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Chairman: Mrs. Lina P. TSALDARIS (Greece).

Tribute to the memory of Judge José Gustavo Guerrero, member of the International Court of Justice

The members of the Committee observed a minute of silence in tribute to the memory of Judge José Gustavo Guerrero of El Salvador, a member of the International Court of Justice.

1. Miss FUENTES (El Salvador) thanked the Committee for the tribute it had paid to the memory of her distinguished compatriot.

AGENDA ITEM 32

Draft International Covenants on Human Rights (E/2573, annexes I, II and III, A/2907 and Add.1-2, A/2910 and Add.1-6, A/2929, A/3077, A/3525, A/3764 and Add.1, A/3824, A/C.3/L.685/Rev.1, A/C.3/L.686-689) (continued)

ARTICLE 9 OF THE DRAFT COVENANT ON CIVIL AND POLITICAL RIGHTS (E/2573, ANNEX I B) (continued)

2. Mr. MEZINCESCU (Romania) said that article 9 of the draft Covenant on Civil and Political Rights as prepared by the Commission on Human Rights (E/2573, annex I B) offered adequate minimum protection against arbitrary arrest and detention. While the safeguards it contained were not of course the only possible ones, it would be difficult in view of the diversity of legal systems to find others commanding general acceptance. The Commission's text was admittedly a compromise; but it was a wise compromise, and its adoption would represent real progress towards securing the rights it proclaimed. He therefore strongly supported the article as it stood.

3. The various amendments unfortunately tended to weaken the article. The United Kingdom amendment to paragraph 1 (A/C.3/L.686), by eliminating the second sentence, excluded a most important element—the moral condemnation of arbitrary arrest or detention—while the addition proposed in it would make the paragraph repetitious. The word "arbitrary" occurred in the Universal Declaration of Human Rights and in article 6 of the draft Covenant on Civil and Political Rights, already adopted by the Committee. As used in article 9, its main purpose was to rule out arrest or

detention in disregard of the law. He therefore opposed the amendment.

4. The amendments to paragraph 2 submitted by the Netherlands (A/C.3/L.687) and Israel (A/C.3/L.689) also tended to weaken or eliminate the guarantees laid down in the original text, and he would therefore vote against them. The Liberian amendment (A/C.3/L.688) to paragraph 2 would be unnecessary if the French text of the paragraph, which referred to a recognized legal procedure (notification), was taken as the basis and the English text amended accordingly.

5. He was also unable to support either the Israel amendment (A/C.3/L.689) to paragraph 3, since it offered fewer guarantees than did the original text, or the Costa Rican amendment (A/C.3/L.685/Rev.1) to paragraph 4, which would only complicate the exercise of the right of recourse.

6. Mr. MAKIEDO (Yugoslavia) said that his delegation has voted for article 9 in the Commission on Human Rights in the belief that no better text could be found which would be acceptable to the majority. The article was in full accord with the constitution and laws of his country, and the amendments before the Committee would not improve it.

7. The United Kingdom amendment (A/C.3/L.686) to paragraph 1, for example, would merely weaken the paragraph. In the Netherlands amendment (A/C.3/L.687) the reference to language, though unobjectionable in itself, concerned a point of detail out of place in the article, while the provision that the arrested person was to be informed "promptly" of the reasons for his arrest was obviously less strong than the original text. Accordingly he was unable to accept that amendment. The Liberian amendment (A/C.3/L.688) would also burden the text with too much detail. The Israel amendment (A/C.3/L.689) would water down the article, in particular by providing that the person arrested could be informed of the reasons for his arrest as soon as circumstances permitted—an indefinite phrase which would easily lend itself to abuse. Moreover, the mention of bail was undesirable in an article which had to be acceptable to countries where the institution was unknown. The Costa Rican amendment (A/C.3/L.685/Rev.1) was unacceptable because the first sentence was no improvement on the original, while the second would occasion great legal difficulties. For all those reasons, he would vote for article 9 as it stood.

8. Mr. MONACO (Italy) said that article 9 was perhaps the most important in the draft Covenant. Since it embodied general principles which were to be found in the constitutions of all nations, there was no disagreement on its substance; the Committee's only task was to find the best formulation.

9. The main purpose of the article was to secure the individual's right to both physical and moral freedom.

Unhappily, the text sometimes appeared to confuse the question of guaranteeing liberty of the person with that of guaranteeing proper legal procedure, a subject dealt with in a long and detailed article not yet considered by the Committee—article 14. He felt that article 9 would be improved by the deletion of certain provisions already covered in article 14; but he had made no formal proposal to that effect in order not to disturb a compromise achieved by the Commission on Human Rights only after considerable difficulty.

10. Analysing article 9, he remarked that in paragraphs 1 and 4 the words "deprived of his liberty" were used to cover both arrest and detention; but in paragraph 5 "deprivation of liberty" was placed on the same footing as arrest—surely an illogical procedure.

11. The word "arbitrary", used in paragraph 1, had given rise to a great deal of discussion. Admittedly, it was not easy to define; but its meaning in the context was clear enough. Public authorities in all countries were endowed with discretionary powers, which they were expected to exercise in the public interest, usually before the machinery of the law was set in motion. The intent of the prohibition of "arbitrary" arrest or detention was to ensure that those powers should not be exercised without due regard for the rights of the individual.

12. The second part of paragraph 2 was a needless repetition of the rule laid down in article 14, paragraph 2 (a), and the Committee should try to co-ordinate the two texts. Lastly, if paragraph 5 was to be of any use it would have to be made much more specific.

13. Turning to the various amendments, he said that the United Kingdom amendment (A/C.3/L.686) to paragraph 1 would not only make the paragraph repetitious, but would eliminate the all-important idea that in effecting arrests or detentions public authorities must not act arbitrarily. The amendment to paragraph 5, on the other hand, was entirely acceptable. He could not vote for the Netherlands amendment (A/C.3/L.687), as it would introduce a repetition of the terms of article 14, paragraph 2 (a). The Liberian amendment (A/C.3/L.688), as other speakers had pointed out, went into unnecessary detail; while States might be expected to change their codes of criminal procedure, if necessary, to conform with the principles set forth in the Covenants, it was illogical to insert in those instruments isolated points of procedure. He was therefore unable to support the amendment. Although he was not in favour of the Israel amendment (A/C.3/L.689), the proposed new text of paragraph 3 had the merit of separating the idea of arrest from that of judicial proceedings.

14. He was prepared to vote for article 9 as it stood because he believed it to be generally acceptable.

15. Mr. ROSSIDES (Greece) said that article 9 was one of the most important in the draft Covenants in that it proclaimed the individual's right to freedom and sought to afford protection against arbitrary action by the State. Paragraph 1 provided, first, that no one should be arrested without due process of law and, secondly, that such procedure should not be unjust by the standards of natural justice. The second sentence of paragraph 1, which repeated the wording of article 9 of the Universal Declaration of Human Rights, was explicit and satisfactory. He could see no objec-

tion to the word "arbitrary". Although the word had originally meant "discretionary", it now had two meanings: it applied, first, to action based on will and not on reasoning or judgement and, secondly, to the exercise of absolute power in a despotic and a tyrannical way. Arrest or detention might therefore be arbitrary in two senses: if it was unjust, and if, although it was in accordance with the law, the law itself was unjust. Both meanings were covered by the second sentence of paragraph 1.

16. However, the third sentence of that paragraph did not provide for the possibility of arrest in accordance with a procedure which, while lawful, was in itself arbitrary. He therefore had considerable sympathy with the additional phrase proposed by the United Kingdom in its amendment (A/C.3/L.686). However, he felt that it might be desirable to reword it to read, for example, "and as are not in derogation of the right protected in this article". As the USSR representative had pointed out at the 863rd meeting, the point was already covered by articles 2 and 5 of the draft Covenant; but those articles had not yet been discussed and might never be adopted. It would therefore be advisable to make sure that the provision was added to paragraph 1 of article 9.

17. He could not support the Netherlands amendment (A/C.3/L.687) because the word "promptly" offered too much opportunity for delay; the words "at the time of arrest", in the original text of paragraph 2 were preferable. The Liberian amendment (A/C.3/L.688) introduced the important idea that charges against an arrested person should be incorporated in a document. He was opposed to the Israel amendment (A/C.3/L.689); the words "has a right to be promptly informed", and "or as soon thereafter as circumstances permit", in the proposed new text of paragraph 2, were unsatisfactory. The wording "shall be informed" in the original text placed squarely on the State the obligation to inform the arrested person of the reasons for his arrest. He was in favour of the Costa Rican amendment (A/C.3/L.685/Rev.1), as a person under arrest might be unable to institute proceedings on his own behalf and might have no relatives or legal representative to do so for him.

18. Mr. AVRAMOV (Bulgaria) said that the original text of article 9 was satisfactory to his delegation. The proposed right of protection against wrongful deprivation of liberty was clearly proclaimed in paragraph 1, and paragraphs 2, 4 and 5 laid down the necessary safeguards. The text of article 9 thus formed a coherent whole.

19. Turning to the United Kingdom amendment (A/C.3/L.686), he said that the deletion of the second sentence of paragraph 1 would weaken the article. He could not see that there was any objection to the word "arbitrary", which had been used in the Universal Declaration of Human Rights and in other articles of the draft Covenants. The consensus, at the current session as at the twelfth session of the Commission on Human Rights, appeared to be that "arbitrary" meant unjust and unlawful. It therefore covered not only unlawful treatment but unjust treatment under cover of the law. As the second and third sentences of paragraph 1 were an extension of the first, the deletion of the second sentence would restrict the scope of the paragraph. Furthermore, the additional wording proposed by the United Kingdom

was redundant: as the USSR representative had already stated, the point intended was covered by articles 2 and 5 in part II.

20. He had no objection in principle to the Netherlands amendment (A/C.3/L.687) to paragraph 2; obviously, any person who was arrested should be informed of the reasons. However, the wording of the Netherlands amendment was less forceful than that of the original text. The same objection could be made to the Israel amendments (A/C.3/L.689) to paragraphs 2 and 3, since they might encourage dilatoriness. Furthermore, paragraphs 2 and 3 of the original text placed on Governments the unconditional duty of informing every arrested person of the reasons for his detention, whereas if the Israel amendment was adopted those paragraphs would become a mere declaration of right. He thought that the point covered in the first sentence of the Costa Rican amendment (A/C.3/L.685/Rev.1) was more clearly put in the original text. The principle expressed in its second sentence was contrary to the legislation of many countries, including his own. He therefore preferred the original text of paragraph 4.

21. The United Kingdom amendment (A/C.3/L.686) to paragraph 5 would limit the right to compensation, since deprivation of liberty was a broader term than detention. Furthermore, the first sentence of paragraph 1 and paragraph 5 both referred to the same idea, deprivation of liberty; it would therefore be unwise to change the wording of paragraph 5. The amendments submitted by the Netherlands (A/C.3/L.687) and Liberia (A/C.3/L.688) were interesting but the original text covered the points intended and was more coherent and harmonious. He would support the article as it stood.

22. Mr. ZAMORA ELIZONDO (Costa Rica) said he wished to reply to some of the objections which had been raised against his amendment (A/C.3/L.685/Rev.1). The first sentence of paragraph 4 in the original text could hardly be clearer than the first sentence of the Costa Rican amendment, as the Bulgarian representative had stated, since the amendment reproduced the original text practically word for word; the only change had been to add the words "of justice" after the word "court". The addition of those words had been criticized. However, there were courts other than courts of justice, and it was essential to specify that the tribunal in question should be a court of justice to ensure a valid and enforceable decision.

23. Some delegations had objected to the second sentence of the Costa Rican amendment on the ground that the case could not arise under their own legislation. But article 9 was meant to protect individuals against wrongful deprivation of liberty in countries where their rights in that respect were not respected. It was because a person under detention might not be able to institute proceedings for himself that the Costa Rican delegation had proposed the second sentence of its amendment. He agreed with the representatives of France and Portugal that there was a difference between public prosecutions and proceedings instituted by private individuals, but he could not see why any person should not be able to exercise the right of recourse on behalf of any other person, whether or not he had a special interest in doing so. There was no danger, as the French and

Belgian representatives had feared, that great numbers of persons would avail themselves of the opportunity to institute proceedings. That did not occur in countries like Chile, Argentina and Costa Rica, where every facility was extended to those who wished to take action of the kind proposed.

24. Mrs. KHADDURI (Iraq) said that the clear statement of principle made in paragraph 1 of article 9 was to be welcomed. Although the individual's right to liberty and security of person was enshrined in the constitutions of many countries, it was a right that was often violated. The safeguards laid down in paragraphs 2, 3 and 4 were therefore both necessary and desirable. She supported the first four paragraphs of the article in their original form.

25. The principle set forth in paragraph 5 was acceptable but there would be some difficulty in applying it unconditionally. It should be clearly stated that the right to compensation existed where an arrest had been due to negligence, malice or gross error on the part of the authorities; in its existing form, the paragraph might hamper the efforts of the public authorities to arrest criminals.

26. Turning to the amendments, she said she would vote against the Costa Rican amendment (A/C.3/L.685/Rev.1), as it was too general and too vague. She could not agree to the deletion proposed in the United Kingdom amendment (A/C.3/L.686); the removal of the second sentence from paragraph 1 would open the way to violations of the principle of the liberty and security of the individual set out in the first sentence. The addition proposed by the United Kingdom merely made the interpretation of the paragraph more difficult. The Liberian amendment (A/C.3/L.688) had some merit although she could not support it in its existing form; she might be able to do so if it was clarified. Most of the amendments did not in her view add anything to the original text, which was perfectly clear and acceptable to her delegation.

27. Miss FAROUK (Tunisia) supported the original text of article 9; although it was not perfect, it provided adequate guarantees. The word "arbitrary" had given her some pause on first reading paragraph 1; she had felt that it might give rise to difficulties of interpretation; but it had become clear in the course of the debate that the word expressed a legally valid concept. She therefore saw no reason to support the United Kingdom amendment (A/C.3/L.686) to paragraph 1. Moreover, to delete the second sentence of paragraph 1 would be a great mistake; it would change the whole meaning of the paragraph, and, in any event, there were precedents for the use of the word "arbitrary" in other articles.

28. Although she had some sympathy with the Netherlands amendment (A/C.3/L.687), particularly the introduction of the words "in a language which he understands", she still felt that the original text of paragraph 2 was preferable. As had been pointed out by the representative of Italy, the point was covered in article 14, paragraph 2 (a). She agreed with the suggestion made by the representative of France that the French text of paragraph 2 should be amended to read "devra être informé" instead of "sera informé", as that would place on the public authorities the responsibility for informing the person under detention of the charge against him. The Liberian

amendment (A/C.3/L.688) was not very clear. She could not support the United Kingdom amendment (A/C.3/L.686) to paragraph 5, since the replacement of the words "deprivation of liberty" by the word "detention", which was narrower in scope, would weaken the text. She felt that the original text of article 9 should be adopted. As the amendments did not appear to improve it, she hoped that their sponsors would withdraw them.

29. Mr. SIMPSON (Liberia) supported the Greek and Moroccan representatives' suggestion, made at previous meetings, that the Committee should take a decision during the current session to expedite its work on the draft Covenants, perhaps by setting up an ad hoc committee.

30. He was afraid that there were some misconceptions concerning his delegation's amendment (A/C.3/L.688) to article 9. The Liberian delegation was prepared to accept the article as drafted by the Commission on Human Rights, but had proposed an addition designed to avoid the possibility of arrests on trumped-up charges which might be communicated purely verbally. The document furnished could be either a magistrate's writ or a grand jury indictment; in any case, the provision would be an additional guarantee of the implementation of the second sentence of paragraph 1. The fact that such a guarantee already existed in some national legislations was no argument against including it in the Covenant.

31. In the United Kingdom amendments (A/C.3/L.686) he could not support the proposed deletion of the second sentence of paragraph 1; however, the proposed change in paragraph 5 had some merit, since "detention" was a more specific term than "deprivation of liberty".

32. Mr. RIBEIRO DA CUNHA (Portugal), replying to the Costa Rican representative, said he had not intended to imply that proceedings should be left to the initiative of the public authorities. Any person should be able to complain to those authorities, but only they or persons having an interest in the case should institute proceedings. In view of the wording of the Costa Rican amendment (A/C.3/L.685/Rev.1), under which the appropriate proceedings could be instituted by any person, he could not vote for it.

33. He could not vote in favour of the United Kingdom amendment (A/C.3/L.686) to paragraph 1, but was inclined to support the amendment to paragraph 5. He could also vote for the Netherlands amendment (A/C.3/L.687), on the understanding that the word "promptly" meant "at the time of arrest". He considered that the Liberian amendment (A/C.3/L.688) was procedural, and that the term "authorized person" was insufficiently clear; it might be better to replace the words "an authorized person or authority" by "competent authority". Finally, while his delegation appreciated the motives that had inspired the Israel amendment (A/C.3/L.689) to paragraph 2, it preferred the Commission's text.

34. Mr. SUDJAHRI (Indonesia) said that his delegation was in favour of the text of article 9 as drafted by the Commission on Human Rights. He would abstain from voting on the Costa Rican amendment (A/C.3/L.685/Rev.1), since the proposed text did not make it clear who could institute proceedings; it

would be better to leave States to define their own procedures in that respect. In the United Kingdom amendment (A/C.3/L.686), he could not agree with the proposal that the second sentence of paragraph 1 should be deleted; no more appropriate term than the word "arbitrary" could be found to express the concept of prohibition of unlawful or unjust arrest. Moreover, it had been used in article 6 of the draft Covenant. Nor could his delegation accept the proposed addition to paragraph 1, which was covered by part II of the draft Covenant. On the other hand, it considered that the United Kingdom amendment to paragraph 5 improved the text.

35. He could not vote for the Netherlands amendment (A/C.3/L.687), because the substitution of the word "promptly" for "at the time of arrest" could only provide a pretext for delay. The point relating to language seemed to be implied in the Commission's text and merely added an unnecessary detail. The latter comment also applied to the Liberian amendment (A/C.3/L.688); each country should be left to decide such procedural matters for itself. He considered that the Israel amendments (A/C.3/L.689) tended to weaken the text, and would therefore be unable to vote for them.

36. Mr. BAROODY (Saudi Arabia) said that article 9 as drafted by the Commission on Human Rights was satisfactory to his delegation, and seemed to cover all the points raised in the amendments. With regard to the United Kingdom amendment (A/C.3/L.686), the majority of the Committee seemed to agree that the word "arbitrary" had a definite connotation. It had to be borne in mind that coercion was inherent in the very concept of law. Without it, there was no deterrent, except self-discipline, from action detrimental to other members of the community. The purpose of article 9 was to temper the coercive element of law, first, by preventing the ill-treatment of suspected persons by public officers, and secondly, by preventing any violation of due process. Such abuses might be described as arbitrary without any danger of misapprehension. He therefore opposed the deletion of the second sentence as proposed by the United Kingdom. With regard to the additional phrase proposed to fill the gap left by that deletion, he considered that the reference to grounds "incompatible with respect for the right to liberty and security of person" might open the way to dangerous abuses by the defence in criminal cases. The United Kingdom amendment to paragraph 5, however, seemed to be wise, for the term "deprivation of liberty" was so general that it would provide opportunities for groundless objections to ordinary law enforcement; thus, a witness who refused to answer a subpoena and had to be arrested might claim that he had been deprived of his liberty.

37. Turning to the Netherlands amendment (A/C.3/L.687), he observed that the provision relating to language was implicit in the Commission's text. Moreover, the term "promptly" seemed to be open to several interpretations.

38. He could not support the Costa Rican amendment (A/C.3/L.685/Rev.1), because to allow anyone to institute proceedings on behalf of detained persons would open the door to the misplaced and inopportune zeal of any ill-advised persons or groups who wished to exploit a given situation. In any case, it was the

practice of national courts to appoint counsel for all persons requiring legal assistance.

39. He had no objection to the Liberian amendment (A/C.3/L.688), because it was an addition to, and not a substitution for, the Commission's text. How-

ever, he reserved his position on the amendment, since he supported the Commission's wording of the article as a whole.

The meeting rose at 6 p.m.