article should be redrafted so as to make it clear that what is intended is that only those persons who have been sentenced to imprisonment with hard labour, in countries where such a punishment may be imposed, may be required to perform such hard labour. It is thought that the paragraph may be reworded as follows:

> "The preceding sub-paragraph shall not be deemed to preclude, in countries where it is lawful for a court to impose on any person guilty of a crime a sentence of imprisonment with hard labour, the infliction of such penalty by a lawful authority pursuant to the sentence of a competent court."

Article 5, paragraph 3 (c) (ii)

Alternative compulsory national service

106. Paragraph 3 of this Article defines the term forced or compulsory labour as not including any service of a military character or, in the case of conscientious objectors, service exacted in virtue of laws requiring compulsory national service. The Brazilian representative in the General Assembly pointed out that this provision made no mention of compulsory national service which might be required of women in the interests of national defence (A/C.3/SR.289, paragraph 26). This provision was regarded by the representative of New Zealand in the General Assembly as containing restrictive wording which might have the effect of depriving conscientious objectors of protection under the Covenant (A/C.3/SR.290, paragraph 40).

Article 5, paragraph 3 (c) (iii)

Service exacted in times of emergency

107. The representative of the Byelorussian SSR in the General Assembly felt that the effect of Article 5 as a whole was likely to be cancelled by sub-paragraph (iii) of paragraph 3 (c) which excepted from the term "forced or compulsory labour"

> "Any service exacted in cases of emergency or calamity threatening the life or well-being of a community." (A/C.3/SR.291, paragraph 53)

Article 5, paragraph 3 (c) (iv)

Scope of phrase "normal civic obligations"

108. The representative of Pakistan in the Council stated that there were parts of Article 5, whose drafting the representative had found satisfactory (see above, paragraph 102), which were open to the same criticisms of faulty drafting as had been levelled at the articles by the British representative. The term "part of normal civic obligations" in paragraph 3 (c) (iv) was an example of such vagueness, for it was uncertain how "normal civic obligations" could be defined internationally. He mentioned this expression not because he wished it to be expressly defined in the Covenant but because he hoped to show that it was impossible to define every term and that posterity should be left to determine the precise application of the articles (E/AC.7/SR.148, page 10).

Article 6, paragraph 1

Meaning of term "arbitrary"

109. In the opinion of the representative of the United Kingdom in the General Assembly, Article 6 as it stood was inadequately drafted. Repeating the objections to the term "arbitrary arrest or detention" made by the representative of the United Kingdom on the Commission in its comments on the draft Covenant (E/L.68, paragraph 46), he declared that previous discussions by the Third Committee and the Commission about the exact meaning of the word "arbitrary" had made it evident that that word was open to a variety of interpretations. He contended that the danger of using this word in the Covenant lay in the fact that it could not be confidently asserted that it means more than merely "in accordance with the law". Describing a hypothetical case brought before the proposed Human Rights Committee the representative of the United Kingdom declared that, if a State party to the Covenant which was accused of having "arbitrarily" deprived a person of his liberty were to defend its action before the Committee on the ground that the act complained of had been performed in accordance with the law and was therefore

/not arbitrary,

not arbitrary, the Committee, in his opinion, might very well find that the state concerned had not been guilty of violating Article 6. Such an interpretation, which would not be inadmissible so long as the word "arbitrary" was retained without further definition, would scarcely provide an effective safeguard of the liberty of the person. (A/C.3/SR.288, paragraph 14 and E/AC.7/SR.148, pages 4-5). The necessity for a definition of the term "arbitrary arrest" or for using a less vague and uncertain expression was also emphasized by the Canadian representative in the Economic and Social Council (E/AC.7/SR.148, page 13) and by the representative of New Zealand in the General Assembly (A/C.3/SR.290, paragraph 41).

110. The representative of Lebanon in the General Assembly agreed with the criticisms by the representative of the United Kingdom of the word "arbitrary". Although he conceded that the term might be appropriate in the Declaration, he thought that it would introduce an element of dangerous uncertainty into the Covenant (A/C.3/SR.289, paragraph 7). The representative of Yemen in the General Assembly also thought that the word "arbitrary" as used in Article 6 seemed to be inexact; since the adjective merely meant contrary to the law, an act would cease, in his view, to be arbitrary, solely because the state promulgated a law justifying it (A/C.3/SR.290, paragraph 65).

111. The vagueness of the phrase "arbitrary arrest" was noted by the representative of Pakistan in the Council where he pointed out that, because arbitrary action was any action not justifiable by law, the term had a purely relative meaning. He thought, however, that it would be easy to define the expression by reference to national constitutions in which it was used (E/AC.7/SR.148, page 10).

112. The representative of the Philippines in the General Assembly did not share the anxiety expressed by many of the delegates over the inadequacy of the definition of "arbitrary arrest". He was of the opinion that the term could only be interpreted in the light of such traditional safeguards of personal liberty as a normally constituted part of the law of many of the countries who were members of the United Nations. The safeguards to which he referred were the guarantee to a fair and impartial trial; the right to be presumed innocent until proved guilty according to law; the right to legal advice and the assistance of counsel; the prohibition against retroactive criminal offences; and the right to refuse to give self-incriminating evidence or to confess guilt (A/C.3/SR.291, paragraphs 16, 17).

/113. The

113. The representative of the United States of America in the Economic and Social Council also found no difficulty with the word "arbitrary". In his opinion the criticism of this word was unjustified, because it had been shown in the discussions in the Council that the word was perfectly well understood and was unlikely to be misinterpreted (E/AC.7/SR.153, page 15).

114. At its meeting at Lake Success in December 1950 the International Group of Experts on the Prevention of Crime and the Treatment of Offenders suggested that except in cases of an arrest flagrante delicto it should not be possible to make any arrest without the warrant or order of a judicial authority[1]. The Group proposed the insertion in Article 6 of a new sub-paragraph which would define more clearly the expression "arbitrary arrest." The provision would read as follows:

> 1 - bis. Any arrest made without judicial authority except in cases of flagrante delicto shall be considered as arbitrary. (E/CN.4/523, paragraph 6).

Article 6, paragraph 2

Limitations on right to personal liberty

115. The representative of New Zealand in the General Assembly thought that the limitation contained in the words "except on such grounds and in accordance with such procedure as are established by law" might be open to abuse. He was of the opinion that, in order to make the article effective, it would be necessary that the various circumstances in which a person might be justifiably deprived of his liberty should be enumerated (A/C.3/SR.290, paragraph 41).

Article 6, paragraph 3

Drafting changes

116. The Secretary-General considers that in the French text of paragraph 3 the word "motifs" might be substituted for the word "raisons" (E/L.68, paragraph 47).

Article 6, paragraph 4

Question of bail

117. The representative of Yemen in the General Assembly considered that the clause "pending trial, detention shall not be the general rule" which appears in paragraph 4 of Article 6 seemed to imply that the refusal of bail was in fact the general rule (A/C.3/SR.290, paragraph 65).

Continuation of criminal proceedings not to be prejudiced by release on bail

118. The International Group of Experts on the Prevention of Crime and the Treatment of Offenders has given its approval to paragraph 4 of Article 6, but has suggested the completion of the first sentence in order to avoid any error in

1/ E/CN.5/231, paragraph 31.

interpretation. The proposed addition is underlined in the following text:

"Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power, and shall be entitled to trial within a reasonable time, or to release without prejudice to the continuation of the proceedings ..." (E/CN.4/523, paragraph 6).

Drafting changes

119. In order to bring the English text into accord with the French the Secretary-General suggests that in paragraph 4 of Article 6 of the English text the words "or other officer authorized by law to exercise judicial power" be replaced by the words "or other authority vested by law with the exercise of judicial functions" (E/L.68, paragraph 48).

120. As further linguistic improvements the Secretary-General suggests that the words "une garantie" appearing in the last sentence of the French text of paragraph 4 might be put into the plural as "des garanties" in order to adjust it to the English text; and that the word "interessé" should be replaced by the word "inculpé" (E/L.68, paragraph 49).

Article 6, paragraph 5

Remedy of habeas corpus

121. The representative of Brazil in the General Assembly noted that in paragraph 5 of Article 6 the remedy of habeas corpus was apparently applicable, only when a person had been deprived of his liberty by arrest or detention. In his opinion this right should be available to any person whose personal safety was threatened or whose liberty of movement was jeopardized (A/C.3/SR.289, paragraph 27).

Drafting changes

122. The Secretary-General suggests that the language of the French text of paragraph 5 might be improved by substituting for the words "permettant" and "délai" the words "demandant" and "retard" (E/L.68, paragraph 50).

Article 6, paragraph 6

Compensation for unlawful arrest

123. Referring to the difficulties with which the drafters of the Covenant are faced in attempting to fuse into one single document different systems of criminal and civil law which often reflect differences in social and economic structure, the representative of India in the Council stated that what may be right for one country, may be utterly inapplicable in another. As an instance of such

difficulties he cited paragraph 6 of Article 6. Although it was only right that "anyone who has been the victim of unlawful arrest or deprivation of liberty shall have an enforceable right to compensation", when the wrong has been the result of bad faith, in a large country like India, where there was only a very small police force in comparison with the total population, the strict application of such a clause when officials had acted in good faith would seriously hamper the whole course of justice and administration. For this reason Article 6, paragraph 6 should not apply to acts which had been carried out in good faith (E/AC.7/SR.149, pages 6, 7).

Drafting changes

124. The Secretary-General draws to the attention of the Commission the fact that, while paragraphs 1, 4 and 5 of Article 6 contemplate arrest and detention as component parts of the general conception of deprivation of liberty and although paragraph 5 specifically refers to deprivation of liberty by arrest or detention, the implication of the words "unlawful arrest or deprivation of liberty" in paragraph 6 is that arrest is not included in deprivation of liberty. It is suggested therefore that the words "arrest or" in paragraph 6 should be omitted. If this deletion is agreed to, the words "d'arrestation ou" in the French text should also be deleted (E/L.68, paragraphs 51 and 52).

Article 7

Meaning of term "contractual obligation"

125. The Canadian representative in the Council, criticizing the uneven drafting of Part II of the Covenant, stated that Article 7 was so schematic as to leave its meaning doubtful. He was uncertain, for instance, whether a fine imposed by the courts was to be considered as a "contractual obligation" (E/AC.7/SR.148, pages 13, 15).

Article 8, paragraph 1

Scope of right to liberty of movement

126. In the opinion of the Australian representative in the Council, paragraph 1 of Article 8 was among those articles of the draft Covenant whose contents were controversial. He considered that, because of the basic differences of approach to the concept of liberty of movement, substantial reconciliation of divergent view-points would be necessary before the article could be considered satisfactory for submission to the General Assembly (E/AC.7/SR.147, page 12 and A/C.3/SR.305, paragraph 7).

/Limitation

Limitation on right

127. It was stated in the General Assembly by the Brazilian representative that restrictions on the right to freedom of movement not specified in Article 8 as at present drafted might be necessary in the interests of the very persons on whom restrictions are imposed. He pointed out that in countries to which large numbers of immigrants had come to settle, it may be necessary for the security of the country, for the distribution and settlement of the immigrants, and for the purpose of avoiding the formation of small racial groups in certain regions to limit to a certain extent liberty of movement within the country. Furthermore, he was of the opinion that other reasons of a demographic and economic nature might also render certain limitations necessary (A/C.3/SR.289, paragraph 28).

128. The Canadian representative in the Council, although conceding that the main text of Article 8 was satisfactory, regarded the opening sentence as too vague. He understood it to apply to circumstances - such as detention in quarantine or in a penitentiary - where complete liberty of movement and freedom of choice of residence could not be recognized by any State. In the view of the Canadian representative a more precise formulation was necessary; but if the article were adopted as it stood, he would be obliged to enter a reservation covering such circumstances (E/AC.7/SR.148, page 14).

129. The representative of the United States of America in the Council considered that the objections of the Canadian representative to paragraph 1 of Article 8 could be overcome by substituting for the words "subject to any general law consistent with the right recognized in this Covenant," the words "subject to law necessary to protect national security, public safety, health or morals or the rights or freedoms of others" (E/AC.7/SR.153, page 16).

130. The representative of New Zealand in the General Assembly considered that it would be advisable to define Article 8 more clearly. He proposed that paragraph 1 should be completely reworded in accordance with a text which he submitted during the discussion. This text reads as follows:

> "Every person shall be free to move and choose his place of residence within the borders of the State, subject to any general law not contrary to the purposes and principles of the United Nations Charter and adopted for specific reasons of national defence or in the general interest. Any person shall be free to leave any country including his own, provided that he is not subject to any lawful deprivation of liberty or to any outstanding

obligations with regard to national service or taxation." (A/C.3/SR.290, paragraph 42)

131. The introductory words of paragraph 1 of Article 8 read as follows: Subject to any general law, consistent with the right recognized in this Covenant." "Since the right of movement, with which this paragraph is concerned, is itself one of the rights recognized in the Covenant and therefore one of the rights to which the introductory words above quoted refer, these introductory words, observed the representative of the United Kingdom in the General Assembly (A/C.3/SR.288, paragraph 16) are completely circular. To remedy this defect the United Kingdom representative suggested that the introductory words should be: "Subject to any law which is not contrary to the principles expressed in the Universal Declaration of Human Rights"; or, alternatively, the clause proposed for this article by the Australian Government.[1/]

132. The representative of India in the Council drew attention to the fact that restriction on the right of persons to leave the territory of any State had performed a useful function in bringing many attempted fugitive offenders to justice and in avoiding the spread of international crime by prohibiting certain persons from leaving their home country (E/AC.7/SR.149, page 7).

133. The enumeration of exceptions and limitations to the right to liberty of movement recognized in Article 8 was opposed by the representative of the Netherlands in the General Assembly who asked whether anything would be left of the right referred to in that article if it were only recognized subject to certain restrictions (A/C.3/SR.290, paragraph 21).

Concept of territorial jurisdiction

134. The representative of Yemen in the General Assembly considered that as a condition precedent to the drafting of a satisfactory provision dealing with the right to liberty of movement within the territory of a State, it would be necessary to reach agreement on the definition of the concept of territorial jurisdiction (A/C.3/SR.290, paragraph 66).

Drafting changes

135. The Secretary-General suggests to the Commission that there is no necessity for the numerals (i) and (ii) in sub-paragraph (a) of paragraph 1 of Article 8. If these numerals were deleted the sub-paragraph would read as follows:

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1/ "Subject to any general law adopted for specific reasons of national security, public safety or order, welfare or health or for the protection or well-being of women or indigneous peoples or for immigration purposes--" (E/CN.4/353/Add.10, page 8).

"Everyone legally within the territory of a State shall, within that territory, have the right to liberty of movement and to the freedom of choice of residence."

The French text of the same sub-paragraph would then read:

"Quiconque se trouve légalement sur le territoire d'un Etat a le droit d'y circuler librement et d'y choisir librement sa résidence." (E/L.68, paragraph 56)

136. In its consideration of Article 8, the Commission may wish to refer to the texts of Articles 27 and 28 of the draft Covenant relating to the Status of Refugees which was recommended to the Economic and Social Council by the ad hoc Committee on Refugees and Stateless persons at its second session. (E/1850, page 25).

Article 9

Obligation to disclose reasons for deportation

137. The representative of India in the Council thought that there may be instances when it would be inadvisable to acquaint an alien against whom deportation proceedings were contemplated with the reasons for his expulsion, as would seem to be necessary, in his opinion, by the words "on established legal grounds" contained in Article 9. He considered that, if aliens were known to act as informers for a foreign diplomatic mission, the publication of that fact as a ground for deportation proceedings might impair good relations with the Government concerned (E/AC.7/SR.149, page 7).

Article 10, paragraph 1

Scope of rights related to the administration of justice

138. In the opinion of the representative of the United Kingdom in the Council the first two paragraphs of Article 10 furnished an example of the satisfactory results which could be obtained from an objective and analytical approach to the drafting of the Covenant (E/AC.7/SR.148, page 6). The enumeration of the minimum guarantees necessary to ensure fair trial and the fair determination of a civil suit was considered by the Canadian representative in the Council to be excessively detailed for a Covenant on human rights (E/AC.7/SR.148, page 13).

139. The representative of Cuba in the General Assembly contended that, although paragraph 1 of Article 10 proclaimed a right which was desirable, it was too technical and detailed for inclusion in an instrument like the Covenant on Human Rights when it went into the questions of the attendance of the press and public at trials of juveniles (A/C.3/SR.291, paragraph 4).

Drafting changes

140. The Secretary-General suggests that it may be desirable to change the order of the first sentence of paragraph 1 in the French text, so as to follow the order of the English text. If this proposed alteration were made, the sentence would then read as follows:

> "Toute personne a droit à ce que sa cause soit entendu equitablement et publiquement par un tribunal independant et impartial etabli par la loi qui decidera soit du bien-fonde de toute accusation en matiere penale dirigee contre elle, soit des contestations sur ses droits et obligations de caractere civil" (E/L.68, paragraph 58).

141. The Secretary-General considers that it may be necessary to clarify the meaning of the expression "where the interest of juveniles (so/otherwise) requires," so as to indicate whether the clause is intended to refer only to the interests of juveniles who are directly concerned with the proceedings before the court, either as parties or as witnesses, or to the interests of juveniles in general. If the former meaning is intended, it is suggested that the words "involved in the proceedings before the court" might be inserted in the text of paragraph 1 immediately after the word "juveniles" wherever it occurs. In the French text the expression impliques dans l'instance pendante devant le tribunal might similarly be inserted after each use of the word mineurs. (E/L.68, paragraph 60)

Article 10, paragraph 2

Scope of individual guarantees

142. The representative of India in the Council was unable to support the inclusion of the stipulation in paragraph 2 (b) of Article 10 that everyone charged with a criminal offence was entitled to have legal assistance assigned to him "without payment by him in any such case where he does not have sufficient means to pay for it." The application of such a provision in India, he observed, might well prove ruinous to the administration and financial stability of the country, for a magistrate there might deal with as many as 5,000 persons a year (E/AC.7/SR.149, pages 7-8).

/143. The

143. The representative of New Zealand in the General Assembly thought that Article 10, paragraph 2 (c), should include provision for an accused person, not only to examine or have examined the witnesses against him, but also to secure the production of the documents on which the prosecution may rest its case (A/C.3/SR.290, paragraph 43).

144. The International Group of Experts on the Prevention of Crime and the Treatment of Offenders has suggested certain changes in paragraph 2 of Article 10. The text of this provision, with the proposed amendments underlined, reads as follows:

> "Any person held for trial or charged with a criminal offence shall be presumed innocent until proved guilty according to law ...
>
> (a) ...
>
> (b) ...
>
> (c) To challenge all charges and examine all evidence, to examine and have examined ...

The slight change in the first sentence of the text was suggested by the Group of Experts for the sake of greater accuracy; the addition to sub-paragraph (c) was suggested with a view to stating more clearly the right of any person charged with a criminal offence not only to examine the witnesses against him or to obtain attendance of witnesses on his behalf, but to challenge all the charges and evidence brought against him (E/CN.4/523, paragraph 7).

145. The provisions of paragraph 2 (f) which deal with juveniles should, in the opinion of the representative of El Salvador in the General Assembly, be extended to adults (A/C.3/SR.291, paragraph 62).

Drafting changes

146. The Secretary-General considers that it may be appropriate to change sub-paragraph (f) into a separate paragraph in order to achieve a greater homogeneity of content in paragraph 2. Sub-paragraphs (a) to (e) deal with the minimum guarantees to which an accused person is entitled: since sub-paragraph (f) is slightly dissimilar in nature there would seem to be no reason for its retention in paragraph 2 (E/L.68, paragraph 61).

147. The Secretary-General suggests that it may be appropriate to substitute in the English text of paragraph 2 of Article 10 the words "in his defence against a criminal charge" for the phrase "in the determination of any criminal charge". Such a change would accord with the phrase "pour sa défense" in the

/French text.

French text. It is believed that this wording would define with more precision the rights and guarantees listed in sub-paragraphs (a), (b), (c) and (d) (E/L.68, paragraph 62).

148. The French text of the second sentence of paragraph 2 might be improved by the deletion of the words "au moins" after "droit" and the insertion of the word "minima" after "garanties" (E/L.68, paragraph 63).

149. The word "grounds" may be substituted for the word "cause" in paragraph 2 (a) of Article 10 in order to adjust the English text to the French where the word "motifs" is used (E/L.68, paragraph 64).

150. The Secretary-General also considers that in the English text of paragraph 2 (a) the word "charge" may be substituted for the term "accusation". This change would require the substitution of the words chef d'accusation for "accusation" in the present French text. It will be noted that neither in the English nor in the French text of this provision is the expression "accusation" used in a technical sense. In some jurisdictions, however, that term or its equivalent has a technical significance which does not appear to be intended in the present context (E/L.68, paragraph 65).

151. The Secretary-General renews the suggestion which he made to the Council that there should be inserted between the present sub-paragraphs (a) and (b) of paragraph 2 of Article 10 a new sub-paragraph, which would relate to the period which should elapse between the time when the accused was supplied with the information required by the present sub-paragraph (a) and the beginning of criminal proceedings against him (E/L.68, paragraph 66). The Commission may feel that it should adopt the provision which is contained in paragraph 3 (b) of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome by the members of the Council of Europe on 4 November 1950. This sub-paragraph reads as follows: "To have adequate time and facilities for the preparation of his defence". In French, such a new provision would read: disposer du temps et des facilités nécessaires à la préparation de sa défense.

152. It appears to be desirable to bring the English and French texts of sub-paragraph (b) of paragraph 2 into closer alignment, since at present the first text refers to "legal assistance" and to "any such case where he does not have sufficient means to pay for it", whereas the French text refers to "défenseur" and to s'il n'a pas les moyens de la rémunérer. The necessity for eliminating the present divergence between the two texts rests on the following grounds:

/(a) The terms

(a) The terms "legal assistance" and the "person who renders such assistance" are not synonymous;

(b) "Legal assistance" may be thought to represent something wider than the assistance of a defending lawyer;

(c) The present French text assumes that, if the accused had had "les moyens", he would necessarily have paid the "défenseur", whereas, in fact, if legal assistance had been assigned to him, he might conceivably have been under an obligation rather to pay the public authorities for this assistance (E/L.68, paragraph 67).

153. In the French text of sub-paragraph (c), the equivalent of the word "compulsory" in the English text does not appear. The word "obligatoire" might therefore be inserted after the word "comperution" (E/L.68, paragraph 68).

154. The term "jurisdiction" in the French text of paragraph 2 (c) might be changed to "compétence", which is used as the French equivalent of the English word "jurisdiction" in paragraph 1 of Article 1 of the Covenant (E/L.68, paragraph 69).

155. It will be observed that the expression "juveniles" is rendered differently in the French text of paragraph 1 and of paragraph 2 (f) of Article 10. A readjustment of the French text may be made. In the French penal law, the categories of minors covered in the English language by the word "juveniles" are generally described by adding to the word "mineur" the age of the person: for example, "mineur de 18 ans", "mineur de 13 à 18 ans", etc. (See Articles 66 to 69 of the French Penal Code). The expression used in paragraph 2 (f) "jeunes gens qui ne sont pas encore majeurs au regard de la loi pénale" could be changed to "mineurs au regard de la loi pénale". It is further suggested that, if the term "mineur" in French were not used, the word "adolescent", while not in use in French law, might be found more satisfactory than the present wording (E/L.68, paragraph 70).

Article 10, paragraph 3

Right to compensation for miscarriage of justice

156. The representative of India in the Council thought that an exception should be made in paragraph 3 of Article 10 for miscarriages of justice and erroneous sentences which were caused by mistakes made in good faith (E/AC.7/SR.149, page 8).

157. The representative of Pakistan in the Council considered that, if paragraph 3 of Article 10 were interpreted literally and carried to its logical conclusion, it would oblige a Government to pay the compensation to be awarded for a miscarriage

/of justice

of justice to the heirs of a person who had been executed by an erroneous sentence which they themselves had caused. However, even in this obvious instance of inadequate drafting, the representative of Pakistan stated that Governments could be relied upon to realize that the mandatory sense of the article should be waived in the circumstances he had outlined and that accordingly he would not press for an amendment (E/AC.7/SR.148, page 11). The Canadian representative in the Council stated that, not only was the final sentence of paragraph 3 open to the objection lodged against it by the representative of Pakistan, but it also ignored the fact that the right to compensation would not be terminated by the death of the individual concerned (E/AC.7/SR.148, page 13).

158. The representative of the United Kingdom in the Council expressed his Government's objection to paragraph 3 (E/AC.7/SR.148, page 6 and E/AC.7/SR.153, page 17); the representative of the United States of America in the Council wished to see paragraph 3 of Article 10 deleted altogether (E/AC.7/SR.153, page 18).

159. The representative of Yemen in the General Assembly pointed out that it was not sufficient merely to state that the victim of a miscarriage of justice should be compensated: paragraph 3 of Article 10 should contain a plain statement that the compensation to be awarded should be adequate (A/C.3/SR.290, paragraph 67).

Drafting changes

160. The Secretary-General draws the attention of the Commission to the fact that the French text of paragraph 3 does not contain the equivalent of the word "exclusively" which appears in the English text. The expression "d'une façon concluante" could therefore be inserted after the word "preuve". Should it be decided to leave the substance of the paragraph unchanged, the language might be improved by redrafting the words "... sera indemnisé. Cette indemnisation profitera aux héritiers..." to read as follows: "...obtiendra réparation. L'indemnité sera attribuée aux héritiers..." (E/L.68, paragraph 73).

Article 11, paragraph 1

Reference to international law

161. The representative of Yemen in the General Assembly thought that it would be sufficient for paragraph 1 of Article 11 to state that no one should be held guilty on account of any act or omission which did not constitute a criminal offence under national law at the time when it was committed. There should be no reference to international law, because, in his opinion, States did not apply provisions of

/international law,

international law, unless these were already embodied in their national legislation (A/C.3/SR.290, paragraph 68).

Drafting changes

162. The Secretary-General considers that it may be desirable to bring the French text of Article 11 closer to the English text by rewording the first sentence of the former version, which would then read as follows: "Nul ne sera déclaré coupable d'infraction pour des actions ou abstentions qui, au moment où elles ont eu lieu, ne constituaient pas des actes punissables, d'après le droit interne ou international". (E/L.68, paragraph 74).

Article 11, paragraph 2

Reference to "generally recognized principles of law"

163. The representative of Belgium in the Council considered that paragraph 2 of Article 11 seemed to be in contradiction to paragraph 1, which laid down the main principles recognized in the sphere of retroactive penal legislation. The second paragraph appeared to have been inserted to justify a posteriori the judgment of the International Military Tribunal at Nuremberg. The Belgian representative pointed out that the Nuremberg procedure, which had had to be introduced to meet a legitimate reaction of the human conscience against the crimes committed by the leaders of certain States, had been universally approved. If any effort were made to justify such a procedure by a retrospective provision, it might appear as a weakening of the moral sense of the community and as a concession to those who had cast doubts on its lawfulness. Any concession of this kind would be particularly serious at a time when efforts were being made by the International Law Commission within the framework of the United Nations to codify the principles on which the Nuremberg procedure had been based. Apart from these considerations, the Belgian representative contended that the lack of balance in the structure of Article 11 by the introduction of a second paragraph should be redressed (E/AC.7/SR.148, pages 8, 9). The representative of the United States of America in the Council was also in favour of the deletion of the second paragraph of Article 11 (E/AC.7/SR.153, page 18).

164. The Secretary-General observes that there seems to be no clear reason for regarding the provision made in paragraph 2 as being different in content from that made in the first sentence of paragraph 1 of the Articles, particularly in view of the reference made therein to "international law". It seems to be accepted that

/the generally

the generally recognized principles of law are a part, or are a source of, international law. Thus for instance Article 38, paragraph 1, of the Statute of the International Court of Justice includes a provision that "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply... c. the general principles of law recognized by civilized nations". When, in the proceedings and judgments of war crime trials and in the literature thereon, reference has been made to "the generally recognized principles of law", these principles have been quoted and relied upon for the sole purpose of demonstrating that certain acts on the part of accused persons could be regarded as punishable under the law of war as part of international law (E/L.68, paragraph 75).

Article 12

Scope of right to recognition as a person before the law

165. The representative of Canada in the Council (E/AC.7/SR.148, page 13) included among the provisions of the draft Covenant which require revision on the grounds of style the undefined expression "person before the law" in Article 12. As an example of over-lapping and lack of co-ordination in the draft Covenant, the Canadian representative in the General Assembly cited the relationship between the affirmation in Article 12 that everyone had the right to recognition everywhere as a person before the law and the provisions of Article 5, paragraph 1, prohibiting slavery and of Article 17 proclaiming the equality of all before the law (A/C.3/SR.289, paragraph 18).

166. The Cuban representative in the General Assembly contrasted Article 12 with Article 10. The latter was too technical and detailed in certain matters, yet Article 12, which dealt with a right no less basic than than recognized in Article 10, was enunciated in a most sweeping form (A/C.3/SR.291, paragraph 4).

167. In its desire to define more precisely the rights recognized in the draft Covenant the New Zealand delegation to the General Assembly proposed a text worded as follows: (A/C.3/SR.290, paragraph 44).

> "No person shall be prevented from having access to the courts to obtain redress for any infringement of his civil rights nor shall any person, unless he is one of a class of generally recognized incapacity, such as minors, persons of unsound mind and persons undergoing imprisonment, be deprived in whole or in part of his legal capacity to enter into lawful contracts or other legal relationships."

Article 13, paragraph 1

Reference to freedom to change one's religion

168. The inclusion in paragraph 1 of Article 13 of specific reference to freedom to change one's religion or belief was criticized in the General Assembly by the representatives of Afghanistan, Egypt, Saudi Arabia and Yemen. The reasons for the objections of these representatives may be stated to have been as follows.

169. The representative of Afghanistan informed the Assembly that in his country, where the Moslem religion was dominant, religious freedom was guaranteed by the national constitution to all citizens without exception, including the right to change one's religion. It was, however, important that the Covenant should not specifically mention such a right because of the significance which the Afghanistan delegation attached to religion and to the role of religion in the world by virtue of its direct appeal to the emotions and feelings of the masses (A/C.3/SR.306, paragraphs 50-52).

170. The Egyptian representative stated that the provision in paragraph 1 of Article 13 that everyone enjoyed the right to freedom of thought, conscience and religion was unquestionable. He agreed that it was quite logical to state in paragraph 1 of Article 13 that "this right (to freedom of thought, conscience and religion) shall include freedom to change his religion or belief". However, the draft Covenant was not simply a declaration of principles, but a legally binding document which as such had to be ratified by governments in accordance with their constitutional procedures. Since attitudes in national legislatures varied from extreme liberalism to extreme reaction, the Egyptian representative feared that the retention of the words "freedom to change his religion or belief" might make it difficult for many governments to secure ratification. Although he conceded that the freedom to change one's religion or belief was implied in the first sentence of Article 13, he suggested for the reasons which he had stated that the words in question should be deleted (A/C.3/SR.288, paragraph 26 and A/C.3/SR.302, paragraph 7).

171. The representative of Saudi Arabia urged that the phrase in question should be deleted, because, like the Egyptian representative, he considered that such a freedom was implied in the first part of the paragraph. If it were not so implied, he failed to understand why it had been thought necessary to make a distinction between the right to freedom of thought, conscience on the one hand and the right to freedom of religion on the other by singling out the latter right and

proclaiming that this right included freedom to change one's religion or belief. His delegation's attitude, he stated, was prompted by the fear of the repercussions which such a provision would have on the Moslem world. After recalling historical precedents he asserted that the appeal of religion was essentially emotional and modern propaganda did not refrain from making use of people's religious beliefs for its own ends. There had existed and there still did exist groups which claimed to be the chosen people or proclaimed the superiority of their beliefs over those of others. Such claims were in his opinion inconsistent with the Universal Declaration of Human Rights which proclaimed the equality of all. The representative of Saudi Arabia appealed to the Assembly in its efforts to make the Declaration universal to avoid any provision in the Covenant which some people might use as a pretext for fomenting hatred and for encouraging in their own interests the differences between men (A/C.3/SR.289, paragraphs 40-44).

172. The representative of Yemen in the General Assembly thought that the adoption of Article 13 would raise great difficulties for Arab countries, because their legislation was largely religious in origin (A/C.3/SR.290, paragraph 62).

173. The Egyptian delegation to the General Assembly submitted a draft resolution (A/C.3/L.75/Rev.1) in which it was proposed that the General Assembly should recommend to the Commission on Human Rights that there be deleted from Article 13, paragraph 1, the implication to change one's religion or belief. This and similar previous proposals were supported by the representatives of Afghanistan (A/C.3/SR.306, paragraphs 50-2) and of Saudi Arabia (A/C.3/SR.306, paragraphs 46-49).

174. The representative of the Netherlands in the General Assembly was opposed to the deletion of the provision relating to freedom to change one's religion because in his opinion true freedom of conscience was non-existent, if the right to change one's belief was not also acknowledged. He submitted that the representative of Egypt had agreed with him, when he had stated that the expression of the right to freedom to change one's religion was implied in the right to freedom of religion. The Netherlands representative contended that the deletion of the words in question in accordance with the Egyptian proposal would be tantamount to a denial of the right to change one's religion. Although he understood the fears of those representatives who had spoken of their difficulties in accepting an express provision of the right to change one's religion, since in an objective sense,

/every religion

every religion would and must be opposed to any change of religion, because it rejected other religions, in the Covenant, as in the Universal Declaration, it was the subjective rights of persons which were at stake. For this reason he considered it necessary to maintain a provision stating that the right to change his religion or belief was one of the undeniable fundamental rights of every human being (A/C.3/SR.306, paragraphs 42-45).

175. The Egyptian proposal was later withdrawn and replaced by a proposal, which was finally adopted by the General Assembly, that the Economic and Social Council should request the Commission on Human Rights "to take into consideration in its work of revision of the draft Covenant: (i) the views expressed during the discussion of the draft Covenant in this (the fifth) session of the General Assembly and in the eleventh session of the Economic and Social Council, including those relating to Articles 13 .... of the draft Covenant" (A/C.3/L.99).

Distinction between "thought" and "belief"

176. The Canadian representative in the General Assembly noted that Article 13 dealt with freedom of thought, conscience and religion and Article 14 with freedom to hold opinions without interference. It seemed that a distinction was contemplated between thought and belief. Although such a distinction was probably purely a verbal problem, he thought that it would be well to remedy the defect in the draft Covenant (A/C.3/SR.289, paragraph 18).

Drafting changes

177. The Secretary-General draws the attention of the Commission to the fact that although "religion" and "belief" both appear as distinct concepts in the second sentence of paragraph 1, the word "belief" does not appear at all in the first sentence where the fundamental right is proclaimed. There is a similar omission with regard to the word "conviction" in the French version of paragraph 1 of Article 13 (E/L.68, paragraph 84).

178. In the French text of paragraph 1 the word "implique" may be replaced by the word "comprend". Such a change would bring the French text of paragraph 1 into conformity with the English text of the same provision and with the French text of paragraph 2 of Article 14 (E/L.68, paragraph 85).

Article 13, paragraph 2; Article 14, paragraph 3; Article 15; and Article 16, paragraph 2

179. It may be appropriate at this stage to consider together the limitation clauses in the above-mentioned articles dealing with the right to freedom of thought,

/conscience,

conscience and religion; the right to seek, receive and impart information and ideas; the right to peaceful assembly; and the right of association. By resolution 421 B (V), section 4 (2), the General Assembly called upon the Economic and Social Council to request the Commission on Human Rights to take into consideration in its work of revising the draft Covenant the views expressed during the discussion of the draft Covenant at the fifth session of the General Assembly and at the eleventh session of the Economic and Social Council that it is desirable to define the rights set forth in the Covenant and the limitations thereto with the greatest possible precision.

Desirability of restricting the number of limitations

180. Some representatives in both the Council and the General Assembly regretted the inclusion of too many limitations in Articles 13-16. The representative of the Netherlands in the General Assembly thought that the Commission could not be accused of imprudence on the subject of the exceptions or limitations it was necessary or desirable to make in regard to various rights. He wondered what would be left, if the rights referred to in Articles 13-16 were recognized only subject to exceptions and limitations. In his opinion, it would be easy for dictators to violate several fundamental human rights while remaining within the framework of the Covenant (A/C.3/SR.290, paragraph 21).

181. Expression was given to this same opinion by the representative of El Salvador in the General Assembly who limited his remarks to limitations on the right to freedom of expression recognized in Article 14 of the Covenant. The sole result of the suppression of this freedom was the growth of an underground movement and an underground press. To state a freedom and at the same time to place restrictions on it was a negative approach; it established a conditional freedom only, which was no freedom at all. Although he thought that laws against abuse of the freedom of the press were justified, he said that they must always be invoked against the offender himself, never against the press as an institution (A/C.3/SR.291, paragraph 60).

Additional limitations

(i) Prohibition of anti-democratic activity

182. On the other hand there were representatives who considered that the limitations of the rights set forth in Articles 13-16 were inadequate and would create conditions favourable for the resurgence of anti-democratic organizations. Commenting on Article 14, the representative of the Union of Soviet Socialist Republics in the General Assembly pointed out that it made no provision for safeguarding the right to freedom of speech and of the press from being used

/against

against the interests of the people and of democracy. His delegation thought that it would be advisable to insert the following sentence: "In the interests of the democracy everyone shall be guaranteed by law the right of free expression of opinion and in particular freedom of speech, of the press and of artistic expression, provided that freedom of speech and of the press is not used for war propaganda, to inciting to enmity among others, racial discrimination and the dissemination of slanderous rumours" (A/C.3/SR.289, paragraph 36). Articles 15 and 16 were also defective in their failure to make provision for the banning of the establishment of fascist or anti-democratic associations or unions. To remedy this defect he suggested the inclusion of the following provision: "All associations, unions and other organizations of a fascist or anti-democratic nature, and any form of activity on their part, shall be prohibited by law" (A/C.3/SR.289, paragraph 37). The Polish representative in the General Assembly also considered that the application of Articles 15 and 16 should be limited in order to prevent fascists from using the rights mentioned therein to overthrow the democracies (A/C.3/SR.290, paragraph 5). The representatives of the Byelorussian Soviet Socialist Republic and of the Ukrainian Soviet Socialist Republic, supporting this view, regretted that there was no reference in the Covenant to propaganda for nazism, fascism or racist views. Such propaganda and any incitement to war and enmity between nations should, in his opinion, be prohibited (A/C.3/SR.291, paragraph 12 and A/C.3/SR.291, paragraph 55). Similar remarks were addressed to the General Assembly by the representative of Yugoslavia (A/C.3/SR.291, paragraph 23).

183. The representative of the Union of Soviet Socialist Republics submitted a draft resolution to the Third Committee of the Assembly in which it was proposed that, in drafting the Covenant, the Commission on Human Rights should have in mind the inclusion therein of the following provisions:

"3. In the interests of democracy, everyone must be guaranteed by law the right to the free expression of opinion; in particular, to freedom of speech, of the Press and of Artistic representation, under conditions ensuring that freedom of speech and of the press are not exploited for war propaganda, for the incitement of hatred among the peoples, for racial discrimination and for the dissemination of slanderous rumours.

"4. Any form of propaganda on behalf of Fascist or Nazi views, or of racial and national exclusiveness, hatred and contempt, must be prohibited by law.

/"5. In the

"5. In the interests of democracy, the right to organize assemblies, meetings, street processions and demonstrations and to organize voluntary societies and unions must be guaranteed by law. All societies, unions and organizations of a Fascist or anti-democratic nature, and any form of activity by such societies, must be prohibited by law, subject to penalty." (A/C.3/L.96, page 2, paragraphs 3, 4 and 5)

184. The representative of the United States of America in the General Assembly was opposed to the phrase "in the interests of democracy" which appears in the above draft resolution. She thought that there might be some cause for concern lest that phrase might be interpreted by certain states to mean "in their own interests". (A/C.3/SR.305, paragraph 3)

185. The action which the Third Committee took on this proposal and the action taken by the General Assembly on an identical proposal submitted by the representative of the Union of Soviet Socialist Republics in plenary (A/1576), is described in document E/CN.4/513, paragraphs 14 and 15. It is sufficient to note that these proposals are included in document A/C.3/L.96 which the Commission has been requested by the Economic and Social Council, by virtue of General Assembly resolution 421 B (V), 4 (i), to take into consideration in its work of revising the draft Covenant.

(ii) Maintenance of friendly relations between States

186. An additional limitation was also suggested, with particular reference to Article 14, by the representative of Egypt in the General Assembly who stated that, althought he had no objections to the criteria already listed in paragraph 3 of that Article, he thought that they should also include contingencies likely to offend the friendly relations between states (A/C.3/SR.288, paragraph 27). In accordance with this view, the representative of Egypt submitted a proposal to the Third Committee of the General Assembly whereby the words "the maintenance of peace and friendly relations between states" should be inserted between the words "public order, safety" and the words "health or morals" (A/C.3/L.73 and A/C.3/L.75). This specific proposal was subsequently modified to a proposal that the General Assembly should recommend the Commission to add to the safeguards expressed in Article 14, paragraph 3, of the Covenant a safeguard of the maintenance of peace and friendly relations between states (A/C.3/L.75/Rev.1). Speaking in support of his proposal, the Egyptian representative stated that, since the words he wished to insert defined the main

/objectives of

objectives of the United Nations, and since they had been adopted in a similar text by the United Nations Conference on Freedom of Information, held in Geneva in 1948, he did not think that there could be any objection to the addition (A/C.3/SR.302, paragraph 8).

The term "public order"

187. Included among the limitations to the rights recognized in Articles 14, 15 and 16 - and also in Article 10 - is the term "public order". In Article 13 the word "order" appears as one of a list of lawful limitations to the right to freedom of thought, conscience and religion. This list reads as follows: "public safety, order, health, or morals". It is assumed that the adjective "public" qualifies the noun "order" in this enumeration.

188. There have been many representatives, both in the Council and in the General Assembly, who have objected to this term on the grounds that it is vague and so general as to include a wide variety of state action. The representative of Belgium in the Council cited the expression as an example of vague phraseology in the draft Covenant. There were, he said, many examples in history of flagrant abuses sanctioned by the use of such a vocabulary. Moreover, there was not even general agreement on the meaning of the term (E/AC.7/SR.147, page 9).

189. The representative of Ethiopia in the General Assembly thought that the reference to "public order" in Articles 13-16 could easily enable any state to bring a complaint under Article 38 of the Covenant that derogations from basic rights were being improperly made under those exceptions (A/C.3/SR.301, paragraph 35).

190. The French representative in the Council thought that only by the addition of the words "in a democratic society" immediately after the words "public order" could precision be given to this last mentioned term. He reminded the Council that the explanatory words "in a democratic society" were to be found in Article 29 of the Universal Declaration of Human Rights (E/AC.7/SR.147, page 18 and E/AC.7/SR.148, page 16). In the General Assembly the French representative referred to the fact that on several occasions (see E/AC.7/SR.147, page 18) his delegation had requested clarification of the idea of "public order" so as to avoid any abuses that dictators or potential dictators might commit under cover of it. He again urged the adoption of the formula "public order in a democratic society" which would enshrine the democratic concept of the idea (A/C.3/SR.290, paragraph 29). This proposal by the French representative was supported by the representative of El Salvador who agreed that the words "in a democratic society" should be inserted after the words "public order" in various articles to prevent aspiring dictators from abusing human rights (A/C.3/SR.291, paragraph 61).

/191. Although

191. Although the Lebanese delegation, in spite of some doubts, had accepted the "public order" reservation in paragraph 2 of Article 29 of the Universal Declaration of Human Rights, since it considered that term to be admissible in the Declaration, the representative of Lebanon in the General Assembly thought that the expression would be out of place in the Covenant. In his country it would be intolerable for the government to use such a wide reservation as a pretext for evading its moral obligations (A/C.3/SR.289, paragraph 5).

192. The representative of New Zealand in the General Assembly, with particular reference to Articles 14 and 15, suggested that instead of the expression "public order" it would be better to use the expression "necessary for the prevention of disorder or crime" (A/C.3/SR.290, paragraph 46).

193. The representative of Turkey in the Assembly suggested the introduction into the Covenant, instead of the term "public order", a still broader and more general concept, namely "promotion of conditions of social progress" (A/C.3/SR.291, paragraph 73).

194. Speaking with particular reference to paragraph 3 of Article 14, the representative of the United Kingdom in the Council stated that, unless the term "public order" were more closely defined, it would allow a state to reject all recognition of the right to freedom of expression. The only way legally to bind member states to respect this right was by the insertion of an alternative phrase such as "the prevention of disorder" or another more accurate term (E/AC.7/SR.148, page 5). In the General Assembly the representative of the United Kingdom considered that, even if a dictator were to accede to the Covenant, his repressive activities would not be in any way inhibited, because he could invoke the exception in the interest of "public order" embodied in Articles 13, 14, 15 and 16. Because innumerable atrocities had already been committed for the protection of the state against subversive activities under that pretext, the United Kingdom representative in the Commission on Human Rights had consistently argued against the use of the phrase on such grounds. The United Kingdom delegation agreed with the Secretary-General's exposition of the meaning of the term "public order" (E/L.68, paragraph 83). The introduction of that expression into the Covenant as justifying the limitation of the enjoyment of human rights might well constitute a basis for far-reaching derogations from the rights granted. Since the Commission on Human Rights itself had gone on record as interpreting the term "public order" as covering both the rights to licensed media of information and the right to regulate

the importation of information material, (A/C.3/534, paragraph 15) any phrase capable of such wide interpretation could not possibly be regarded as adequate for the protection of human rights (A/C.3/SR.288, paragraphs 17 and 18).

195. On the other hand, the representative of Pakistan in the Council stated that in his opinion the difficulty experienced by the representative of the United Kingdom in recognizing the term "public order" as a limiting one arose from the fact that the constitution of the United Kingdom was not a written one. He pointed out that at least one and probably more of the written constitutions of the world did include the expression "public order" and no objection had been raised against it as justifying any governmental action based on policy. He thought that by reference to such constitutions the meaning of "public order" was easy to define (E/AC.7/SR.148, page 10).

196. The representative of Yugoslavia in the General Assembly shared the anxiety of those who feared that the term "public order" was so broad as to permit a camouflage of many abuses and violations of human rights. He thought that a given government's concept of "public order" might be contrary to the ideals of the United Nations (A/C.3/SR.291, paragraph 22).

197. The Secretary-General considers that the use of this expression raises serious questions of substance and consequantly feels obliged to draw the attention of the Commission to the following legal considerations. It should be observed first of all that the English expression "public order" is not the equivalent - and is indeed substantially different from - the French expression "l'ordre public", (or in Spanish, "orden publico"). In civil law countries the concept of "l'ordre public" is a fundamental legal notion used principally as a basis for voiding or restricting private agreements, the exercise of police power, or the application of foreign law. The common law counterpart of "l'ordre public" is not "public order" but rather "public policy". It is this concept which is employed in common law countries to invalidate or limit private contractual agreements. In contrast to this concept of public policy the English expression "public order" is not a recognized legal concept. In its ordinary English sense it would presumably mean merely the absence of public disorder. This notion is obviously far removed from the concept of "l'ordre public" or "public policy". Since the Covenant should undoubtedly contain equivalent concepts in English and French, the question arises as to whether the notion of "l'ordre public" or, in English "public policy" should be retained as an exception to the rights in Articles 13-16. In the Secretary-

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General's opinion, this is a most important question since the concept of "l'ordre public/public policy" is in most jurisdictions a broad and flexible principle, often characterized by legal commentators as vague and indefinite. (Paton, Jurisprudence, page 181; Rolland, Précis du droit administratif, ninth edition, paragraph 463, Bielsa, Derecho Administrative, volume 4, paragraphs 707, 708). It is ture that in regard to certain situations public policy or "l'ordre public" has been given a technical and fairly well-defined meaning, but at the same time the concept is sufficiently wide and fluid to permit its application in a variety of new situations. Accordingly, it could hardly be doubted that by introducing it as an exception to fundamental human rights, it may well constitute a basis for far-reaching derogations from the rights granted. The Secretary-General questions whether it was intended to include in an international covenant a term which would permit a contracting State to repeal basic provisions of the Covenant merely on the grounds of the indefinite concept of public policy. Consequently, the Secretary-General suggests that the expression "l'ordre public" may be eliminated. If it is desired to have an exception based on public order in its ordinary English sense, then it is suggested that this exception be phrased explicitly in terms of prevention of public disorder. In this way, there would be no confusion with the far-reaching notion of public policy or "l'ordre public" (E/L.68, paragraph 83 and A/C.3/534, paragraph 15).[1/]

Uniform statement of limitations

198. Since Article 13, paragraph 2, and Articles 14, 15 and 16 contain statements of limitations which are similar in content, the Secretary-General suggests that it may be desirable to use in each article a uniform presentation of these limitations, except where a difference of substance is intended, as in Article 14, where there appear the words "or reputations", which do not appear elsewhere. This varying presentation of limitations may be seen by comparing the following wording taken from the four articles in question:

Article 13, paragraph 2

"..... subject only to such limitations as are pursuant to law and are reasonable and necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others."

Article 14, paragraph 3

"..... these shall be such only as are provided by law and are necessary

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1/ The Commission will recall that at its Sixth Session it went on record as interpreting the term "public order" (ordre public) as covering both the right to license media of information and the right to regulate the importation of information material (E/CN.4/SR.167, paragraphs 52-4).

for the protection of national security, public order, safety, health or morals, or of the rights, freedoms or reputations of others."

Article 15

"..... other than those imposed in conformity with the law and which are necessary to ensure national security, public order, the protection of health and morals or the protection of the rights and freedoms of others."

Article 16, paragraph 2

"..... other than those prescribed by law and which are necessary to ensure national security, public order, the protection of health or morals or the protection of the rights and freedoms of others."

The corresponding wording of the French texts is as follows:

Article 13, paragraph 2

"..... ne peut faire l'objet que des seules restrictions prévues par la loi et qui constituent des mesures raisonnables et nécessaires à la protection de la sécurité, de l'ordre et de la santé publique, ou de la morale ou des droits et libertés fondamentaux d'autrui."

Article 14, paragraph 3

"..... qui devront toutefois être expressément fixées par la loi et strictement nécessaires pour la sauvegarde de la sécurité nationale, de l'ordre public, de la santé publique ou des bonnes moeurs, ou des droits, des libertés ou de la réputation d'autrui."

Article 15

"..... ne peut faire l'objet que des seules restrictions imposées conformément à la loi et qui constituent des mesures nécessaires à la sécurité nationale, l'ordre public, la protection de la santé ou de la morale ou des droits et des libertés d'autrui."

Article 16, paragraph 2

"..... ne pourra faire l'objet que des seules restrictions prévues par la loi et que constituent des mesures nécessaires à la sécurité nationale, á l'ordre public, à la protection de la santé ou de la morale, ou à la protection des droits et libertés d'autrui."

Except in so far as a difference of substance is intended, it is submitted that a uniform text may be drafted along the following lines:

"..... subject only to such limitations as are provided by law and are

/reasonable

reasonable and necessary to ensure national security, public order,[1] the protection of health and morals or the protection of the rights and freedoms of others."

The French equivalent of such a text might read:

"..... sous réserve des seules restrictions prévues par la loi et qui constituent des mesures raisonnables et nécessaires pour la sauvegarde de la sécurité nationale et de l'ordre public[1] et pour la protection de la santé et des bonnes moeurs et le respect des droits et libertés d'autrui."

Article 13, paragraph 2[2]

Drafting changes

199. The Secretary-General considers that, if the present text of Article 13, paragraph 2 is not to be substituted by the uniform provisions as proposed above (paragraph 198), the following suggestions relating to the present French text might be considered.

(a) That the word "publique" be changed to "publics" in order to make it applicable to "sécurité" and to "ordre", as well as to "santé".

(b) That the expression "de la morale" be replaced by "des bonnes moeurs" which is used in Article 14, paragraph 2, for the translation of the English word "morals" (E/L.68, paragraph 86).

Article 14, paragraph 1

Scope of right to hold opinions without interference

200. The Australian representative in the Council emphasized the controversial character of the content of Article 14 and the basic differences of approach thereto which he thought called for substantial reconciliation of various viewpoints before the document could be submitted to the General Assembly (E/AC.7/SR.147, page 12). In the General Assembly the Australian representative stated that, as the drafting of Article 14 was unsatisfactory, his Government would propose a new text for that article to the Commission on Human Rights at its next session (A/C.3/SR.305, paragraph 7).

201. The representative of Sweden in the General Assembly observed that the aim of the Covenant was to protect the human rights of the individual not only against

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1/ The expression "public order" ("l'ordre public") is included in the suggested possible uniform text because it appears as part of the phraseology at present used in Articles 13, 14, 15 and 16. See paragraph 198 of the text above.

2/ For general observations on the limitations contained in this paragraph see paragraphs 179 to 198.

governments but also against other individuals or organizations. That principle was clearly acknowledged in Article 3 but no reference was made to it in Article 4 to which, in her opinion, it should nevertheless apply (A/C.3/SR.300, paragraph 6).

202. The representative of the Union of Soviet Socialist Republics in the General Assembly considered that the right to freedom of opinion and expression was not fully guaranteed by Article 14, because it did not contain sufficient guarantee on the part of the State. The Soviet delegation suggested the insertion of the following sentence: "In the interests of democracy, everyone shall be guaranteed by law the right of free expression of opinion and, in particular, freedom of speech, of the press and of artistic expression..." (A/C.3/SR.289, paragraph 36).

Drafting changes

203. The Secretary-General draws attention to the fact that paragraph 1 of Article 14 is different in the English and French texts. To eliminate this divergence, he suggests that this paragraph be reworded as follows:

English: "Everyone shall have freedom of opinion: no one shall suffer interference because of his opinions".

French: "Toute personne a droit á la liberté d'opinion: Nul ne peut être inquiété pour ses opinions" (E/L.68, paragraph 88).

Article 14, paragraph 2

Drafting changes

204. The Secretary-General suggests that in the French text of paragraph 2, a linguistic improvement might be achieved by the substitution of "écrite ou imprimée ou sous la forme artistique" for "écrite, imprimée ou artistique" (E/L.68, paragraph 89).

205. The definition of freedom of information as drafted by the General Assembly Committee on the Draft Convention on Freedom of Information (Annex to A/AC.42/7) is summarized in paragraphs 9, 10 of document E/CN.4/532.

Article 14, paragraph 3[1/]

Drafting changes

206. The representative of New Zealand in the General Assembly suggested that the phrase "national security" in paragraph 3 of Article 14 be replaced by the words "national defence" (A/C.3/SR.290, paragraph 45).

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1/ For general observations on the limitations contained in this paragraph see paragraphs 179 to 198.

207. The permissible limitations on Freedom of Information as drafted by the General Assembly Committee on the Draft Convention on Freedom of Information (Annex to A/AC.42/7) will be found in paragraphs 11 to 14 of document E/CN.4/532.

Article 15[1]

Drafting changes

208. The representative of New Zealand in the General Assembly stated that he would prefer Article 15 to be phrased: "Everyone has the right to freedom of peaceful assembly", a wording which in his opinion had the double advantage of being stronger than the text before the Third Committee and of conforming with the remainder of the draft article (A/C.3/SR.290, paragraph 46).

Article 16, paragraph 1

Drafting changes

209. Commenting on paragraph 1 of Article 16 the New Zealand representative in the General Assembly said that he would prefer the retention of the text studied by the Commission on Human Rights at its fifth session so that the article would read: "Everyone shall enjoy the right of association" (A/C.3/SR.290, paragraph 47).

Article 16, paragraph 2

210. The observations made by representatives in the Council and in the General Assembly and by the Secretary-General concerning the limitations contained in this paragraph have already been noted (see above paragraphs 179 to 198).

Article 16, paragraph 3

Reference to the Freedom of Association and Protection of the Right to Organize Convention, 1948

211. The Belgian representative in the Council stated that the Freedom of Association and Protection of the Right to Organize Convention of 1948, an instrument which came within the traditional sphere of activities of the International Labour Organisation, provided a minimum of rules in the particular field of freedom of association. Paragraph 3, however, seemed to suggest that even that minimum exceeded the rights guaranteed by paragraph 1, especially since the normal restrictions to the right of association had already been included in paragraph 2. In his opinion, paragraph 3 of Article 16 had been wrongly included

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1/ For general observations on the limitations contained in this paragraph see paragraphs 179 to 198 above.

in Part II of the draft Covenant, because it dealt with the question of implementation (E/AC.7/SR.148, page 9). Later in the same debate in the Council, the Belgian representative expressed his opinion that it would be better to include paragraph 3 of Article 16 in Part III of the Covenant (E/AC.7/SR.150, pages 14, 15).

212. The French representative in the Council explained that his delegation had thought it advisable to add paragraph 3 to Article 16. The reasons for this addition were twofold: firstly, to avoid the possibility of conflicts of jurisdiction; and secondly, because it seemed desirable to mention trade union rights in the Covenant, since they were one of the most characteristic forms of the right of association (E/AC.7/SR.148, page 16).

213. The representative of New Zealand in the General Assembly doubted whether paragraph 3 of Article 16 was pertinent, since it could not bind States which were not parties to the Freedom of Association and Protection of the Right to Organize Convention of 1948. It appeared needless, if not unwarranted, to make reference in the Covenant to another international instrument (A/C.3/SR.290, paragraph 48).

Article 17

Relationship with other articles of the covenant

214. The Belgian representative in the Council stated that Article 17, providing for equality before the law, appeared to go beyond the scope of Article 1, paragraph 1, since equality before the law included equality in regard to obligations under the law - in other words equality of legal status, a proviso not contained in Article 1. On the other hand, Article 1, paragraph 2, appeared to suggest that the rights must be embodied in the law before they could be ensured. Either, then, Article 1 merely duplicated what was contained in Article 17, in which case it would be well to specify what it was that was added. Hence it would seem that the text of Articles 1 and 17 should be carefully revised and their religionship more precisely defined. (E/AC.7/SR.148, pages 6 and 7) This criticism of Articles 1 and 17 was also voiced by the Canadian representative in the Council. In his view, these two provisions referred to distinct concepts: paragraph 1 of Article 1 to the obligation of States to ensure the rights defined in the Covenant; and Article 17 to the broader notion of protection under the law without specific limitation to the Covenant. The similarity in language, however, tended to obscure this distinction and to make it uncertain whether or not there

/was in fact

was in fact a different connotation (E/AC.7/SR.148, pages 13, 14). In the General Assembly the Canadian representative referred particularly to the ill-defined relationship between Articles 12 and 17. He considered that these Articles were an example of the overlapping and lack of co-ordination in the draft Covenant. Article 12 affirmed that everyone had the right to recognition everywhere as a person before the law, a concept which was not unconnected with the provision in Article 17 that all were equal before the law (A/C.3/SR.289, paragraph 18).

Criteria for non-discrimination

215. The representative of Denmark in the Council thought that Article 17 should be referred again to the Commission on Human Rights for redrafting. This Article states (inter alia) that "all shall be accorded equal protection of the law without discrimination on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". His Government was convinced that, although the Article did not so state explicitly, the words "on any grounds" and "other status" were meant to apply to persons who belonged to a national minority (E/AC.7/SR.149, page 4).

216. In connexion with the statement of the Danish representative in the Council, (see above, paragraph 215) the Secretary-General draws to the attention of the Commission the fact that Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 under the auspices of the Council of Europe includes among the grounds for which discrimination is not admissible "association with a national minority".

Scope of right to equality before the law

217. The French representative in the Council regretted the adoption in Article 17 of an ambiguous wording which would apparently extend to all rights and all cases the obligation of non-discrimination of the law, an obligation which at first applied only to "all the rights and freedoms defined in the Covenant" (E/AC.7/SR.147, page 18).

218. The Polish representative in the General Assembly did not believe that Article 17 as drafted guaranteed the rights to which it referred. In his opinion, it was vague, arbitrary and inadequate (A/C.3/SR.290, paragraph 5).

219. The representative of the Union of Soviet Socialist Republics maintained that Article 17 failed adequately to guarantee the enjoyment of the right of all to equality without discrimination before the law. He stated that at its sixth session,

/the Commission

the Commission on Human Rights had decided to omit a paragraph which it had approved at its fifth session and which had provided: "Everyone shall be accorded equal protection against any incitement to such discrimination" (on any ground such as race, colour etc.). His delegation considered that, in its present form, Article 17 was not sufficiently explicit in its prohibition of propaganda in support of discrimination on racial or national grounds. To remedy this omission, he was in favour of inserting the following provision: "Any form of propaganda in support of Fascist or Nazi ideas, propaganda in favour of discrimination based on race or nationality, and propaganda inciting to hatred or contempt shall be prohibited by law" (A/C.3/SR.289, paragraph 38).

220. It was the view of the representative of New Zealand in the General Assembly (A/C.3/SR.290, paragraph 49) and of the representative of the United States of America in the Council (E/AC.7/SR.148, pages 17-18) that the addition of the words which follow "equal protection of the law" in Article 17 is not only unnecessary, but casts doubt on the meaning of the proposition that all are equal before the law and that all shall be accorded equal protection of the law. It was pointed out that discussions in the Commission had shown that it is possible to regard the present article as prohibiting the existence or the enactment of laws which discriminate between individuals on grounds such as race, colour, etc., has no place in Article 17 and that consequently all the words after "equal protection of the law" should be deleted.

221. The representative of Yemen in the General Assembly considered that the adoption of Article 17 would raise great difficulties for the Arab countries whose legislation was largely religious in origin. In his opinion, Article 17 did not take into consideration the differences between the laws of various countries, particularly with regard to marriage, divorce and inheritance. He contended that such differences in legislation occurred between European countries themselves as well as between Western countries on the one hand and Arab States on the other (A/C.3/SR.290, paragraph 62).

Article 18

Relationship with measures of implementation

222. The Belgian representative in the Council expressed the view that, since paragraph 2 of Article 18 was related to implementation, it had been wrongly included in Part II of the draft Covenant (E/AC.7/SR.148, page 9). He thought

/that it would

that it would be better to introduce into Part III dealing with implementation provision for mitigating the difficulties which might arise when States became parties to conventions concluded by other international organizations (E/AC.7/SR.150, page 3).

Drafting changes

223. The Secretary-General points out that paragraph 2 of Article 18 refers to "any Contracting State", although elsewhere in the draft Covenant the phrase "State Party to the Covenant" is used. In the interest of uniform terminology it may be advisable to replace the words "Contracting State" by "State Party to the Covenant" (E/L.68, paragraph 98).

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