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OBSERVATIONS ON DRAFT FIRST INTERNATIONAL COVENANT ON HUMAN RIGHTS (1)

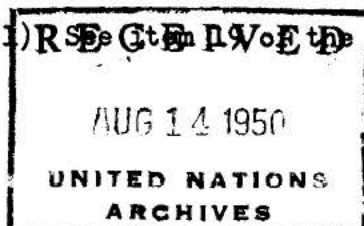
Statement submitted by the World Jewish Congress, a non-governmental organization in category B consultative status

A summary of the following statement was circulated in document E/C.2/259. The Council Committee on Non-Governmental Organizations decided that the statement should be circulated in full in accordance with paragraph 23 of Council resolution 288 B (X).

Whereas the Universal Declaration of Human Rights secures international recognition of the human rights and fundamental freedoms set out therein, an International Covenant on Human Rights is concerned with application in practice of the principles embodied in the Declaration. The Draft Covenant ought, therefore, to adhere to those principles and to prove acceptable to all Member States genuinely desirous of securing that human rights and fundamental freedoms should be protected by practical measures internationally accepted and workable.

Unfortunately, in this period of international tension, the effective safeguarding of these rights and freedoms is rendered more difficult by the anxiety of many governments desirous of excluding from a Covenant substantive provisions and procedural measures which, they believe, could be misused and

(1) ~~RESOLUTION~~ ~~OF THE~~ Council Agenda.



thereby aggravate the tension.

The efforts of the Human Rights Commission to draw up, in the Draft First International Covenant, rules for the international protection of human rights are highly appreciated. In view, however, of the great difficulties mentioned, the Draft as it stands calls for reconsideration by the Commission, because, in certain fundamental aspects, it deviates from the basic principles of the United Nations Charter and the Universal Declaration, and does not provide for practical measures of effective international protection of human rights.

#### I. DEVIATION FROM BASIC PRINCIPLES

##### 1) The Covenant in Disharmony with the Charter of the United Nations

Non-discrimination in respect of race, sex, language, or religion is recognised, in the Charter, as an inalienable human right, and constitutes one of its fundamental principles. (Art. 1 (3), 55 (c), 62 (2), 76 (c)). By virtue of Art. 56 of the United Nations Charter, all Member States have pledged themselves to take joint and separate action, in co-operation with the Organization for the promotion of universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. This pledge was given as a result of the fact that the repudiation by the Nazi Government of the principle of non-discrimination, as described, led to the annihilation of many millions of innocent people, among them six million Jews.

Nevertheless, the Draft First Covenant, in Art. 2 (2), omits from those rights which cannot be derogated even in a state of emergency or public disaster, the right not to be discriminated against for reasons of race, sex, language or religion. The omission in Art. 2 (2) to quote Art. 1 (1) and Art. 17 of the Draft Covenant amounts to negation of a fundamental principle of the Charter.

As far as Art. 1 (1) and Art. 17 prohibit discrimination for reasons of political or other opinion, national or social origin, property, birth or other status, it may not be possible to avoid such discrimination in time of emergency

or public disaster. In the case of a war, fought, or pretended to be fought, on ideological grounds, a State may not be able to allow full human rights to enemy nationals or members of parties which support the principles of the enemy, but the right of the individual to profess his religion, to use his language and not to suffer discrimination because of race or sex, cannot, and should not, be derogated even in the case of war. In a period of emergency, even more than at any other time, all States must adhere to their obligation under Art. 56 of the Charter to accord to all equal protection of the law without any distinction as to race, sex, language or religion.

It is submitted that insofar as race, sex, language and religion are concerned Art. 1 (1) and Art. 17 should be quoted in Art. 2 (2) lest a fundamental principle of the Charter be departed from.

2) The Term "Law"

When the Nazi and Fascist Governments, before and during the last war, trampled down human rights and fundamental freedoms, they did so consistently by way of laws which were valid according to their national constitutions. These laws, being in contradiction of the general principles of law recognised by civilised nations (Art. 38 (1c) of the Statute of the International Court of Justice) were themselves crimes from the international point of view. The whole purpose of the Covenant would be defeated, if the sole protection of human rights would be that provided by national laws, when such laws might be contrary to the principles for which the United Nations stands.

The Human Rights Commission seriously considered this fundamental problem of non-recognition of such national laws. The Draft Covenant, however, offers not one, but several solutions which are not in harmony with each other:

(a) Art. 3 (3) recognises a national law imposing the death penalty only if this law is "not contrary to the Universal Declaration of Human Rights".

(b) Art. 8 (Liberty of Movement) recognises national laws only if they are "consistent with the rights recognised in this Covenant."

(c) Art. 11 (1) and (2), (Retroactivity of Criminal Laws) states that a criminal offence which was not a crime according to national law at the time it was committed, may be considered a crime under international law. Any national law within the meaning of this article will, therefore be disregarded by the Covenant if in contradiction of international law and of the generally recognised principles of law.

(d) Arts. 13, 14, 15 and 16 (Freedom of Thought, of Opinion, of Assembly and of Association) recognise national laws only if they "are reasonable and necessary to protect public safety, order, health, morals or the fundamental rights and freedoms of others." Moreover, in Art. 16 (3) there is the further qualification that the national law cannot be applied "in such a manner as to prejudice the guarantees provided for in this Convention."

(e) By Art. 6 (1) "arbitrary arrest or detention is prohibited." This may, or may not, mean that the law mentioned in the following para. 2 should not be arbitrary, i.e. not contrary to the general principles of international law.

(f) Only in Art. 9 (Expulsion of Aliens), in contrast to all the other articles, is the term "law" used without any further definition or explanation; so that, in this case alone, national laws would be recognised by the Covenant even if contrary to the Universal Declaration or to the general principles of law recognised by civilised nations, or if unreasonable and unnecessary to protect national security, public order, health or morals. While Art. 14 of the Universal Declaration grants the right of asylum to racial or religious persecutees insofar that a refugee once admitted is entitled to enjoy asylum and cannot be expelled, Art. 9 of the Draft Covenant recognises a similar principle that "no alien legally admitted to the territory of a state shall be expelled therefrom." The addition, however, that any national law might allow expulsion nullifies the basic principle.

In any case, the position of the Draft Covenant as to the validity of national law is that, in some cases, national laws are considered invalid if contrary to the Universal Declaration of Human Rights; in some cases, they are invalid if contrary to the general principles of law; in other cases, they are invalid if they are unreasonable and unnecessary to protect public welfare; and, in some cases, they are fully recognised even if contrary to all fundamental principles of the Charter or of the Declaration. These inconsistencies in the Draft offer a striking illustration of the necessity of reconsidering the whole Draft, were it only to establish a comprehensible and consistent terminology.

3) Incompleteness of the Draft Covenant

(a) Omission of Economic, Social and Cultural Rights

The Human Rights Commission decided not to deal with social, economic and cultural rights in the Draft First Covenant. In this respect, the World Jewish Congress supports generally the objections raised in the statement made on behalf of the International League for the Rights of Man (E/CN.4/SR.184, p. 14), and would add that, as all human rights and fundamental freedoms are inter-linked, there ought not to be any distinction in the matter of their protection. For example, the right of Freedom of Movement is of small practical importance unless the right to Free Choice of Employment be not granted at the same time; again, a person who is illiterate and has not the right to be educated can hardly be said to have full equality in the determination of his rights and obligations before a legal tribunal.

(b) Other Rights Omitted

There are other rights which the Draft First Covenant omits, such as, the Right to Marriage (Art. 16 of the Declaration), Equal Access to Public

Services (Art. 21 (2) of the Declaration), and the Right to Education (Art. 26 of the Declaration).

The Right to Marriage is not merely a social right, but a fundamental right of the highest importance, since the family, in the words of Art. 16 (3) of the Declaration, "is the natural and fundamental group unit of society." Art. 16 (1) of the Declaration grants the right to marry and to found a family "without any limitation due to race, nationality or religion." The fact that the Nazi Government enacted laws under which Jews, at first, and members of other nations, afterwards, had their marriage rights seriously curtailed, shows the close connection of the Right to Marriage with the fundamental principle of non-discrimination. The same considerations apply to the omission from the Draft First Covenant of the Right of Equal Access to Public Service, as provided by Art. 21 (2) of the Declaration.

Similarly, the Right to Education is not only a cultural right. It is the foundation of all human rights and fundamental freedoms and these cannot be defended except by individuals educated on the basis of the principles on which a democratic society should be built. If education is not carried out in the spirit of teaching non-aggression and tolerance, all efforts to protect human rights and fundamental freedoms must be in vain. It is submitted, therefore, that the Draft First Covenant should contain an article on education to correspond with Art. 26 of the Declaration and particularly with paragraph 2.

## II. IMPRACTIBILITY OF THE DRAFT FIRST COVENANT

### 1) Procedure

Twenty three articles of the Draft (Art. 19 - 41) deal with Implementation. Of these, no less than 19 deal with the composition of the Human Rights Committee. The substantive rules of procedure and its aims are restricted to four articles (38-41).

On the basis of these four articles the State Parties which alone can raise complaints, are under obligation to bring a complaint first to the attention of the State against which it is directed. If the matter is not adjusted within six months, both States have the right to refer the matter to the Committee. The Committee cannot, however, deal with the complaint until all available domestic remedies have been invoked and exhausted. Only when the application of these remedies is unreasonably prolonged, may the Committee call upon the States concerned to supply relevant information. The Committee must then ascertain the facts and offer its good offices. Only when this fails, is the Committee obliged, not later than eighteen months after the complaint is referred to it, i.e., after twenty four months have elapsed, to make a report to the States concerned and to the Secretariat of the United Nations, for publication. There the matter rests. The Committee is not entitled to make recommendations or to propose any remedy.

An infringement of human rights and fundamental freedoms may involve the life, liberty and destiny of many human beings. Redress requires speedy procedure. If the Human Rights Committee were normally to report only after twenty four months have elapsed, there is good ground for the apprehension that, by that time, no report would be necessary at all, since the individuals concerned may no longer be alive or may otherwise have already suffered the effects of the violation of the Covenant. Consequently, by the procedure envisaged in the Draft Covenant, the present legal position would be worsened. At present, a government or, under Art. 80 of the Rules of Procedure of the Economic and Social Council, non-governmental international organisations may draw attention to an infringement of human rights. In a number of cases, the

Economic and Social Council has decided to take immediate action on the basis of this procedure.

The foregoing considerations support the submission that the procedure proposed in the Draft First Covenant will not serve the purpose of effectively protecting human rights and fundamental freedoms.

## 2) Right of Petition

Only State Parties are entitled to raise complaints under art. 38 of the Draft. Neither individuals, groups, nor even selected, responsible Non-Governmental Organisations may submit petitions and draw the attention of the Human Rights Committee, and thereby of the United Nations, to infringements of human rights and fundamental freedoms. The denial of this Right of Petition, at least to recognized Non-Governmental Organisations, defeats the purpose of the Covenant.

(a) The Right of Petition against wrongs was the first and primary human right for which, in the course of history, people fought and died. It is no more and no less than the right of the subject to be heard by the appropriate authority. Without it, human rights and fundamental freedoms of the individual remain only theoretical. An international covenant concluded under the auspices of the United Nations is designed to secure that human rights be observed in an international society under the control of an international organ. To attain this end, the first condition consists in creating a legal position whereby infringements may be brought to the notice of the United Nations. If representative and authorised Non-Governmental Organisations have no means of submitting petitions under the Covenant, the primary human right to be heard and, therefore, the effective protection of human rights, are denied to humanity.

(b) Moreover, the monopoly of State Parties to make complaints may become a danger to peace. A complaint raised by one State against another is always likely to be considered an unfriendly act. States will, therefore, be reluctant to draw international attention to an infringement of human rights by another State.

No States made use of the provisions of the League of Nations to raise complaint against the Hitler Government's consistent and open policy of persecution for reasons of race, religion or political opinion. It was individuals and Non-Governmental Organisations which, under the provisions of the League of Nations, indicted the Hitler Government, drew the attention of the world to its misdeeds and, in some cases, succeeded in averting danger for some groups and individuals. Action by the Council of the League against Nazi persecution was never once taken on the initiative of any of its Member States; the Council was invariably moved to act only by petitions from individuals and Non-Governmental Organisations. The result of one such petition was to hold up the application of the Nuremberg laws in German Upper Silesia for more than three years, thus enabling tens of thousands of individuals who would otherwise have been the victims of these laws, to be saved from their grievous effects. It is relevant also to refer to the petition which set in motion a process which ultimately brought down the notorious Goga Government in Rumania.

These instances show that the exercise of the Right of Petition by responsible Non-Governmental Organisations is not only practicable as a measure of international implementation, but has often secured important results in safeguarding human rights.

The World Jewish Congress does not overlook the possibility that the Right of Petition might be misused. This could be obviated, however, if the right were made available only to such Non-Governmental Organisations as had previously given proof of their sincere interest in objectively defending human rights. This safeguard could be strengthened by giving the Secretary General of the United Nations the authority to determine the receivability of petitions in accordance with criteria designed to secure their authenticity, seriousness and sincerity. Such a procedure is already in operation in respect of petitions under the Trusteeship System.

It is submitted that it would be preferable to postpone the conclusion of a Covenant in the form of the present Draft, rather than to omit from a Covenant so fundamental an element as the right of petition and, thereby, to take

a retrograde step against the progressive development of international law.

### 3) Federal Clauses

The Human Rights Commission did not make any definite proposals as to whether and how far, Member States of a federal government would be bound by its acceptance of a Covenant. Considering that such influential countries as Argentina, Australia, Brazil, Canada, India, the United States of America, the Soviet Union and others, are governed under federal constitutions, it is hardly feasible to conclude a Covenant or even to submit it to the General Assembly, before the Human Rights Commission has formulated explicit proposals on this crucial subject as well as with regard to Colonies and Trust Territories. For this reason, too, the Draft should be re-considered by the Human Rights Commission.

Reference is made, in this connection, to the Report of the Secretary General (E/1721, 19 June 1950).

### III. CONCLUSIONS

The Human Rights Commission did not recommend acceptance by the Economic and Social Council of the Draft Covenant as it stands. In the words of Dr. Charles Malik, the Rapporteur of the Human Rights Commission, (United Nations' Bulletin, June 1, 1950, p. 501), "it is entirely up to the Economic and Social Council, to decide without previous guidance from the Commission, what to do with the Draft Covenant".

Three ways are open to the Economic and Social Council:

(1) It may discuss the Draft Covenant, article by article and so improve its provisions; (2) It may recommend the Draft Covenant as it stands, for consideration by the next General Assembly; (3) It may refer the Draft back to the Human Rights Commission for reconsideration and completion.

It is respectfully submitted, that only the last method is practicable. It would be impossible for the Economic and Social Council to discuss so complicated and fundamental a document in the short time at its disposal at this session, especially as the document is incomplete.

The submission of the Draft to the General Assembly without detailed discussion would not be in harmony with the function of the Economic and Social Council to give guidance to the General Assembly. Moreover, it would not, at the present stage, serve a useful purpose as long as (a) the procedures proposed in the Draft for the protection of human rights by a Human Rights Committee are partly incomplete and in important respects do not serve the purpose required, (b) the federal clauses have not yet been inserted in the Draft, and (c) the decision by narrow majorities to omit so fundamental a matter as the right of petition and its implementation, calls for reconsideration by the Human Rights Commission itself.

The World Jewish Congress would respectfully recall its efforts to assist in the drafting of the Universal Declaration and the International Covenant. In appealing for reconsideration of the Draft Covenant by the Human Rights Commission, the Congress is motivated by the conviction that an incomplete and in some important respects, a defective covenant may endanger the progress of mankind more than by deferring its conclusion. An International Covenant for the protection of human rights was conceived at a time when the prospects of world peace and the security of mankind appeared to be bright. To conclude a covenant weakened by the impact of the stresses and tensions of the present unhappy international political situation, may have the effect, not desired by the United Nations, of disappointing the hope of a secure future for the peoples of the world.