

UNITED NATIONS
ECONOMIC
AND
SOCIAL COUNCIL



GENERAL

E/CN.4/SR.146
12 April 1950

ORIGINAL: ENGLISH

COMMISSION ON HUMAN RIGHTS

Sixth Session

SUMMARY RECORD OF THE HUNDRED AND FORTY-SIXTH MEETING

Held at Lake Success, New York,
on Wednesday, 5 April 1950, at 11 a.m.

CONTENTS:

Draft international covenant on human rights (E/1371, E/CN.4/365,
E/CN.4/353/Add.10, E/CN.4/394, E/CN.4/397, E/CN.4/399, E/CN.4/400,
E/CN.4/401, E/CN.4/402, E/CN.4/405, E/CN.4/406, E/CN.4/408, E/CN.4/409)
(continued);

Article 9 (continued)

<u>Chairman:</u>	Mrs. F. D. ROOSEVELT	United States of America
<u>Members:</u>	Mr. WHITIAM	Australia
	Mr. STEYAERT	Belgium
	Mr. SANTA CRUZ	Chile
	Mr. CHANG	China
	Mr. SOREINSON	Denmark
	Mr. RAMADAN	Egypt
	Mr. ORDONNEAU	France
	Mr. KYROU	Greece
	Mrs. MEHTA	India
	Mr. MALIK	Lebanon

<u>Members:</u> (cont'd)	Mr. MENDEZ	Philippines
	Miss BOWIE	United Kingdom of Great Britain and Northern Ireland
	Mr. ORIBE	Uruguay
	Mr. JEVREMOVIC	Yugoslavia

Also present:

Mrs. CASTILLO-LEDON	Commission on the Status of Women
---------------------	-----------------------------------

Representative of a specialized agency:

Mr. EVANS	International Labour Organisation (ILO)
-----------	--

Representatives of non-governmental organizations:

Category A:

Miss SENDER	International Confederation of Free Trade Unions (ICFTU)
Mrs. THOMAS	World Federation of United Nations Associations (WFUNA)

Category Registered:

Miss TOMLINSON	International Federation of Business and Professional Women
Miss ROBB	International Federation of University Women
Mr. CRUICKSHANK	Inter-American Council of Commerce and Production
Mr. NOLDE	Commission of Churches on Inter- national Affairs
Mr. BERNSTEIN	Co-ordinating Board of Jewish Organizations
Mrs. CARTER } Miss PARSONS }	International Council of Women
Mr. HUNTINGTON	Friends World Committee for Consultation
Mr. MOSKOWITZ	Consultative Council of Jewish Organizations

Secretariat:

Mr. HUMPHREY	Director of the Division of Human Rights
Mr. LIN MOUSHENG	Secretary of the Commission

/DRAFT

DRAFT INTERNATIONAL COVENANT ON HUMAN RIGHTS (E/1371, E/CN.4/365, E/CN.4/353/Add.10, E/CN.4/394, E/CN.4/397, E/CN.4/399, E/CN.4/400, E/CN.4/401, E/CN.4/402, E/CN.4/405, E/CN.4/406, E/CN.4/408, E/CN.4/409) (continued)

Article 9 (continued)

1. The CHAIRMAN suggested that article 9 of the draft international covenant on human rights should be considered paragraph by paragraph, but thought that paragraphs 1 and 2 were connected. She drew particular attention to the joint amendment sponsored by the United Kingdom (E/1371, Annex II) and the United Kingdom amendment thereto (E/CN.4/397), the Lebanese amendment (E/CN.4/405), the Danish amendment (E/CN.4/402) and the Danish amendment to the Lebanese amendment (E/CN.4/409).

2. Speaking as the representative of the United States of America, she observed that the Lebanese amendment was open to the same objections as her delegation had raised against the United Kingdom amendment in the paper submitted to the Commission (E/CN.4/401). The Lebanese representative had explained that the principal aim of his amendment was the protection of the individual against the acts of state officials, but paragraph 1 of that text was couched in broad terms and covered the right of every person to liberty protected by law. The new text applied, therefore, both to individuals and to public officials. The nine exceptions which the United States observation on the United Kingdom amendment had listed applied equally to the Lebanese amendment, in particular objections 3, 5, 6, 7 and 8. None of them was covered by the five exceptions enumerated in the Lebanese amendment. The Lebanese representative's attempt to consolidate all possible exceptions had thus been as unsuccessful as that of the United Kingdom delegation.

3. Mr. KYROU (Greece) agreed with the United States representative. He would support the original text of paragraphs 1 and 2.

4. Miss BOWIE (United Kingdom) withdrew her delegation's amendment (E/1371, Annex II) in favour of the Lebanese amendment, subject to acceptance of a drafting change at a later stage.

/5. Mrs. MEHTA

5. Mrs. MEHTA (India) supported the United States representative. She was, however, prepared to accept the Danish amendment (E/CN.4/402). As the Commission was attempting in the covenant to build up a body of international law for the protection of human rights, it should not be too specific at that stage. Precedents would be created and would themselves contribute to the establishment of such international law. She could not, therefore, support the Lebanese amendment.

6. Mr. SORENSON (Denmark) explained that he had submitted his amendment (E/CN.4/409) to the Lebanese amendment in view of the objections which the United States delegation had raised against the enumeration of exceptions. The Lebanese amendment was similar in substance to the proposal originally submitted by the minority at the fifth session of the Commission on Human Rights. He was inclined to prefer that method in principle, because the exceptions should be stated in the covenant as precisely as possible. The range of possible exceptions was, however, very wide, as many countries undoubtedly had particular institutions which they wished to preserve. He hoped that the Lebanese representative would accept the additions proposed in the Danish amendment, as acceptance of them might make it easier for some countries to ratify the covenant. They covered some of the same ground as those listed in the United States observation on the United Kingdom amendment. The wording had been taken from a proposal by a group of experts, representing twelve countries, to the Council of Europe and had been derived from the list drawn up by the minority at the Commission's fifth session. They had found that a number of the proposed exceptions were not covered by existing law.

7. It might seem at first sight that there was something contradictory in proposing amendments to texts reflecting two conflicting trends of thought. He had done so in order to provide the best possible text, whichever of the two principles the Commission adopted. If the Lebanese representative was unwilling to accept the Danish amendment (E/CN.4/409) to his amendment, he would not press for a vote on it.

/8. Mr. MALIK

8. Mr. MALIK (Lebanon) said that his amendment (E/CN.4/405) was intended to solve the difficulties which had plagued the Commission's fifth session. The original text (E/1371) referred to "arbitrary arrest" and deprivation of liberty "in accordance with such procedure as established by law". It had been objected time and again that a Hitler could sign an instrument containing such a provision and continue his nefarious activities, because he could assert that the arrests he made were not arbitrary and, as he was a law unto himself, persons deprived of liberty had been/^{detained}in accordance with procedure established by law.

9. All Members of the United Nations had pledged themselves under Articles 55 and 56 of the Charter to take joint and separate action in co-operation with the Organization to promote universal respect for, and observance of, human rights and fundamental freedoms; they had thus pledged themselves to refrain, in co-operation, from committing such abuses of freedom as the Fascists had committed in Europe. He was surprised that members of the Commission, who were fully conversant with the history of the subject and of the genesis of the Commission and its terms of reference, should still be prepared to accept that unsatisfactory word "arbitrary". He had never yet heard any definition of it which would preclude the possibility of abuse by a signatory State.

10. He appealed to the members of the Commission to take their dual capacity fully into account. They were/^{at}one and the same time the representatives of their Governments and the representatives of something higher and wider than their Governments -- humanity. Their Governments had been chosen from the entire membership of the United Nations specifically to promote the cause of human rights; the representatives of those Governments had themselves been honoured by personal confirmation by the Economic and Social Council. Obviously, the members of the Commission were bound by the instructions of their Governments, but they had a transcendent loyalty to humanity under the Commission's terms of reference, the Charter and the Declaration of Human Rights.

11. In their wider capacity, members ought to discuss the promotion of respect for human rights reasonably and be open to reasonable conviction. They should be prepared to inform their Governments that, while they naturally had complied with their instructions, discussion in the Commission on Human Rights had won them over to a broader view of the interests of humanity. He admitted the difficulties inherent in the dual capacity. But he felt most

/strongly

strongly that members should not confine themselves to bearing in mind the existing legal codes of the countries which they represented; they should be prepared to look beyond current practice and attempt to persuade their Governments to carry their legislation to the level demanded by the true promotion of respect for human rights. Unless they did that, the Commission would be guilty of a dereliction of duty.

12. It was with such considerations in mind that he had submitted his amendment. The Commission must be fully aware of the inevitable consequences of the adoption of the expression "arbitrary arrest or detention". If that expression was adopted without a clear definition, and if it were to mean only acts not in accordance with procedure established by law, the Commission would simply be voting for the status quo and opening the way to the possibility of violating human freedom with impunity.

13. The Lebanese amendment (E/CN.4/405) suggested a distinction between private rights and the rights of public officials in the field of human rights. Paragraph 1 stated the fundamental right to liberty. It was no accident that article 9 had become closely linked with article 5, because they dealt with the most basic rights in the covenant and all the other rights enunciated derived from them. The whole field of the private right to liberty should, however, be subject to law. Each country had its own law protecting the private right; all exceptions in that field were, therefore, covered by the duty of the signatory State to regulate the general statement of right by its own domestic legislation.

14. The question of the rights of individuals as against the State was, however, a different issue. Almost all the abuses which had occurred during the past thirty years and had given cause for the creation of the Commission itself had been between the State and the Individual, not between individuals. Accordingly, immediately after the general statement had been laid down, it should be clearly asserted that Governments might deprive individuals of their liberty only in certain clearly specified cases.

15. Such exceptions were fully covered in the Lebanese amendment. The Danish amendment to it (E/CN.4/409) seemed unnecessary. On closer examination, the exceptions listed in it appeared to be covered by the stipulation in subparagraph (c) in the Lebanese draft of paragraph 2 to the effect that the

/exceptions

exceptions should include arrest which was reasonably considered to be necessary to prevent the commission of a crime. If under Danish law the spreading of infectious diseases was a crime or an alcoholic or a drug addict was regarded as a criminal, perhaps on the grounds of the bad example he set, offenders could be arrested under the provisions of sub-paragraph (c). If, however, such acts were not crimes, the law was arbitrary and ought to be abrogated.

16. The fundamental issue was that raised by the United States statement of objections and its enumeration of further exceptions. If Governments were to be left free to make their own interpretation, further exceptions could always be discovered. If, on the other hand, members of the Commission kept the promotion of human rights in view, they would see that in the past abuses had always been committed by Governments and, however much faith they had in their own Governments, they would be well advised to cherish a healthy scepticism about others. The Commission must make sure that the covenant was so precisely worded that no Government could commit abuses in applying it.

17. It was to be hoped that, even if the covenant was fully enforced, it would be reviewed and improved at regular intervals. At the existing stage, however, it was perfectly possible to enumerate all exceptions and consolidate them in categories. If the Commission intended to take the initial moral decision not to leave Governments free to interpret the covenant as they wished, it would be free to consider as many exceptions as possible with an open mind. If, however, an inflexible decision was taken, enabling the Governments to make their own interpretation, agreement on the text of article 9 would be virtually impossible. He ventured to believe that the Lebanese amendment was a real contribution to the solution of the question and deserved not to be dismissed in the somewhat summary way in which it had so far been treated.

18. Mr. SORENSON (Denmark) withdrew his amendment (E/CN.4/409) to the Lebanese amendment in view of the Lebanese representative's objections.

19. The CHAIRMAN, speaking as the representative of the United States of America, stated that the enumeration of exceptions submitted by her delegation (E/CN.4/401) was intended to be merely illustrative; it was not to be regarded as exhaustive.

/20. The real

20. The real issue confronting the Commission was whether the article under consideration should proclaim the essential rights with general qualifications. It had been suggested that the Covenant would be subject to subsequent reviews, for example, after ten years, and that any shortcoming in the enumeration of limitations might then be corrected. That, however, would not meet the problem because additional limitations were most likely to be thought of, not after years, but within a matter of days.

21. It was true, as stated by the Lebanese representative, that the members of the Commission were serving in a dual capacity. The crucial fact in the situation was, however, that the goal desired by all the members could not be achieved without good faith between peoples and nations. It was becoming increasingly clear that what really mattered was the constant and continuing watchfulness of the people with regard to their Governments. The end could not be attained by the simple process of putting words on paper: in the last analysis it was the people themselves who must attain it. The Lebanese representative had pointed out that even a Hitler could accept the majority draft of paragraph 1. But a Hitler could also accept the wording suggested by the Lebanese delegation by proclaiming, in effect, that he was the law.

22. What was really needed was good faith, primarily among people determined to see to it that their Governments lived up to the desired standards.

23. Mr. ORIBE (Uruguay) thought that the Lebanese representative had clearly stated the fundamental points. He differed, however, from him on the proper method of attaining the objective desired by all the members. The problem was one of legal technique, of finding the best procedure to ensure protection of human rights.

24. Basically, the drafts before the Commission involved two divergent types of procedure: the Lebanese amendment was predicated upon analytical and formalistic conceptions, whereas the majority draft envisaged the problem from the point of view of the covenant as a whole and in the light of the preceding work. To his mind, the latter approach was the correct and, indeed, the only possible one, given the nature of the Commission's work.

/25. As Mr. Oribe

25. As Mr. Oribe saw it, the Commission would, in adopting article 9, be consecrating the principle of legality and would establish the fact that all restrictions on the liberty of human beings must be based on non-retroactive laws. It had been argued that the principle of legality would be inadequate and that Hitler himself could have accepted paragraph 1 as drafted by the majority. The representative of the United States had, however, been correct in stating that what was really involved was a question of trust and good faith; without such trust and good faith there would be no point in drafting a covenant.

26. Recognition of the principle of legality in the constitutional texts of the nations had come only after centuries of struggles. The principle was not merely a matter of form: it had shown its viability and strength, and people had demonstrated that they would entrust their liberty only to that principle. It was not, however, simply the fact that law was law that had led them to do so: the procedure in accordance with which laws were created with the participation of the people had been a crucial consideration. The draft covenant should reflect not only the principle of legality, but also that procedure. In other words, the draft covenant must also deal with the political rights of man.

27. He would also draw attention to another point: articles 1, 2 and 20 of the draft covenant and articles 29 and 30 of the Universal Declaration of Human Rights set forth basic obligations of Governments in the protection of human rights. From a technically legal point of view the principle of legality was not enough. There must be superimposed upon it the principle of international legality, as was clearly provided for in article 29, paragraph (3) of the Universal Declaration of Human Rights. To do so would be to provide the guarantees sought by the Commission and would therefore be the best method to follow.

28. The Lebanese representative had sought to remedy the insufficiency of the principle of legality per se by enumerating exceptions. But, as had been pointed out, new cases would constantly arise and it was to be feared that the more specific and precise the drafting, the more difficult it would be to secure the adherence of Governments to the draft covenant. That

/practical

practical consideration was yet another argument against the enumerative, formalistic approach.

29. To sum up, Mr. Oribe preferred seeking the desired guarantees by superimposing international legality over domestic legality. He supported the United States proposal.

30. Mr. KYROU (Greece), while greatly impressed by the Lebanese representative's high motives, shared the United States and Uruguayan representative's views.

31. The Lebanese representative had frankly conceded that his enumeration of exceptions might not be exhaustive. In the circumstances it was to be feared that a partial enumeration would lead to results diametrically opposed to those desired. On the other hand, if it were possible to compile an exhaustive list of exceptions -- and Mr. Kyrou was convinced that that was in fact impossible -- the document under consideration would become a bulky code rather than a covenant, for if that procedure were to be followed in the case of the present article, it would also have to be followed in the case of many other articles.

32. It had been asserted that even a Hitler could accept the wording of paragraph 1 proposed by the majority, by claiming that his actions were not "arbitrary". While Mr. Kyrou would be willing to accept the addition of the words "and unjust", he felt that the meaning of the word "unjust" was covered by "arbitrary". The point was that a Hitler could accept any wording; what counted was, as had been stated before, the good faith of Governments and people.

33. Mr. SANTA CRUZ (Chile) associated himself with the remarks of the representatives of Uruguay and the United States of America. He reserved his right to intervene again in the debate at a later stage.

34. Mrs. MEHTA (India) stated that she and her Government were as anxious as the Lebanese representative to promote and protect human rights. It seemed to her that the real safeguards were in paragraphs 3 to 6 of the majority draft of article 9, and not simply in paragraphs 1 and 2.

/35. Her delegation

35. Her delegation was of the opinion that, if an exhaustive enumeration of exceptions could be drafted, it would be desirable. If, however, no such exhaustive enumeration were possible, it would be most dangerous to include a partial list. In the circumstances, she was opposed to the Lebanese proposal.

36. If it were true that Hitler could have accepted paragraphs 1 and 2 as worded by the majority, it was equally true that he could have accepted the Lebanese wording. The preamble should make it clear that the draft Covenant dealt with laws of democratic States, that the laws themselves must be democratic, and that what was desired was a democratic society in which a Hitler would have no place.

37. Mr. MENDEZ (Philippines) thought that the word "arbitrary" was quite clear in the context of paragraph 1. He would, however, suggest that the paragraph should also include "illegal detention", which covered a different ground, namely that of the illegal detention of one individual by another as in the case of kidnapping. If his suggestion were adopted, the article would cover detention of individuals both by the State and by private persons.

38. While his Government could accept the idea that the cases in which an arrest or detention might be effected should be clearly defined and enumerated, it was of the opinion that such specifications must be most carefully formulated. The draft of article 9 proposed by the representatives of Australia, Denmark, France, Lebanon and the United Kingdom, and reproduced in annex 2 of the Commission's report on its fifth session to the Economic and Social Council (E/1371, page 32), was incomplete and showed the pitfalls of the method of enumeration.

39. He reserved his right to comment at a later stage on article 9, paragraph 6.

40. Mr. CHANG (China) was in favour of paragraphs 1 and 2 as they stood.

41. The corresponding paragraphs of the Lebanese amendment invoked law and legal procedure; but, when discussing the article at previous sessions, the Commission had been aware that laws alone were not sufficient to ensure

/justice

justice and freedom. Dictators might well be able to accept the Lebanese text and twist it to suit their purposes; their will was law and could easily be made the law of the land. By excluding the concept of arbitrariness, contained in the original text, the Lebanese representative would open the door to abuses of human freedom carried out according to perfectly legal procedure. Sub-paragraph 2 (c) alone of the Lebanese amendment could be held to justify the most arbitrary methods. Freedom could be guaranteed only by a combination of proper laws and good faith on the part of every one concerned.

42. The word "arbitrary" as used in paragraph 1 of article 9 meant unjust, unfair, inconsiderate of others. It was quite right that that paragraph should contain a general exhortation of a moral character and should set a goal of justice and respect for the rights of others which the peoples of the world must strive to attain, and that the following paragraphs should deal with the more immediate and practical aspects of the matter.

43. He urged the Commission to have faith in the innate goodness of man, which would in the long run overcome all obstacles to liberty and justice.

44. Miss BOWIE (United Kingdom) remarked that it had been heartening to hear the Lebanese representative's clear and eloquent exposition of the basic principles by which the Commission should be guided in its work on the draft covenant. She warmly endorsed his statement and added that, if members examined every article with a view to discovering loopholes that might be used by their Governments, they would most certainly not be following those principles.

45. The Chairman's remark on constant and continuing watchfulness applied equally to the members of the Commission, who should be constantly prepared to examine the reasons for the laws and procedures of their countries rather than regard them as sacrosanct.

46. While the Lebanese amendment to paragraphs 1 and 2 generally met the views of the United Kingdom delegation, she hoped that the Lebanese representative would agree to replace the words "State officials" in paragraph 2 by the phrase, "the exercise by officers of the State of powers of arrest or detention", thus making the subject of the paragraph entirely clear.

47. In reply to objections, she explained that the list of exceptions in paragraph 2 of both the original United Kingdom amendment and the Lebanese amendment was intended to be a list not of particular cases -- which would be endless -- but of groups or classes of cases in which State interference with the freedom of the individual might be necessary or justified.

48. The United Kingdom had always held the view that a brief and reasonable list of that kind could be prepared to cover all possible cases. The list in question would certainly include the particular exceptions cited by the United States (E/CN.4/401). Thus, the first of the exceptions was clearly covered under paragraph 1 of the Lebanese amendment; the second under either paragraph 1 or sub-paragraph 2 (d), depending on whether detention by private individuals or state officials was meant; the third under sub-paragraph 2 (e); the fourth, if it referred to action by individuals, under paragraph 1. The fifth and sixth exceptions were not permitted by law in the United Kingdom; generally in such cases a subpoena was issued, and, if not obeyed, was replaced by a court order, disregard of which would permit arrest under sub-paragraph 2(b). While the seventh and eighth exceptions appeared to cause some difficulty, she hoped they would be covered by the United Kingdom amendment to paragraph 2 of the Lebanese amendment. Finally, the ninth exception, if it referred to individual action, would be covered under paragraph 1 and, if a court order was involved, would come under sub-paragraph 2 (b).

49. The general limitation clause favoured by the United States would have precisely the effect feared by the Lebanese representative: that of leaving Governments' hands free. The United Kingdom could not accept such a framing of an article designed to make clear the extent of the powers of Governments with regard to individual liberty.

50. Mr. MALIK (Lebanon) accepted the United Kingdom amendment to paragraph 2 of his own amendment.

/51. Mr. WHITLAM

51. Mr. WHITIAM (Australia) had found the discussion most illuminating. He wished in particular to express appreciation of the remarks of the Chinese representative, with whose philosophy he was in complete agreement, although he had himself reached the opposite conclusion.

52. That conclusion was that the method impressively and powerfully advocated by the Lebanese representative should be followed. Representatives of States which were able to rely on the fairness and stability of their legal institutions should be prepared to co-operate with the representatives of those less fortunate countries in which the public order had been shaken to its very foundations by recent events, and should put in the draft covenant texts which seemed as firm to the second group as its own texts appeared to the first.

53. Article 9 dealt essentially with legal procedure -- a subject of considerable importance, especially if it was remembered that Hitler had come to power by virtue of a procedure which had been perfectly legal in his country. The emphasis placed on legal procedure by countries in which political tension existed was therefore fully justified, and it was a matter for regret that the Commission appeared to be divided into two camps with regard to the drafting of that article.

54. He was unable to agree with the view of the United States and China that the word "arbitrary" in paragraph 1 of the original text constituted any real safeguard against arbitrary action. In centuries gone by, arrests by royal decree had been considered lawful procedure, but had come to be regarded as arbitrary. They had been supplanted by democratic legal procedures and juridical institutions which the covenant should do nothing to weaken. The real purpose of the Lebanese amendment, as amended by the United Kingdom, was to ensure that proper legal procedures were applied in those classes of cases which warranted arrest or detention. In that connexion, he wished to point out that "legal procedure" had a much more precise meaning than "lawful procedure"; it meant legal action in accordance with established juridical institutions.

55. As the subject of article 9 was legal procedure, there was no real opposition between paragraphs 1 and 2 as originally drafted and the corresponding paragraphs of the Lebanese text. The Australian Government had suggested that the two paragraphs might be merged into one (E/CN.4/353/Add.10); that single

/paragraph

paragraph might, however, be followed by a list of classes of cases in which arrest or detention might be permitted provided that a proper legal procedure was followed. While the various classes suggested in the Lebanese amendment were subject to further review, he hoped that general agreement might be reached on a text drafted along those lines.

56. He was prepared to vote in favour of the Lebanese amendment as amended by the United Kingdom. It seemed the most satisfactory framing of an article which guaranteed a right second in importance only to the right to life itself.

The meeting rose at 1 p.m.

12/4 a.m.