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Parvez Hassan

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THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: BACKGROUND AND PERSPECTIVE ON ARTICLE 9(1)*

PARVEZ HASSAN**

I. THE SIGNIFICANCE OF "ARBITRARY" AND THE RELEVANCE OF *Travaux Preparatoires*

Article 9(1) of the International Covenant on Civil and Political Rights[1] (the "Covenant") provides:

> Everyone has the right to liberty and security of person. No one shall be subjected to *arbitrary* arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. [Emphasis added.]

It is self evident that the content of this article would, to a large extent, turn on the meaning of the word "arbitrary." Does it mean "illegal" or "unjust" or both? For if it merely means "illegal," all despotic acts and oppressive laws of a government would be unassail-

* The author gratefully acknowledges the guidance of Professors Louis B. Sohn and Richard R. Baxter in the preparation of this article which is related to the author's two studies, *The Word "Arbitrary" as Used in the Universal Declaration of Human Rights: "Illegal" or "Unjust"?*, 10 HARV. INT'L L.J. 225-62 (1969), and *The International Covenants on Human Rights: An Approach to Interpretation*, 19 BUFFALO L. REV. 35-50 (1968-69). The importance of determining the meaning of the word "arbitrary" used in art. 9(1) of the International Covenant on Civil and Political Rights and in other international human rights articles has been highlighted in both these articles.

** LL.B., Punjab University (Pakistan); LL.M., Yale University; S.J.D., Harvard University; Member of the Pakistani Bar.

1. For an exhaustive summary of the drafting of the Covenant, *see* Sohn, *A Short History of United Nations Documents on Human Rights*, EIGHTEENTH REPORT OF THE COMMISSION TO STUDY THE ORGANIZATION OF PEACE, THE UNITED NATIONS AND HUMAN RIGHTS 39, 101-20 (1968). The various stages up to 1954 when the Commission completed the drafting of the Covenant are recorded in Secretary-General, Annotations on the Text of the Draft International Covenants on Human Rights, 10 U.N. GAOR, Annexes, Agenda Item 28 (Part II), at 2-7 (1955), U.N. Doc. A/2929 (July 1, 1955). In this connection, *see also* Commission on Human Rights, Report of the Tenth Session, 18 ESCOR, Supp. 7, at 3-7, U.N. Doc. E/2573 (1954).

able so long as these legislative enactments are in accordance with municipal laws. If, on the other hand, "arbitrary" is synonymous with "unjust," governments would have to respond to a higher standard.

Prescribing the rules for the interpretation of treaties, Articles 31 and 32 of the Vienna Convention on the Law of Treaties, 1969 concede (1) that a special meaning shall be given to a term if it is established that the parties so intended, and (2) the relevance, as a supplementary means, of the *travaux preparatoires*, to the determination of the treaty content. Whether the parties intended that a certain term shall have a special meaning can generally be only established after reviewing the *travaux*. Accordingly, this is a study of the preparatory work of Article 9(1) to determine the understanding behind the adoption of the word "arbitrary" used therein.

A comprehensive drafting history of Article 9(1), however, presents many complex problems. In addition to the unusually long period of over two decades during which it was drafted, this article was referred back and forth in the United Nations to various sessions of the Commission on Human Rights (the "Commission"), the Economic and Social Council (the "Council") and the General Assembly. Within these bodies, the article was referred to their various committees; sometimes special subcommittees and drafting groups were established. Even when the article was not being debated in any organ of the United Nations, it was constantly being commented upon by several governments, specialized agencies, and individuals. Moreover, because of the increase in membership of the United Nations from 51 to 122 States during the period under review, the participants involved in the drafting continually varied.

II. DEVELOPMENT OF "ARBITRARY" IN ARTICLE 9

A. *The Origins (1945-1947)*

The beginnings of the arrest and detention article in the Covenant can be found in the declarations of human rights submitted by Cuba[2] and Panama[3] at the San Francisco Conference.[4] The Cuban

2. 3 UNITED NATIONS INFORMATION ORGANIZATION, DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION, SAN FRANCISCO, 1945, at 500-02 (1945).

3. *Id.* at 264, 266-69.

4. The origins of this article are also perceptible in some pre-San Francisco Conference declarations. The Declaration of the International Rights of Man (1929), the first international bill of human rights, provided in its art. 1 that it "is the duty of every State to recognize the equal right of every individual to . . . liberty . . . and to accord to all within its territory the full and entire protection of this right." *See* 35 AM. J. INT'L L. 663, 664 (1941). Also relevant is a Bill of Rights included in a 1942 U.S. draft of the U.N. Charter. Its arts. 3 and 9 declared that "no person shall be deprived of . . . liberty . . . except in accordance with humane and civilized processes provided

"Declaration of the International Rights and Duties of the Individual" emphasized the right of every individual to "security of his person."[5] The Panamanian "Declaration of Essential Human Rights" was more elaborate on the subject and dealt with "freedom from arbitrary detention" in its Article 8:

> Every one who is detained has the right to immediate judicial determination of the legality of his detention.
>
> The state has a duty to provide adequate procedures to make this right effective.[6]

A "Statement of Essential Human Rights"[7] submitted later by Panama to the first session of the Council explained that this Article 8 implied that no one could be subjected to arbitrary arrest or be detained except pursuant to law. It also pointed out the "statement of the right does not include a statement of the grounds on which a person may be taken into custody and held for trial; that will depend upon the laws and legal system in the particular state."[8]

At its first session, the Council also had before it another Cuban "Declaration on Human Rights."[9] This Declaration sought to assure to every human being the "right to . . . liberty, to personal security and to respect of his dignity as a human being" and the "right to immunity from arbitrary arrest and to a review of the regularity of his arrest by ordinary tribunals."[10] All these declarations of human rights were, however, not discussed[11] and the first debate on the substance of the international bill took place after the establishment of the Commission.

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by law" and that the "right of people to be secure in their persons . . . from . . . arrest and detention shall not be denied or abridged except by orderly process determined by law and upon the establishment of probable cause." U.S. DEPARTMENT OF STATE, POST-WAR FOREIGN POLICY PREPARATION 1939-1945, at 483-84 (1950). From among the numerous contemporary bills of human rights prepared by private bodies and individuals, only a few had comprehensive articles on arrest and detention. Art. 1 of a bill prepared by Hersh Lauterpacht provided, *inter alia*, that there shall be protection from "arbitrary and unauthorized arrest." *See* H. LAUTERPACHT, AN INTERNATIONAL BILL OF THE RIGHTS OF MAN 70, 93-97 (1945). Art. 15 of the International Bill of Human Rights prepared by the Committee on Human Rights of the Commission to Study the Organization of Peace also included the provision that "every person has the freedom from arbitrary arrest or detention." *See* COMMISSION TO STUDY THE ORGANIZATION OF PEACE, DRAFT INTERNATIONAL BILL OF HUMAN RIGHTS 10 (1947).

5. *Supra* note 2, at 500.

6. *Id.* at 267.

7. U.N. Doc. E/HR/3 (Apr. 26, 1946).

8. *Id.* at 7-8.

9. U.N. Doc. E/HR/1 (Apr. 22, 1946).

10. *Id. See* arts. 1 and 19.

11. The nuclear Commission did discuss, very briefly, the Cuban "Declaration on Human Rights" and the Panamanian "Statement of Essential Human Rights," U.N. Doc. E/HR/8, at 4 (1946); and U.N. Doc. E/HR/13 (1946), but finally decided to leave the drafting of the bill to the Commission, U.N. Doc. E/HR/15, at 5 (May, 1946).

During its first session, the Commission began its discussion on the bill with a debate about the rights that should be included in such a bill.[12] The United States suggested some categories of rights which "persons of differing national, legal, economic and social systems would regard as the human rights and fundamental freedoms to be promoted and respected by the United Nations."[13] Among such categories were included:

> (b) procedural rights, such as safeguards for persons accused of crime.[14]

The United Nations Secretariat's "International Bill of Rights"[15] appears to have contained a similar provision[16] and also included the right to liberty and security.[17] An Indian draft contained a reference to the "right of liberty, including the right to personal freedom."[18]

Another draft before the Commission was the "Declaration of the International Rights and Duties of Man"[19] formulated by the Inter-American Juridical Committee. Article XI of this Declaration related to the "Right to be Free from Arbitrary Arrest" and included the provision that:

> every person accused of crime shall have the right not to be arrested except upon warrant duly issued in accordance with the law, unless the person is arrested *flagrante delicto*.[20]

All these documents and proposals were considered very generally at some meetings.[21] They were eventually overshadowed by debates regarding the creation of a drafting group,[22] the "form" of the

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12. *See* U.N. Doc. E/CN.4/SR.7 (Jan. 31, 1947).

13. U.N. Doc. E/CN.4/4, at 2 (Jan. 28, 1947).

14. *Id.*

15. U.N. Doc. E/CN.4/W.4 (Jan. 13, 1947). This working paper was a restricted document and its text is not available. Other restricted comments of relevance appear to be U.N. Doc. E/CN.4/W.8, W.16, and W.18 (1947). *See* U.N. Doc. E/CN.4/20 (Feb. 26, 1947) which contains a complete list of documentation at this session.

16. See opening remarks of the Chairman, U.N. Doc. E/CN.4/SR. 7, at 2 (1947).

17. See remarks of Malik, U.N. Doc. E/CN.4/SR.9, at 2 (Feb. 1, 1947).

18. U.N. Doc. E/CN.4/11, at 1 (Jan. 31, 1947).

19. U.N. Doc. E/CN.4/2 (Jan. 8, 1947). This Declaration was submitted by the delegation of Chile.

20. *Id.* at 7. A commentary on this article may be found in COMMISSION TO STUDY THE ORGANIZATION OF PEACE, DRAFT DECLARATION OF THE INTERNATIONAL RIGHTS AND DUTIES OF MAN AND ACCOMPANYING REPORT 40-41 (1946). It must be noted that, as in this article, the word "arbitrary" was used in most of the arrest and detention articles in contemporary draft declarations. It had been used, as we saw, in the draft declaration submitted by Panama at San Francisco and at the first session of the Council; *see supra* notes 6-8. Cuba had used it in its "Declaration" submitted at the first session of the Council; *see supra* notes 9-10. "Freedom from arbitrary arrest" was also used in a draft declaration submitted by the American Federation of Labor; *see* U.N. Doc. E/CN.4/AC.1/3/Add.1, at 46 (June 2, 1947). *See also* art. 1 in H. LAUTERPACHT, *supra* note 4.

21. U.N. Doc. E/CN.4/SR.7-10, SR.13-14 (Jan. 31-Feb. 5, 1947).

22. U.N. Doc. E/CN.4/SR.10-12 (Feb. 3-4, 1947).

bill, and the measures of implementation.[23]

The Drafting Committee, entrusted by the Commission with the preparation of a preliminary draft of an international bill of human rights, had several proposals before it at its first session. Two approaches were suggested with regard to the drafting of an article on arrest and detention. The Secretariat draft[24] and the United States draft[25] both referred to rights against "arbitrary arrest" and "unauthorized arrest" while the United Kingdom[26] enumerated several specific exceptions to the "no deprivation of liberty" rule in a detailed article. The beginning of what was later to become an almost bitter dispute between those who preferred a general article and those who advocated an article with enumerated exceptions was already in the air, but a head-on collision of the two approaches was avoided, at least for the time being, by the utilization of both approaches for different purposes. Thus, while the "general" approach may have been the inspiration behind the arrest and detention article in the proposed draft Declaration,[27] the more detailed articles in the United Kingdom draft formed the basis for a general examination of the possible substantive contents of a draft Convention.[28]

The Drafting Committee decided to submit the United Kingdom draft as a working paper for a Convention, which the Commission might wish to consider and elaborate.[29] Accordingly, Article 10 of the United Kingdom draft was incorporated as Article 4 in Annex G ("Draft Articles on Human Rights and Fundamental Freedoms to be considered for inclusion in a Convention") of the Report of the First Session of the Drafting Committee.[30]

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23. U.N. Doc. E/CN.4/SR.14-16 (Feb. 5-6, 1947).

24. The text of arts. 5, 6, and 7 may be found in U.N. Doc. E/CN.4/AC.1/3, at 2-4 (1947). For a documented outline of these articles, which includes comments and proposals made at the first session of the Commission and related provisions in Constitutions of member States, *see* U.N. Doc. E/CN.4/AC.1/3/ Add.1, at 25-58 (1947).

25. U.S. art. 7 read: "No one shall be subjected to arbitrary or unauthorized arrest or detention." For text of arts. 6 and 7 proposed by the United States, *see* U.N. Doc. E/CN.4/AC.1/8, at 1-2, and Rev. 1, at 1 (June 11-19, 1947).

26. U.N. Doc. E/CN.4/AC.1/4, at 9-10 (June 5, 1947). It was pointed out by the U.K. representative that the U.K. draft articles did not represent the final views of his Government but were merely intended as a basis of discussion. U.N. Doc. E/CN.4/AC.1/SR.10, at 7 (June 20, 1947).

27. Commission on Human Rights, *Report of the First Session of the Drafting Committee*, U.N. Doc. E/CN.4/21, Annex F, art. 8, at 73, 74-75 (July 1, 1947).

28. *Id.* at 4-5, paras. 14, 18.

29. Report, *supra* note 27, at 5, para. 18. Eleanor Roosevelt, as Chairperson, pointed out that, with regard to the U.K. draft, there had been general approval in principle only. *See* U.N. Doc. E/CN.4/AC.1/SR.11, at 14-15 (July 3, 1947).

30. Report, *supra* note 27, at 82, 83.

B. *The Opening of Pandora's Box: The Second Session of the Commission (1947)*

The Working Party on the Convention appointed by the Commission considered, as the basis of its work, Annex G of the Report of the First Session of the Drafting Committee. As the United States was not represented on the Working Party, it was decided that its 18-article "Proposal for a Human Rights Convention" be presented and explained, on its behalf, by an observer.[31]

The United States "Proposal" included a two sentence article on arrest and detention that began with the provision that "No one shall be subjected to arbitrary arrest or detention."[32] The United Kingdom, on the other hand, suggested additions to what was already a detailed Article 4 of the Drafting Committee's draft Convention.[33]

The text of Article 8,[34] dealing with arrest and detention proposed by the Working Party, adopted both the "arbitrary arrest" sentence of the United States and the enumeration of exceptions as originally proposed by the United Kingdom. This article, which was probably the first article on arrest and detention ever to be drafted by an international group, with resulting legal obligations in mind, foreshadowed Article 5 of the European Convention on Human Rights.[35]

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31. Commission on Human Rights, *Report of the Working Party on the Convention*, U.N. Doc. E/CN.4/56, at 3, para. 4 (Dec. 11, 1947). The U.S. "Proposal" is in U.N. Doc. E/CN.4/37 (Nov. 26, 1947).

32. Art. 9, U.N. Doc. E/CN.4/37, at 4 (1947).

33. Among them was the proposal to add the provision that "no person shall be convicted of, or punished for, crime save by judgment of a competent tribunal and in conformity with the law." Other additions related to "fair trial" provisions. *See* para. 2 of U.N. Doc. E/CN.4/39 (Nov. 26, 1947).

34. U.N. Doc. E/CN.4/56, at 7-8. The relevant first two paragraphs of the five-paragraph art. 8 proposed by the Working Party provided:

> 1. No person shall be subjected to arbitrary arrest or detention;
> 2. No person shall be deprived of his liberty save in the case of:
>
> (a) the arrest of a person effected for the purpose of bringing him before a court on a reasonable suspicion of having committed a crime or which is reasonably considered to be immediately necessary to prevent his committing a crime;
>
> (b) the lawful arrest and detention of a person for noncompliance with the lawful order or decree of a court;
>
> (c) the lawful detention of a person sentenced after conviction to deprivation of liberty;
>
> (d) the lawful detention of persons of unsound mind;
>
> (e) the parental or quasi-parental custody of minors;
>
> (f) the lawful arrest and detention of a person to prevent his effecting an unauthorized entry into the country;
>
> (g) the lawful arrest and detention of aliens against whom deportation proceedings are pending.

35. For text of art. 5 of the European Convention, *see* EUROPEAN COMMISSION OF

With regard to the first paragraph, the adoption of the "arbitrary arrest" sentence by the Working Party is significant. This was the first occasion when the word "arbitrary" was discussed in connection with an arrest or detention article. Although, as we saw, "arbitrary arrest" had been used in several international bills of human rights submitted to the Council and the Commission,[36] it had never been debated earlier. Equally important was the fact that the Working Party adopted the word "arbitrary" in preference to "unlawful."

The acceptance in principle of the need for a second paragraph to contain exceptions to the right against arrest seems to have opened a Pandora's box. Discussions on the arrest and detention article in the Working Party were dominated by several proposals to include more, or modify existing, limitations.[37] In the final text of Article 8, the Working Party suggested a list of seven exceptions.[38] There were, however, already some doubts that a list of exceptions could be exhaustive.[39]

The active cooperation of the U.S. observer, Plaine, stands out as the most noteworthy feature in the discussions of the Working Party in the formulation of the exceptions.[40] Later on, as we will see, the United States strongly opposed the enumeration of exceptions.

On December 13, 1947, when Article 8 of the Draft of the Working Party on the Convention was considered by the Commission,[41] Malik, Rapporteur of the Working Party, explained that paragraph 2 was "certainly not intended to be exhaustive. It represented the restrictions which had occurred to members of the Working Group, and representatives were free to suggest others based on the internal

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HUMAN RIGHTS, DOCUMENTS AND/ET DECISIONS 8-11 (1955-57). The European Convention may also be found in 213 U.N.T.S. 221; UNITED NATIONS YEARBOOK ON HUMAN RIGHTS FOR 1950, at 418 (1952); and in 45 AM. J. INT'L L. Supp. 24 (1951). Generally speaking, and keeping in mind the deletion of "arbitrary" in the European Convention, it might be fair to remark that art. 8 of the Working Party on the Convention anticipated art. 5 of the European Convention. Compare particularly the enumerated exceptions to the right against arrest and detention in both articles.

36. *See supra* note 20. *See also* the earlier discussion of drafts before the first session of the Drafting Committee.

37. *See* U.N. Doc. E/CN.4/AC.3/SR.6, at 10-15; SR.7, at 2; and SR.9, at 3-5 (Dec. 9-10, 1948).

38. For these exceptions, *see* text of para. 2, in *supra* note 34.

39. *See, e.g.*, the comment of the Egyptian representative in U.N. Doc. E/CN.4/AC.3/SR.6, at 13 (1948).

40. Plaine suggested "parental custody of minors" to replace "lawful custody of minors," a proposal which, with an addition, was accepted. U.N. Doc. E/CN.4/AC.3/SR.6, at 12-13 (1948). At the ninth meeting, he suggested the addition of a limitation to cover the case of civil arrest. *See* U.N. Doc. E/CN.4/AC.3/SR.9, at 3-4 (1948).

41. U.N. Doc. E/CN.4/SR.36, at 6-8 (Dec. 13, 1947).

laws of their countries."[42] The representative of the Soviet Union, however, opposed the enumeration of exceptions on the ground that they were the subject of different legislation in each country and that the Commission was not empowered to take any decision regarding them.[43] Chile was also of the view that it was unwise to make too many exceptions which might render the text valueless.[44] The United States, on the other hand, agreed to the text of Article 8, but for a minor reservation on the sufficiency of one of the limitations to cover all cases of civil arrest, and endorsed paragraph 2.[45] Subject to a minor modification, France also seemed to agree with paragraph 2.[46]

While in the Commission, therefore, there was some reaction to paragraph 2, paragraph 1 containing the word "arbitrary" escaped criticism. Article 8, as recommended by the Working Party on Convention, was adopted by 11 votes to 0, with 7 abstentions[47] and was incorporated as Article 9 in the draft Convention proposed by the second session of the Commission.[48]

C. *The Draftsmen's Dilemma: Brevity versus the "Limitations" (1948-1952)*

1. *Plethora of Limitations: The Second Session of the Drafting Committee*

In response to the request by the Secretary-General,[49] several governments submitted their comments on the draft Convention proposed by the second session of the Commission.

From these comments on Article 9, it was clear that the biggest issue likely to emerge before this session would relate to the "limitations" in paragraph 2. While previous drafting stages had seen no

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42. *Id.* at 7.

43. *Id.* at 4.

44. *Id.* at 6.

45. *Id.* at 7. The reservation was regarding 2(b) of art. 8 which the United States felt did not adequately cover all cases of civil arrest.

46. *Id.* at 6. Cassin suggested that the word "crime" in 2(a) be changed to "criminal offense." With this change, he pointed out, the article will cover minor offenses.

47. *Id.* at 8.

48. Commission on Human Rights, *Report of the Second Session*, 6 ESCOR, Supp. 1, U.N. Doc. E/600, Annex B, Part I, at 26 (1948). *See also* comments on art. 9 in Annex B, Part II, at 32; Uruguay felt that the text should be drafted in a less detailed form. India suggested an addition to paragraph 2(b). The United States repeated its reservation made before the Commission; *see supra* note 45.

For an appraisal of the work of the second session of the Commission, *see* Hendrick, *An International Bill of Human Rights*, 18 DEP'T STATE BULL. 195, 208 (1948); and Lockwood, *Drafts of International Covenants and Declaration on Human Rights*, 42 AM. J. INT'L L. 401-05 (1948). Lockwood concludes that the principles in the Covenant covered the right not to be deprived of one's life or liberty without due process of law. *Id.* at 402.

49. *Report of the Second Session, supra* note 48, at 3-4, para. 13.

more than a general discussion on this issue, the second session of the Drafting Committee was to witness the first detailed articulation of the two opposing points of view regarding the desirability of enumerating limitations.

The difficulty in drafting a list of limitations acceptable to all the parties was already becoming apparent. While some governments suggested additions[50] to the already long list adopted at the second session of the Commission, others pointed out several of their national laws that allowed arrests and detentions in cases not seemingly covered by paragraph 2.[51] The result was that as many as 40 suggested limitations were before the Drafting Committee.

Anticipating the inherent difficulties in the formulation of an exhaustive list of limitations, there gradually evolved, under the leadership of the United States, opposition to the enumeration of exceptions in the article. Commenting generally on the draft Covenant in its reply to the Secretary-General, the United States had argued that "the attempt to define in detail all the limitations permissible under each article is unnecessary and probably impossible"[52] and pointed out that "technological developments, whose nature cannot be forecast in any way, are bound to arise . . . . [e]ven existing contingencies cannot all be mapped out . . . . [t]he only type of document on which general agreement can possibly be secured is one of a general nature."[53] Accordingly, the article proposed by the United States did not contain any limitations. Instead, it provided that "no one shall be deprived of liberty without due process of law."[54]

In the Drafting Committee,[55] reacting against the possibility of a too detailed and yet possibly an inexhaustive list of limitations, Chile, China and the Soviet Union joined the United States in opposing the enumeration of exceptions. Favoring the principle of enumerating limitations were Malik (Lebanon) and Wilson (United King-

50. *See, e.g.*, replies of the Netherlands, U.N. Doc. E/CN.4/82/Rev. 1, at 9 (1948); Brazil, *id.* Add.2, at 9; and Norway, *id.* Add.5.

51. *See, e.g.*, replies of South Africa, *id.* Add.4, at 14; Norway, *id.* Add.5; and Sweden, *id.* Add.11, at 2.

52. U.N. Doc. E/CN.4/82/Rev.1, at 20 (1948).

53. *Id.* at 21.

54. *See* U.N. Doc. E/CN.4/AC.1/SR.23, at 5 (May 10, 1948); and U.N. Doc. E/CN.4/AC.1/19, at 9 (May 3, 1948). The approach against enumerating exceptions was also adopted in a contemporary draft prepared by Professor H. Lauterpacht, *Human Rights, The Charter of the United Nations, and the International Bill of Rights of Man*, and presented to the International Law Association, Brussels Conference, 1948. *See* U.N. Doc. E/CN.4/89, at 35, 37 (May 12, 1948). *See also* H. LAUTERPACHT, AN INTERNATIONAL BILL OF THE RIGHTS OF MAN 70, 93-97 (1945).

55. The arrest and detention article was discussed at three meetings of the Drafting Committee, U.N. Doc. E/CN.4/AC.1/SR.23, at 4-9; SR.30, at 6-7; and SR.32, at 11-13 (May 10-26, 1948).

dom) who felt that, in the absence of enumerated restrictions, States may arrogate to themselves the widest possible powers over the individual. They felt that the Drafting Committee should concern itself less with brevity and more with precision.[56] The preference for this approach was also implicit in the texts of articles proposed by France[57] and New Zealand.[58]

The Drafting Committee, therefore, was faced with, on the one hand, proposals to delete the limitations and, on the other hand, equally forceful suggestions that they be retained. However, even those who wanted to enumerate exceptions did not seem to be able to agree on an acceptable list of limitations. Attempts at compromise seem to have failed and the Drafting Committee was at a dead-end.[59]

Helplessly, therefore, the Drafting Committee, unable to take any decisions on this issue, had to refer the whole matter to the Commission.[60] Forwarded to the Commission were:[61]

> (a) a slightly amended text of Article 9 originally forwarded by the second session of the Commission,
> (b) a list of limitations before the Drafting Committee,
> (c) the text proposed by the United States and
> (d) the text proposed by the Soviet Union. The Drafting Committee did indicate, however, that it preferred the Commission text.[62]

While the deadlock on the issue of limitations may be the most notorious aspect of the second session of the Drafting Committee, another potentially explosive issue, which was soon to dominate the entire debates on this article, began to shape up. The United Kingdom had proposed the deletion of paragraph 1 of the Commission text on the ground that the word "arbitrary" was "imprecise, indefinite and vague" and, as such, did not add anything to the rest of the article.[63] It was also pointed out that, while such a "subjective" word might be suitable for a Declaration, it was totally inappropriate for a Covenant.[64] Although, during the debates of the Drafting Committee, active opposition to the word "arbitrary" came forth only from the United Kingdom, it must be noted here that none of the several alternate texts for Article 9 submitted at this session contained the word "arbitrary." The texts proposed by France[65] and New Zealand[66]

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56. U.N. Doc. E/CN.4/AC.1/SR.23, at 4-6 (1948).
57. U.N. Doc. E/CN.4/82/Add.8, at 9-10 (1948).
58. U.N. Doc. E/CN.4/82/Add.12, at 11-12 (1948).
59. *See* U.N. Doc. E/CN.4/AC.1/SR.32, at 11-13 (1948).
60. *Id.* at 13.
61. Commission on Human Rights, *Report of the Second Session of the Drafting Committee*, U.N. Doc. E/CN.4/95, Annex B, art. 9, at 20-26 (May 21, 1948).
62. U.N. Doc. E/CN.4/95, at 20 (1948).
63. U.N. Doc. E/CN.4/AC.1/SR.23, at 4 (1948).
64. U.N. Doc. E/CN.4/82/Add.4, at 3-4 (1948).
65. U.N. Doc. E/CN.4/82/Add.8, at 9-10 (1948).

contained the limitations but omitted paragraph 1. The shorter articles of the United States[67] and the Soviet Union[68] also avoided "arbitrary."

Yet, the formal proposal to delete paragraph 1 was resisted by the representatives of Lebanon and Chile on the ground that it contained the central idea of the article.[69] Malik felt that "arbitrary" was the most important word in the entire article and preferred it to "due process of law" because under the latter the "notion of law was left entirely to the subjective interpretation of the state."[70] When put to a vote, paragraph 1 of the Commission text was adopted by a vote of four to none, with two abstentions.[71] Thus, by the time Article 9 had been discussed before the second session of the Drafting Committee and was referred to the Commission, both the issues of "arbitrary" and "limitations" were ripe for exploitation.[72]

2. *The Triumph of Brevity: The Fifth Session of the Commission*

When the first two paragraphs of Article 9[73] were discussed at the fifth session of the Commission,[74] three principal approaches were suggested and debated:

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66. U.N. Doc. E/CN.4/82/Add.12, at 11-12 (1948).

67. U.N. Doc. E/CN.4/AC.1/19, at 9 (1948); and U.N. Doc. E/CN.4/AC.1/SR.23, at 5 (1948).

68. U.N. Doc. E/CN.4/AC.1/31 (1948).

69. U.N. Doc. E/CN.4/AC-1/SR.23, at 4-7 (1948). *See also* statement of Malik quoted at U.N. Doc. E/CN.4/AC.1/SR.23, at 4 (May 10, 1948).

70. U.N. Doc. E/CN.4/AC.1/SR.23, at 6 (1948).

71. U.N. Doc. E/CN.4/AC.1/SR.23, at 7 (1948).

72. It has been remarked that the principal issue raised at, and left unresolved by, the second session of the Drafting Committee, related to "limitations." Numerous limitations each were suggested for several articles, including the one on arrest and detention. For a discussion of the controversy over short or detailed articles at this session, *see* Hendrick, *Progress Report on Human Rights*, 19 DEP'T STATE BULL. 159, 160-62 (1948); Simsarian, *Third Session of United Nations Commission on Human Rights*, 42 AM. J. INT'L L. 879, 881-32 (1948).

73. As the third session of the Commission did not consider the draft Convention proposed in Annex B of the *Report of the Second Session of the Drafting Committee, supra* note 61, this draft Convention, unamended, was incorporated in Annex B of the Commission on Human Rights, *Report of the Third Session*, 7 ESCOR, Supp. 2, U.N. Doc. E/800, at 12 (1948). Regarding art. 9, *see id.* at 15-20. The draft Convention was also not considered at the fourth session; this time, however, it was not included in the Commission's Report of the Fourth Session, U.N. Doc. E/1315 (Apr. 15, 1949). The fifth session, therefore, had before it the draft Convention as incorporated in the Commission's Report of the Third Session.

74. U.N. Doc. E/CN.4/SR.95 and SR.96 (May 31-June 1, 1949). Amendments relevant to paras. 1 and 2 are in U.N. Doc. E/CN.4/170 and Add.4, 188, 203, 206, 231, and 235 (May 6-23, 1949). Recapitulation of some of these amendments may be found in U.N. Doc. E/CN.4/212 (May 19, 1949).

(a) deletion of paragraph 1 with "arbitrary" and the retention of the limitations;
(b) retention of both "arbitrary" and the "limitations";
(c) adoption of a short article with "arbitrary" and without the limitations.

Although it was the third approach that was eventually adopted at this session, this choice did not come easily to the Commission.

a. *The "Arbitrary Arrest" Paragraph*

While opposition to this paragraph by the United Kingdom could have by now been anticipated, what may have surprised some was the change of heart in the Lebanese position.[75] It was Malik who, as we noted, championed the retention of this paragraph before the second session of the Drafting Committee. Now, he preferred to do without it. He pointed out that the law could not be its own master in deciding what was just, and that, by the use of the word "arbitrary," Article 9 to some extent established a law above the law.[76]

Members supporting the retention[77] of paragraph 1 contested this "law above the law" interpretation of "arbitrary" and pointed out that "arbitrary" could have "no other meaning but that of non-compliance with the law,"[78] that it "had an exact legal meaning and offered sufficient guarantee against any illegal arrest,"[79] that it undoubtedly meant "contrary to the law"[80] and "illegal."[81] Sensing the majority feeling in favor of paragraph 1 and perhaps in the hope that both "arbitrary" and "limitations" could be incorporated in the final article, the representatives of Lebanon and United Kingdom joined in the unanimous adoption of paragraph 1.[82]

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75. Para. 1 was omitted in texts of art. 9 submitted by the U.K., U.N. Doc. E/CN.4/188 (1949), and Lebanon, U.N. Doc. E/CN.4/206 (1949). Representatives of both these countries also initially opposed this paragraph at the meeting held on May 20, 1949, U.N. Doc. E/CN.4/SR.95, at 2-4 (1949).

76. U.N. Doc. E/CN.4/SR.95, at 5 (1949).

77. Representatives of India, Egypt, United States, Philippines, France, Guatemala, and Soviet Union, for example, made express statements in favor of para. 1. *See id.* at 3-6. The paragraph was also included in a new text proposed by Australia. *Id.* at 4. Yet, in the Report of this session of the Commission, Australia and France are listed as having joined Denmark, Lebanon and the U.K. in opposing para. 1. *See* Commission on Human Rights, *Report of the Fifth Session*, 9 ESCOR, Supp. 10 U.N. Doc. E/1371, Annex II, at 31-33 (1949).

78. From remarks of Mehta (India), U.N. Doc. E/CN.4/SR.95, at 3 (1949).

79. From remarks of Eleanor Roosevelt, *id.*

80. From remarks of Cassin (France), *id.* at 5.

81. From remarks of Pavlov (Soviet Union), *id.* at 6. Representatives of Guatemala and Philippines also agreed that "arbitrary" meant "illegal" or "contrary to the law" was "unrealistic" and "not universally accepted." *Id.* at 5-6.

82. *Id.* at 7.

b. *Retention of both "Arbitrary" and the "Limitations"*

Initially favored by Australia and France,[83] this approach was formally put forth in a text proposed by Belgium. The formula proposed in this Belgian text was that after providing that "no one shall be subjected to arbitrary arrest or detention," the article should enumerate the limitations which "shall be deemed to be arbitrary and therefore prohibited."[84] Although both the United States and the Soviet Union received this proposal favorably,[85] the problem of formulating an exhaustive list of exceptions seems to have obscured the attractiveness of this approach. An opportunity to define "arbitrary arrest and detention" presented at this session was, therefore, passed.

c. *The Limitations*

Conscious of the fact that the "yet incomplete" list of limitations before the second session of the Drafting Committee had included about 40 exceptions, the United States realized that it would be difficult to formulate a concise, exhaustive and acceptable set of exceptions. It, therefore, recommended that a short article, providing against "arbitrary arrest" but without the limitations, be adopted.[86] Eleanor Roosevelt pointed out that the presence of the word "arbitrary" made a list of exceptions quite unnecessary.[87]

The opposite point of view, regarding the necessity of including the limitations, was advocated by the representatives of the United Kingdom, Lebanon, France, Denmark and Australia.[88] They felt that Article 9 would not be complete without a full list of exceptions. Addressing herself to the criticism that it would be impossible to formulate an unwieldy and exhaustive list, Bowie (United Kingdom) pointed out that the list proposed by her delegation had not only reduced the exceptions to a reasonable number, but that it also "covered the vast majority of cases in which an individual could justly be deprived of his liberty," including all exceptions brought up before the second session of the Drafting Committee.[89]

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83. *Id.* at 4-5.

84. U.N. Doc. E/CN.4/235.

85. Eleanor Roosevelt felt that this proposal might provide the means of finding a solution to the various approaches suggested at this session. U.N. Doc. E/CN.4/SR.96, at 5. Pavlov found the proposal "interesting," but while the Belgian representative pointed out that it was essential that the list of limitations be "exhaustive," Pavlov was prepared only to accept it as illustrative. *Id.* at 7.

86. U.N. Doc. E/CN.4/170/Add.4, at 1.

87. U.N. Doc. E/CN.4/SR.95, at 9. Garcia Bauer (Guatemala) was of the same view. *See id.* at 8.

88. *See generally* their statements in U.N. Doc. E/CN.4/SR.95 and SR.96. *See also* the U.K. and Lebanese alternative texts of art. 9, U.N. Doc. E/CN.4/188 and U.N. Doc. E/CN.4/206, respectively. Related is the Belgian proposal, U.N. Doc. E/CN.4/235. All these alternate texts enumerated the exceptions under 7-8 subclauses.

89. U.N. Doc. E/CN.4/SR.95, at 9 and SR.96, at 5.

After considerable controversy and despite some severe opposition, the Commission finally not only adopted the "arbitrary arrest" paragraph, but also voted the "limitations" out.[90] The representatives of Australia, Denmark, France, Lebanon and the United Kingdom, however, joined to record their "minority position"[91] against the Commission decisions.

The issue of "limitations" and the use of the word "arbitrary" at the fifth session also aroused considerable interest among commentators outside the Commission. Hersch Lauterpacht, after a penetrating survey of the disadvantages of excessive elaboration, strongly favored the exclusion of limitations and urged the adoption of a briefer article with the word "arbitrary."[92] It was generally conceded that the drafting of the article on arrest and detention was one of the most difficult tasks faced by the Commission.[93]

The acceptance of the word "arbitrary" by the Commission was explained as a compromise between the positions taken by the United States and the United Kingdom.[94] "Arbitrary" was generally understood to mean "due process of law,"[95] and it was pointed out that it should provide an effective safeguard against bad and oppressive laws.[96]

3. *Another Unsuccessful Attempt to Include the Limitations: The Sixth Session of the Commission*

In the Commission, another attempt was made to broaden the participation in the drafting of the Covenant by inviting comments

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90. The text of 1 and 2 of art. 9 adopted at this session:

1. No one shall be subjected to arbitrary arrest or detention.
2. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as established by law.

In favor: Chile, China, Guatemala, India, Iran, Philippines, Ukraine, Soviet Union, United States and Yugoslavia.

Against: Australia, Belgium, Denmark, Egypt, France and U.K.

See, Report of the Fifth Session of the Commission, 9 ESCOR, Supp. 10, U.N. Doc. E/1371, Annex I, at 19 (1949).

91. The "minority position" will be found in *id.*, Annex II, at 31-33. For an effective refutation of the "minority position" and of the "minority" article, *see* H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 327-33 (1950). See particularly *id.*, at 328-29 n.6.

92. H. LAUTERPACHT, *supra* note 91, at 314, 327-33.

93. *See* Simsarian, *supra* note 72, at 780.

94. C. MALIK, THE COVENANT ON HUMAN RIGHTS 7-8 (1949).

95. Holcombe, *The Covenant on Human Rights*, 14 LAW & CONTEMP. PROB. 418 (1949); E. FERNANDO, AN INTERNATIONAL BILL OF HUMAN RIGHTS 17 (1948). *But see* Simsarian, *supra* note 72.

96. *See* Fawcett, *A British View of the Covenant*, 14 LAW & CONTEMP. PROB. 438, 442-43 (1949). C. MALIK, *supra* note 94, at 8, seems to admit that "arbitrary" limits the freedom of action of governments.

of governments on the draft prepared at its fifth session.[97] Of the twelve governments[98] that responded to the Secretary-General's letter, nine had some comments on Article 9, and as was expected, many of these related to its paragraphs 1 and 2.[99]

The governments, it will be recalled, had before them not only the short text of paragraphs 1 and 2 adopted at the fifth session, but a "minority text," detailed with limitations, proposed by the representatives of Australia, Denmark, France, Lebanon and the United Kingdom at that session. The comments received from the governments indicated that while the United Kingdom[100] would continue to feel strongly about the inclusion of the limitations, Denmark[101] and France[102] might reconcile themselves to a shorter article. Although the United Kingdom must have been disheartened by this "defection," it probably found some comfort in the support for the "minority text" by the Philippines,[103] particularly when, at the fifth session, the Philippine representative had supported the United States position against the limitations.[104] Also, a statement of preference for the "minority text" came forth from the Government of Norway.[105]

But when paragraphs 1 and 2 were considered at the sixth session,[106] any real "comfort" that the representatives of the United Kingdom might have sought, they probably found in the most eloquent support for the limitations by Malik (Lebanon). Realizing, perhaps, that they were outnumbered, Bowie and Hoare (later Sir Samuel Hoare) of the United Kingdom and Malik joined to make a most determined effort to have the limitations incorporated. If sheer

97. *See Report of the Fifth Session of the Commission, supra* note 90, at 7-8, para. 16.

98. Soviet Union, United States, United Kingdom, Philippines, Israel, Yugoslavia, the Netherlands, Denmark, France, India, Australia, and Norway. U.N. Doc. E/CN.4/353 and Add. 1-11 (Dec. 29, 1949-Apr. 22, 1950). Besides the Netherlands, Israel and Norway, all the other governments were represented on the Commission. Thus the objective of broadening the participation base, through comments of governments, may not have been all that successful at this date.

99. *See* U.N. Doc. E/CN.4/365, at 30-32 (Mar. 22, 1950) and U.N. Doc. E/CN.4/353/Add.10, at 7 (1950), and Add.11, at 1.

100. U.N. Doc. E/CN.4/365, at 30 (1950).

101. *Id.* at 31.

102. *Id.* at 32.

103. *Id.* at 30-31.

104. For the Philippine position at the fifth session *see* U.N. Doc. E/CN.4/SR.96, at 9 (1950).

105. U.N. Doc. E/CN.4/SR.144, at 9-17; SR.146, at 3-15; SR. 147, at 3-12; and SR.154, at 6-7 (Apr. 12-21, 1950). Relevant documents and proposals at this session; U.N. Doc. E/CN.4/397, 400, 401, 402, 405, 405/Rev.1, and 409 (Apr. 3-5, 1950).

106. *See* U.N. Doc. E/CN.4/SR.144, at 9-17; SR.146, at 3-15; SR.147, at 3-12; and SR.154, at 6-7 (Apr. 12-21, 1950). Relevant documents and proposals at this session: U.N. Doc. E/CN.4/397, 400, 401, 402, 405, 405/Rev.1, and 409 (Apr. 3-5, 1950).

unrelenting determination and effort were the sole arbiters of success, the victory, perhaps, should have been theirs, but they lost primarily because they could not convince the other members of the Commission that it was possible to draft a comprehensive, exhaustive and universally acceptable list of limitations.

Dissatisfaction with lists of limitations, a perennial problem, was not confined to only those members who, on principle, favored a short article. Even those who favored the inclusion of a list of limitations found it difficult to agree on any one list. Thus, both the United Kingdom[107] and the Philippines[108] sought to amend the "minority text" by suggesting some modifications and additions to the list in that article.

The United States, leading the opposition against the limitations,[109] argued that no list could be complete as it is "scarcely possible to foresee all possible exceptions."[110] Concern was also expressed that the enumeration of exceptions would turn the Covenant "into a document of limitations rather than a document of freedoms."[111]

While the difficulties in formulating a list of limitations provided the main argument for those who favored a short article, on the positive side these "generalists" pointed out that the word "arbitrary" in paragraph 1 of the Commission text constituted a real safeguard against arbitrary action. Most of these representatives interpreted "arbitrary" to include the idea of "injustice" and argued that, as such, it was an effective deterrent against any possibility of abuse.[112]

When all these proposals regarding deletion of "arbitrary," retention of limitations, and the merging of the first two paragraphs were voted upon on April 5, 1950, they were rejected most decisively.[113] Adopted by substantial majorities were paragraphs 1 and 2 as recommended by the fifth session of the Commission.[114]

Thus, despite concerted efforts by some delegations to change

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107. For change suggested by the United Kingdom, *see* U.N. Doc. E/CN.4/397 (1950).

108. The position of the Philippines is to be found in U.N. Doc. E/CN.4/365, at 30-31 (1950).

109. The U.S. position on limitations at this session may be found in its memorandum on the subject, U.N. Doc. E/CN.4/401 (1950), and in statements of Mrs. Roosevelt, U.N. Doc. E/CN.4/SR.144, at 10-11, paras. 42-44; SR.146, at 3; and SR.147, at 7, paras. 22-23 (1950).

110. U.N. Doc. E/CN.4/401, at 2 (1950).

111. *Id.* at 1.

112. *See, e.g.*, U.N. Doc. E/CN.4/SR.144, at 14, para. 57; SR. 146, at 10, 12, paras. 32, 42; SR.147, at paras. 24-25 (1950). Those opposed to "arbitrary," on the other hand, were unable to agree that it provided any real safeguards against abuse. *See, e.g.*, statement of Whitlam (Australia), U.N. Doc. E/CN.4/SR.146, at 14, para. 54 (1950).

113. *See* U.N. Doc. E/CN.4/SR.147, at 9 (1950).

114. *Id.* at 9-10.

paragraphs 1 and 2 as adopted at the fifth session of the Commission, the sixth session rejected all proposals to delete, modify or elaborate these paragraphs and adopted instead, by substantial majority, the text of these paragraphs as recommended by the fifth session. It dealt what was, perhaps, the most decisive defeat to the "enumerationists."

While this defeat of the "enumerationists" could be explained, as has been noted previously, by the growing realization that if limitations were listed, it would be impossible to be concise and exhaustive, it must also be emphasized here that on the positive side, the word "arbitrary" seemed to many to provide against the kind of abuses that the "enumerationists" sought to prevent by the listing of limitations. It was thus clear that the fate of the limitations was inextricably tied up with the interpretation of the word "arbitrary."[115] Accordingly, when paragraph 1 was adopted, the representatives of Greece, the United States, Chile, India and France explained that they had voted for it on "the clear understanding that the word 'arbitrary' conveyed the idea of injustice."[116] It was pointed out that the word "arbitrary" had been "purposely chosen in order to cover all possible cases in which an arrest or detention should not take place."[117]

In response to the criticism that "arbitrary" was vague, and following the opinion of the representative of Uruguay that the word "essentially meant 'illegal' and did not necessarily include the idea of 'injustice',"[118] Eleanor Roosevelt, as Chairperson, suggested that the Commission formally record its opinion that " 'arbitrary' meant both 'illegal' and 'unjust'."[119] Unfortunately, this was not done and the Commission lost an excellent opportunity to resolve, unequivocally, that the word "arbitrary" meant more than "illegal." Had the Commission acted on Roosevelt's suggestion, the drafting history of the article on arrest and detention would have been much less complicated and the unending discussions regarding the vagueness of the word "arbitrary" that followed in the future could have been avoided.

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115. In this connection, *see* U.N. Doc. E/CN.4/SR.147, at 3-12 (1950). The Greek representative, for example, inquired if Lebanon would withdraw its text with limitations if the words "and unjust" were added after the word "arbitrary" in paragraph 1. Malik preferred not to withdraw his amendment but agreed that the suggestion of the Greek representative "would certainly considerably improve the original text; it would be better to say 'or unjust.' " *Id.* at 8, paras. 29-30.

116. *Id.* at 9-10, paras. 36-37, 41-42.

117. *Id.* at 11, para. 51. [Emphasis added.]

118. *Id.* at 10, para. 39.

119. *Id.* at para. 43.

4. *A Post-Mortem of the Draft Commission Article: Reactions of the International Community*

The article on arrest and detention adopted at the sixth session of the Commission was not further revised until the eighth session of the Commission. But between these two sessions, the Covenant was reviewed generally by the Council and the General Assembly.

When, during the eleventh session of the Council, its Social Committee considered the draft Covenant in detail,[120] it marked the first opportunity when the provisions of the Covenant were discussed by an international body other than the Commission. So far, the drafting of the Covenant had been the primary concern of the 18-member Commission and, although on a few occasions the Commission had sought to widen the participation in such drafting by inviting comments of governments, the Social Committee afforded the first chance for some members of the United Nations, not represented on the Commission, to comment on the various provisions of the Covenant before a United Nations committee. In addition to the governments of Australia, Belgium, Chile, China, Denmark, France, India, the United Kingdom and the United States, which were represented on the Commission, the Social Committee also had represented on it the governments of Brazil, Canada, Iran, Mexico, Pakistan and Peru. The participation in the drafting of the Covenant was, therefore, gradually widening.

In the Social Committee, while several other articles were singled out for severe criticism, Article 6 seems to have escaped much hostility. Of course, the word "arbitrary" troubled some delegates. Belgium,[121] Canada[122] and the United Kingdom[123] objected to it for lacking precise meaning and for its inability to provide any protection against abuses. To the United States, however, the word was "perfectly well understood" and was "unlikely to be misinterpreted."[124] Brohi (Pakistan) thought that it would be easy to define the expression "arbitrary arrest" by reference to national constitutions in which it was used.[125]

The justification for general articles, in view of the fact that it was sometimes impossible to arrive at complete definitions, was also

120. Meetings of the Social Committee generally relevant were: U.N. Doc. E/AC.7/SR.146-149 and SR.153, at 16-19 (Aug. 3-14, 1950).

121. U.N. Doc. E/AC.7/SR.147, at 9 (1950). The ambiguity of "arbitrary" was also referred to by the World Jewish Congress. *See* U.N. Doc. E/C.2/259/Add.1, at 4 (July 19, 1950).

122. U.N. Doc. E/AC.7/SR.148, at 13 (1950). Agreeing with the Canadian delegate was Sen of India, U.N. Doc. E/AC.7/SR.149, at 6 (1950).

123. U.N. Doc. E/AC.7/SR.148, at 4-5.

124. U.N. Doc. E/AC.7/SR.153, at 16. *See also* U.N. Doc. E/AC.17/SR.148, at 17.

125. U.N. Doc. E/AC.7/SR.148, at 10.

pointed out by France[126] and the United States.[127] Defending the substantive provisions of the Covenant as drafted by the Commission, Cates (United States) explained that the Commission

> had to reconcile at least three different legal systems; that of the European continent, based on a detailed code of law; that of the United Kingdom, which rested largely on precedent; and that of the United States of America and certain other countries which was founded on certain broad basic principles subject to interpretation. Failure to meet all the views of any particular delegation did not mean that the draft Covenant was ineffective; it was admittedly a compromise, representing the widest possible area of agreement.[128]

Thus, while even those who strongly supported "arbitrary" implied that the drafted article was not perfect but the best compromise possible, what must have gratified the drafters of Article 6 was the limited nature of the criticisms made against this article in the Social Committee.

The draft Covenant, after the rigorous drafting sessions in the Commission, in its drafting committees and subcommittees and working groups, and after this rather general study by the Council, was next presented to the larger international community represented in the General Assembly. Although the principal legal systems may have been adequately represented in the earlier drafting efforts, this was the first occasion when the provisions of the Covenant were discussed before a body representing all the countries which were, at that time, members of the United Nations. The importance of the reactions of the General Assembly, therefore, could hardly be exaggerated.[129]

When given the chance to express their views, only a handful of delegates out of the 60-member Third Committee, declared, explicitly, their displeasure with the first two paragraphs of Article 6.[130] The representatives of the United Kingdom, Lebanon, New Zealand and Yemen shared in common the anxiety over the inadequacy of the definition of "arbitrary arrest." Some representatives expressed disappointment with the first 18 articles of the Covenant on the ground

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126. *Id.* at 15-17.

127. *Id.* at 17-18.

128. *Id.* at 17.

129. For a discussion on the "general adequacy of the first eighteen articles" in the General Assembly, *see* 5 U.N. GAOR, Third Comm. 197-31 (1950). A good account of the comments on paras. 1 and 2 of art. 6 in both the eleventh session of the Council and in the fifth session of the General Assembly will be found in U.N. Doc. E/CN.4/528, at 38-40 (Apr. 2, 1950).

130. It must be pointed out that although sixty governments were represented on the Third Committee, only about thirty participated in the four-meeting discussion on the eighteen articles of the Covenant. *See generally* 5 U.N. GAOR Third Comm. 107-31 (1950).

that they were imprecise and used vague words,[131] while others pointed out that greater precision would be harmful as, with different countries with different legal systems, undue rigidity may prevent universal acceptance.[132] Savut (Turkey) spoke for the latter group when he emphasized that the Covenant should be drafted in "terms sufficiently general and pliable to render it acceptable to all nations, whatever their stage of development."[133]

Another point that need be made in connection with the fifth session of the General Assembly is that it was agreed that the draft Covenant was "not a law-making agreement but simply an agreement which declared already existing law"[134] and that in "drafting the covenant no new rights were being established; the rights concerned were already guaranteed in civilized countries."[135] Some delegates went further and expressed disappointment that the first 18 articles guaranteed *less* than what constitutions of most countries guaranteed to their peoples.[136] This is significant because it indicates that the substantive provisions of the draft Covenant, including Article 6, were accepted, generally speaking, as representing the minimum "general principles of law recognized by civilized nations."[137]

On the whole, however, the General Assembly found that the first 18 articles of the Covenant needed improvement. It, therefore, instructed the Commission to revise them by defining the rights and the limitations contained in them with the "greatest possible precision."[138]

The invitation of the seventh session of the Commission to comment on the draft Covenant, and the referral of the draft Covenant to the General Assembly by the thirteenth session of the Council provided another opportunity for the response of the international community to Article 6. But on both these occasions, Article 6 ap-

131. *See, e.g.*, comments of the Canadian delegate, *id.* at 112-113.

132. *See* remarks of the Ethiopian delegate, *id.* at 130. Other delegates who found the first eighteen articles generally satisfactory included the representatives of the United States and Egypt, *id.* at 109; Brazil, *id.* at 113; France, *id.* at 119; and El Salvador, *id.* at 129.

133. *Id.* at 130.

134. *See* remarks of the U.K. delegate, *id.* at 108.

135. *Id.*

136. *See, e.g.*, remarks of Menon (India), *id.* at 129. Earlier, in the eleventh session of the Council, Belgium had also criticized the draft Covenant on the ground that it "was well below the average level of the constitutional law of Member States." 11 U.N. ESCOR 15 (1950).

137. *See* art. 38 of the Statute of the International Court of Justice. *See also* in this connection, Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRIT. Y.B. INT'L L. 275, 297-298 (1965-66).

138. *See* G.A. Res. 421 B (V), Dec. 4, 1950; 5 U.N. GAOR, Supp. 20 at 42, U.N. Doc. A/1775 (1950).

pears to have been approved by default. Thus, from among the several governments[139] and specialized agencies[140] that commented on the draft Covenant, only two had specific observations on some aspects of Article 6 and even these did not concern the first two paragraphs of the article.[141] Moreover, while the general debate at the sixth session of the General Assembly was primarily concerned with other issues of the Covenant, it also included several comments on the first 18 articles. Most of these comments concerned either criticism of the article on religion or proposals for additional civil and political rights articles, and Article 6, it must be emphasized, was not singled out for criticism. Generally, however, the necessity of a precise definition of rights and limitations emphasized at the fifth session of the General Assembly, was again stressed at the sixth session of the General Assembly.[142]

5. *The Final Commission Article: The Eighth Session of the Commission*

We have noted the several opportunities made available to governments and specialized agencies to comment on the arrest and detention article drafted by the sixth session of the Commission. The observations invited by the Secretary-General and the discussions in the Council and the General Assembly had indicated that only a few governments objected to the article on the ground that the term "arbitrary arrest" was vague.[143] Particularly in view of the several opportunities offered for criticism, the lack of a more significant protest could fairly be interpreted as an implicit endorsement of the article by the majority of the international community.

If there were any doubts as to such an interpretation of the reactions of the international community, they were dispelled by the

139. *See* U.N. Doc. E/2059 and Add. 1-8 (July 26-Aug. 27, 1951).

140. *See* U.N. Doc. E/2057 and Add.1-5 (July 24-Aug. 27, 1951), and U.N. Doc. E/2085/Add. 1, at 2 (1951).

141. *See* remarks of the Danish Government, U.N. Doc. E/2059/Add. 8, and those of the Office of the High Commissioner for Refugees, U.N. Doc. E/2085/Add. 1, at 2.

142. For the general debate on the draft Covenant held in the General Assembly's Third Committee, *see* 6 U.N. GAOR, Third Comm. 77-105, 107-110, 113-150 (1951-52); *Report of the Third Committee*, U.N. Doc. A/2112 (Feb. 3, 1952), 6 U.N. GAOR, Annexes, Agenda Item 29, at 37 (1951-52). Of relevance is *id.*, Sec. III, at 39-44. Note particularly the comments on the first eighteen articles, *id.* at 41, para. 24.

143. With regard to the "general adequacy of the first eighteen articles" and, in particular, to the article on arrest and detention, drafted at the sixth session of the Commission, a comprehensive account of the reactions of various governments and specialized agencies, expressed between the sixth and eighth sessions of the Commission, will be found in U.N. Doc. E/CN.4/528, at 38-42 (Apr. 2, 1951); U.N. Doc. E/CN.4/528/Add.1, at 14-16, 27-29 (Mar. 20, 1952) and U.N. Doc. E/CN.4/660 at 9, 11 (Apr. 9, 1952). These documents include comments made at the fifth and sixth sessions of the General Assembly, at the eleventh thru thirteenth sessions of the Council and at the seventh session of the Commission.

eighth session of the Commission which adopted the article with the term "arbitrary arrest" and without the limitations,[144] and subsequently by the General Assembly which finally confirmed this decision of the Commission.[145]

For the arrest and detention article, the eighth session of the Commission is perhaps the most important for several reasons. First, the article drafted at the sixth session had, by now, been discussed in the Council and in the General Assembly. The Commission, therefore, had the first opportunity at this session to take into account, in drafting the article, the reactions of the international community. Second, this was the final drafting session of the Commission with regard to this article. Third, Article 9 of the Covenant adopted by the General Assembly in 1966 is very similar[146] to the one drafted at the 1952 session of the Commission.

During this session, when Article 6 was considered on May 28, 1952,[147] the "enumerationists" staged what was their last effort to have the limitations included in this article. Citing in their support the resolution of the fifth session of the General Assembly, which stressed the need for the "greatest possible precision" and obviously encouraged by the developments in the Council of Europe, they favored a United Kingdom proposed amendment[148] which sought to replace paragraphs 1 and 2 of Article 6 with a new paragraph 1, with limitations, similar to paragraph 1 of Article 5 of the European Convention on Human Rights. The familiar arguments for and against both "arbitrary arrest" and limitations which were raised in the Commission on several occasions before were again repeated.[149] Opposing

144. For the text of the arrest and detention article adopted at this session of the Commission, *see* art. 8, in Commission on Human Rights, *Report of the Eighth Session*, 14 U.N. ESCOR, Supp. 4 (E/2556), at 48 (1952). *See also* the relevant summary with regard to the adoption of this article, *id.* at 27-28, paras. 180-81.

145. *See Report of the Third Committee*, U.N. Doc. A/4045 (Dec. 9, 1958), 13 U.N. GAOR, Annexes, Agenda Item 32, at 6-10 (1958-59). *See also* art. 9 of the Covenant as finally adopted by the General Assembly in 1966, 21 U.N. GAOR, Supp. 16, U.N. Doc. A/6316 (1966).

146. The only difference between art. 8 as adopted at the eighth session of the Commission and the final art. 9 of the Covenant is in para. 5 where "unlawful arrest or deprivation of liberty" was changed to "unlawful arrest or detention." *See* citations in *supra* notes 144 and 145.

147. U.N. Doc. E/CN.4/SR.313, at 12-13; and SR.315, at 5-14 (May 28, 1952). Documents at this session related to the "arbitrary arrest" paragraph were: U.N. Doc. E/CN.4/L.137 (May 19, 1952), U.N. Doc. E/CN.4/L.183 (May 28, 1952), and U.N. Doc. E/CN.4/668/Add.3 (May 29, 1952). *See also* U.N. Doc. E/CN.4/NGO/39, at 3-4 (May 20, 1952).

148. U.N. Doc. E/CN.4/L. 137 (1952). This U.K. amendment with limitations, was supported by Lebanon and Australia. U.N. Doc. E/CN.4/SR.314, at 8-10 (1952).

149. Of those who expressed an opinion on this subject, the following seems to be the pattern of support for, and opposition to, the limitations at this session:

the limitations, most delegates pointed out the impossibility of drawing up an acceptable and exhaustive list of lawful exceptions to the right to liberty.

A Polish amendment to the United Kingdom amendment was, however, better received. Poland took the first two paragraphs of Article 6 drafted at the sixth session of the Commission and joining them as the second and third sentences, proposed a new paragraph 1 which read:

> 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.[150]

This paragraph accomplished the merging of paragraphs 1 and 2 into one single paragraph, something that many members had suggested earlier. But the opening sentence, taken from Article 3 of the Universal Declaration of Human Rights, attempted to introduce something new to the article and was resisted by a few members.

When voted upon, the first sentence of the Polish amendment was adopted by 7-5, with 5 abstentions, the second sentence by 10-2, with 5 abstentions and the third sentence by 10-2, with 5 abstentions. The Polish amendment to paragraph 1 and 2, as a whole, was adopted by 7-6, with 4 abstentions.[151]

With the adoption of the Polish paragraph 1, the "enumerationists" lost in their final attempt to have the limitations in the article. Having been defeated so many times, they gradually changed their strategy. When the article next went through a drafting session in the General Assembly in 1958, the attempt was no more to introduce limitations, but mostly to define and qualify the term "arbitrary arrest."[152] Already, this resignation seemed to be taking shape in 1952, for when the Report of the Eighth Session of the Commission appeared, the "enumerationists" did not take the opportunity, as they had done in the past, to register their strong protest against the term "arbitrary arrest" used in Article 8 adopted at this session.[153]

D. *The Commission Article: Relevant Developments (1952-1958)*

Although the next drafting effort with regard to the article on

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In favor: United Kingdom, Lebanon, and Australia.

Against: France, Poland, United States, Soviet Union, Chile, Yugoslavia, and India.

See U.N. Doc. E/CN.4/SR.313, at 12-13 (1952); SR. 314, at 5-14.

150. U.N. Doc. E/CN.4/L.183 (1952).

151. U.N. Doc. E/CN.4/SR.314, at 10-11 (1952).

152. *See Report of the Third Committee, supra* note 145, at 6-8.

153. *See Report of the Eighth Session, supra* note 144. Note that its Annex IV, at 63-64 has no comments on art. 8.

arrest and detention (Article 8) was not to take place until 1958, there are a few related developments between 1952 and 1958 that must be noted. First is the renumbering of this article by the Commission. It now became Article 9 in the draft Covenant completed at the tenth session of the Commission.[154] The second concerns the several comments on the draft Covenant received from various governments[155] and specialized agencies[156] in response to resolutions of the Council[157] and the General Assembly.[158] Of these, only Australia, Canada, the Netherlands and the United Kingdom had any specific comments on the first paragraph of Article 9. Australia,[159] the Netherlands[160] and the United Kingdom[161] found the term "arbitrary arrest" vague and imprecise. The Canadian Government, on the other hand, appeared reconciled with "arbitrary" but indicated that it would be helpful to define it.[162]

An event of equal importance during this period concerns the general discussion[163] on the draft Covenant during the ninth session of the General Assembly. While this discussion was dominated by such issues as the right to petition, self-determination, reservations, federal and colonial clauses and measures of implementation, it also included comments on some substantive articles. Article 9, however, did not evoke any significant criticism.[164] The lack of a general disapproval of Article 9 is also illustrated by the fact that, though a few amendments were proposed regarding some articles, none of these concerned Article 9. It could be said, therefore, that on the whole, the

154. *See* art. 9 in Commission on Human Rights, *Report of the Tenth Session*, 18 U.N. ESCOR, Supp. 7 U.N. Doc. E/2573, Annex I B, at 67 (1954). *See also* art. 9 in Commission on Human Rights, *Report of the Ninth Session*, 16 U.N. ESCOR, Supp. 8 U.N. Doc. 3/2447, Annex I B, at 43 (1953). A memorandum of the Secretary-General prepared for the ninth session of the Commission included some comments on this article. *See* U.N. Doc. E/CN.4/674, at 13 (Feb. 2, 1953).

155. U.N. Doc. E/CN.4/694 and Add. 1-7 (Dec. 2, 1953-Mar. 23, 1954); U.N. Doc. A/2910 and Add.1-6 (June 30-Oct. 13, 1955).

156. U.N. Doc. E/CN.4/702 and Add.1-6 (Feb. 2-Apr. 9, 1954); U.N. Doc. A/2907 and Add.1-2 (June 6-30, 1955).

157. ECOSOC Res. 501 (B) (XVI), Aug. 3, 1953; 16 U.N. ESCOR, Supp. 1, at 10 (1953).

158. G.A. Res. 833 (IX), Dec. 4, 1954; 9 U.N. GAOR, Supp. 21 (A/2890), at 20 (1954).

159. U.N. Doc. A/2910/Add.2, at 13-15 (1955).

160. *Id.* Add. 3, at 11-12.

161. *See* U.N. Doc. E/CN.4/694/Add. 2, at 6; and A/2910/Add.1, at 9-10 (1955).

162. U.N. Doc. E/CN.4/694/Add. 6, at 3-4 (1955); and *id.*, Annex, at 1.

163. 9 U.N. GAOR, Third Comm. 93-121, 123-57, 163-78 (1954).

164. For comments on art. 9 during this session, *see* remarks of the delegates of the United Kingdom, *id.* at 96; Brazil, *id.* at 111; United States, *id.* at 124; Czechoslovakia, *id.* at 130. The United Kingdom's objection to the term "arbitrary arrest," *id.* at 96, was, for example, matched by the approval of the article by Czechoslovakia, *id.* at 130.

ninth session of the General Assembly found Article 9 well-drafted.[165]

E. *Consideration by the Third Committee (1958)*

The importance of the consideration of Article 9, at this final stage of its drafting, by the Third Committee can hardly be overemphasized.[166] Although on previous occasions, as we observed, the General Assembly had discussed this article as part of a general discussion on the adequacy of the first 18 articles or, later, on the draft Covenants, this was the first occasion when this article was taken up separately and dealt with thoroughly by the Third Committee. It is no mean tribute to the drafting skill of the Commission that Article 9, which it completed drafting in 1952, was accepted, with a very minor change in paragraph 5, by the Third Committee in 1958.[167] Not only did the Third Committee adopt, by a vote of 70-0, with 3 abstentions, the article drafted by the Commission, but even more significantly, it agreed with the basic approach in drafting followed by the Commission and also reinforced the interpretations of the Commission on the several issues inherent in this article.[168] This is all the more remarkable in view of the substantial increase in the membership of the United Nations over the preceding four years. Since 1955, when governments had the most recent opportunity to comment on Article 9,[169] membership of the United Nations had increased from 60 states to 81 states.[170] Thus, over 20 new Member States, which never had any opportunity to comment on Article 9 during its drafting by the Commission, now explicitly endorsed the work of the Commission.

Particularly with regard to paragraph 1, this session is important for several reasons. While it is significant that this paragraph, as drafted by the Commission, was adopted by the Third Committee without a negative vote,[171] the debates of the Third Committee are

165. *See Report of the Third Committee*, U.N. Doc. A/2808 (Nov. 29, 1954), 9 U.N. GAOR, Annexes, Agenda Item 58, Sec. III, at 9-12 (1954). Note particularly, *id.* at paras. 37, 39, 45-52.

166. For the crucial importance of the discussions in the Third Committee regarding the interpretation of various articles, *see* N. ROBINSON, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 99-100 (1958).

167. For a summary of the discussions on art. 9 in the Third Committee, *see Report of the Third Committee*, U.N. Doc. A/4045 (Dec. 9, 1958), 13 U.N. GAOR Annexes, Agenda Item 32, at 6-10 (1958-59). Note in particular, *id.* para. 42.

168. *See generally id.*

169. The last opportunity was when observations of governments were solicited pursuant to the resolution adopted by the ninth session of the General Assembly in 1954. *See supra* note 158. These observations may be found in U.N. Doc. A/2910 and Add. 1-6 (1955).

170. For a list of the States admitted as members of the United Nations during 1955-58, *see* UNITED NATIONS, EVERYMAN'S UNITED NATIONS 12 (8th ed. 1968).

171. The vote was 64-0, with 5 abstentions. *See* 13 U.N. GAOR, Third Comm. 157 (1958).

an invaluable source regarding the interpretation of this paragraph because, in addition to the overwhelming vote on its adoption, as many as 36 delegations explicitly stated their views on this paragraph.[172] Most of the issues that had, over the years, been discussed in the Commission were now raised again and the Third Committee adopted the same attitude with regard to them as had been done by the Commission.[173]

The decision of the Commission with regard to the non-inclusion of the limitations was now beyond challenge. Although some delegates continued to feel that an article with a list of specific limitations would have been ideal, they realized the difficulties in formulating such a list. Even the greatest protagonist of the "enumerationists" for about twelve years, the United Kingdom, now finally conceded that "in practice it would be very difficult to agree on the list, and the possibility would always remain that it would be incomplete."[174] It was, perhaps, because of the realization of the inevitability of defeat that the Netherlands decided not to present formally its earlier suggestion of replacing paragraph 1 with a new paragraph which would include limitations similar to those in Article 5 of the European Convention.[175]

A yet more significant aspect of the Third Committee's deliberations was its endorsement of the Commission's work and interpretation with regard to the second sentence of paragraph 1 which provided against "arbitrary arrest or detention." We saw that in the drafting of Article 9, the single most important issue related to the controversy over the word "arbitrary." In spite of consistent and determined opposition by some members on the ground that the word was vague and imprecise, and in spite of the considerable confusion

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172. Art. 9 was discussed in seven meetings of the Third Committee. *See id.* at 128-60. The views of the 36 delegations will be found at the following paginations in these Records: Afghanistan at 159; Australia at 156; Belgium at 138; Brazil at 154; Bulgaria at 148; Burma at 153; Cambodia at 142; Chile at 128; China at 156; Czechoslovakia at 131 and 153; Ecuador at 156; France at 139; Greece at 148; Guatemala at 153; India at 141; Indonesia at 150; Iraq at 149; Ireland at 135 and 145; Israel at 135 and 159; Italy at 147; Japan at 144; Liberia at 136 and 150; New Zealand at 160; Peru at 131 and 137; the Philippines at 142 and 155; Poland at 144; Portugal at 150; Romania at 147; Saudi Arabia at 150; Spain at 154; Tunisia at 149; Soviet Union at 138; United Kingdom at 129, 142, and 156; United States at 137; Venezuela at 155; Yugoslavia at 147.

173. *See Report of the Third Committee, supra* note 161, at 6-10, paras. 32, 34, 42-49 and 66-67.

174. From the remarks on Sir Samuel Hoare, *supra* note 171 at 129. For the same view, *see also* the remarks of the delegates of Chile and Czechoslovakia, *id.* at 128 and 131.

175. *See* the remarks of the Irish delegate, *id.* at 135. The Netherlands earlier suggestion will be found in U.N. Doc. A/2910/Add. 3, at 11-12 (1955).

as to its interpretation,[176] the Commission had time and again voted against its deletion. The clear reason for the retention of this sentence was that the majority of the members of the Commission had considered that "the rule of law did not provide adequate safeguards against the possible promulgation of unjust laws"[177] and that accordingly, by using the word "arbitrary," the requirement would be added that all legislation must conform to the "principles of justice."[178]

If there were any doubts as to "arbitrary" offering protection not only against "illegal" acts but also against "unjust" acts, the Third Committee must have dismissed them. In assessing the precise significance of its discussions what is relevant is not only what the Third Committee did in fact accomplish on the final vote, but also what it could have done, but chose not to do.

Due to the long standing controversy over the interpretation of the word "arbitrary" and the repeated reminders during its debates, the Third Committee was fully aware of the possibility that "arbitrary" may be interpreted to refer to the principles of natural justice. Accordingly, if it did not agree with this interpretation, all it had to do was to act on any one of the suggestions before it: delete the second sentence, or replace "arbitrary" with "illegal," or collectively record that "arbitrary" did not mean "contrary to natural justice."

Third Committee support of the Commission's concern that the article should provide guarantees against unjust laws is confirmed by the general tenor of the discussions. A great majority of the delegates who participated in the discussion on paragraph 1 seemed to agree that its cumulative effect was to impose obligations concerning the "just" content of laws. Many of the delegates thought that this obligation resulted from the use of the word "arbitrary" in the second sentence.[179] But others, even from among those who felt that "arbitrary" meant "illegal" and could not be applied to acts committed in execution of the law,[180] found the guarantee against unjust laws to

176. For a summary of the different interpretations of the word "arbitrary" during the Commission debates, *see* the U.N. Secretariat Annotated Study, A/2929 (July 1, 1955), 10 U.N. GAOR, Annexes, Agenda Item 28 (Part II), at 35 (1955).

177. *See, e.g.*, remarks of Sir Samuel Hoare (United Kingdom), summarizing the work of the Commission, *supra* note 171, at 129.

178. *Id.* at 142-43.

179. The view that "arbitrary" was broader than "illegal" and compelled conformity with principles of justice was explicit or implicit in the remarks of the delegates of Australia, Brazil, Bulgaria, Burma, Ecuador, France, Greece, India, Indonesia, Iraq, Italy, Japan, Liberia, Philippines, Poland, Soviet Union, United Kingdom, United States, and Venezuela. *See supra* note 172 for the paginated references to the remarks of these delegates.

180. The view that "arbitrary" does or should merely mean "illegal" or "unlawful" was explicit or implicit in the remarks of the delegates of Belgium, Israel, New

be in the first sentence. It was argued that the general statement there which provides that "everyone has the right to liberty and security of person" could not be infringed by national laws.[181]

From the discussions in the Third Committee, therefore, it could be concluded that the cumulative effect of paragraph 1 is to provide not only against "illegal" acts but also against "unjust" acts. An analysis of these discussions indicates that, out of the 36 delegates that commented on paragraph 1, as many as 25 delegates expressed the opinion that this paragraph, by itself or supplemented by other provisions of the draft Covenant, did not refer to conformity with the law alone but also concerned itself with the content of the law.

Another clarification that needs to be made here is that the reference to twenty-five delegates does not imply that the remaining eleven delegates felt that paragraph 1 does not provide protection against unjust laws. The statements of some of these eleven delegates do not either deal with, or are at best ambiguous on, this issue.[182]

F. *Final Adoption by the General Assembly (1966)*

Article 9 of the 1958 Third Committee was included in the Covenant finally adopted by the twenty-first session of the General Assembly in 1966.[183] With regard to Article 9, however, the general debate at the time of the adoption of the Covenant is significant for certain specific reasons. The over forty "new" States which had joined the United Nations since 1958 when Article 9 was last considered by the Third Committee, now endorsed Article 9. Such endorsement is implicit either in their general remarks on the Covenant or in not criticizing Article 9 when several of them singled out various other articles and issues for comment. This complete immunity from hostility enjoyed by Article 9 during the twenty-first session of the General Assembly suggests that even the "new" States found it completely acceptable.[184]

Zealand, Peru, Romania and Spain. *See supra* note 172 for the paginated references to the remarks of these delegates.

181. *See, e.g.*, the remarks of the Belgian delegate, *id.* at 138.

182. The comments of the following twenty-five delegations could be construed as suggesting the requirement of "just" laws: Afghanistan, Australia, Belgium, Brazil, Bulgaria, Burma, Cambodia, Czechoslovakia, China, Ecuador, France, Greece, India, Indonesia, Iraq, Italy, Japan, Liberia, Philippines, Poland, Romania, Soviet Union, United Kingdom, United States and Venezuela. For the paginated references to the remarks of these delegates *see supra* note 172. Non-committal remarks on this subject included those of the delegates of Chile, Guatemala, Portugal, Tunisia, and Yugoslavia. *See id.* for paginated references to the remarks of these delegates.

183. 21 U.N. GAOR, Supp. 16 (A/6316), at 54 (1966).

184. The "new" States appear to have found the substantive provisions of the Covenant satisfactory. For a majority of these, the only disappointment related to measures of implementation. *See, e.g.*, remarks of the delegates of Togo, Niger, Tanzania, Mauritania, Guinea, Congo, Sierra Leone, Upper Volta, Chad, Cameroon, Mongo-

III. CONCLUSIONS ON THE DRAFTSMEN'S INTENT WITH REGARD TO "ARBITRARY"

From the above account of the origins, development and final adoption of the first paragraph of Article 9 of the Covenant, it is clear that its draftsmen had generally intended the word "arbitrary" to have a "special meaning." To most of the members who voted for its adoption in both the Commission and in the General Assembly, "arbitrary arrest or detention" implied an arrest or detention which was incompatible with the principles of justice or with the dignity of the human person irrespective of whether it had been carried out in conformity with the law.[185] Intended, thus, to provide safeguards against both "illegal" and "unjust" arrests or detention, the incorporation of "arbitrary" can be explained in the context of the desire of the draftsmen to prevent the exercise of absolute powers by governments in a despotic and tyrannical manner.[186]

Reviewing the drafting history of Article 9, one finds that the word "arbitrary" appeared in most of the articles on arrest or detention submitted at, or adopted by, the United Nations. It appeared in most of the pre-1947 texts and it is found in the very first article adopted at the United Nations by the second session of the Commission in 1947. "Arbitrary" is also present in the five earlier texts of Article 9.[187] Thus, no article on arrest or detention adopted at the United Nations was ever without the word "arbitrary." Moreover, whenever "arbitrary" was included in the article, it was made clear by most of those who favored it that they were voting for it on the understanding that it would be an effective safeguard not only

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lia, Dahomey and Algeria, 21 U.N. GAOR Third Comm. 476, 479-81, 483-86 (1966); and Jamaica and Guinea, U.N. Doc. A/PV.1496 at 3, 43 (1966). Among the "new" States applauding the Covenant without any reservations were Cyprus, U.N. Doc. A/PV.1495, at 72 (1966) and Nigeria, U.N. Doc. A/PV.1496, at 56 (1966). Madagascar was the only "new" State that singled out some substantive articles of the Covenant for criticism, but such criticism did not include art. 9. *See* 21 U.N. GAOR, Third Comm. 482 (1966).

185. *See* remarks of Van Heuven (United States), 13 GAOR Third Comm. 137 (1958). Avramov (Bulgaria), during the debates in the General Assembly in 1958, contended that there was "consensus" that "arbitrary" meant "unjust" and "unlawful." He added that it "therefore" covered not only unlawful treatment but unjust treatment under the cover of law. *Id.* at 148.

186. *See* remarks of Rossides (Greece), *id.*

187. Although art. 9 was discussed and commented upon on numerous other occasions, its earlier texts were *adopted* at the following sessions only: second session of the Commission (1947); second session of the Drafting Committee (1958); fifth (1949), sixth (1950), and eighth (1952) sessions of the Commission; and the thirteenth session of the General Assembly, Third Committee (1958). While the second session of the Drafting Committee could not agree on the adoption of one of the several texts before it, it indicated a preference for the text adopted by the second session of the Commission.

against "illegal" acts, but "unjust" acts as well.

With regard to the drafting of the article by the Commission, it was generally conceded that the "intent" of the Commission in using the word "arbitrary" was to introduce the requirement that all legislation conform to the principle of justice. Even the United Kingdom, the most persistent adversary of the word "arbitrary," admitted that the discussions in the Commission indicated that the intention in using this word was not merely to impose a requirement that the action should be in accordance with the law, but that the action should also not be "arbitrary."[188] Most of the delegates at the Third Committee in 1958 also agreed with this interpretation of the Commission's intention.[189] As far as the "intent" of the Third Committee itself is concerned, analysis of its debates indicates that it confirmed and reinforced the Commission intent.

To refute those that would still insist that "arbitrary" refers only to the legality, and not the justness, of an arrest and detention, one need only point to the several unsuccessful attempts to have the word "unlawful" or "illegal" replace "arbitrary," or to the equally futile attempts to define the word "arbitrary" in such a way so as to totally exclude the possibility of its being interpreted as "unjust." Surveying the historical development of Article 9, we notice that its first text drafted by the second session of the Commission contained the word "arbitrary," although it had been suggested during the same session that the word "unlawful" be substituted for "arbitrary." A similar proposal, for example, during the General Assembly's consideration of the article in 1958, met the same fate. Ignored in similar fashion were the numerous attempts to agree on a restricted definition of "arbitrary." Thus, the failure of the Belgian effort to define "arbitrary" at the fifth session of the Commission and of the United Kingdom attempt to have the Third Committee record, in 1958, its collective opinion that "arbitrary" did not mean "contrary to natural justice" lend support to the argument that both the Commission and the General Assembly did not want the word "arbitrary" to be interpreted narrowly.

Finally, in view of the bitter controversy and the determined opposition aroused by the word "arbitrary" for so many years, it may only be fair to ask why this word was eventually retained in Article

188. *See* U.N. Doc. E/CN.4/694/Add.2, at 6 (1958). *See also* remarks of the U.K. delegate before the Third Committee in 1958, *supra* note 185, at 129 and 142-43.

189. *See generally supra* note 185, at 128-60. Practically all the writers, including Hersh Lauterpacht, Charles Malik, James Simsarian, John Lockwood, Arthur Holcombe, and Sandford Fawcett, who commented on the various drafts of the Commission, emphasized the necessity to interpret "arbitrary" in a liberal manner. Their views have been noted during the discussion of the drafting history of art. 9.

9. First, and on the positive side, the greatest appeal of "arbitrary" lay in its hopeful potential to provide against "unjust" laws.As to its being "vague" and "undefined," it was pointed out that in an instrument like the Covenant, which is endeavouring to break new ground, the use of certain broad concepts was inevitable. Magna Carta and Bills of Rights in many countries have mostly lacked precise definitions; yet these instruments have greatly promoted the development of liberty.[190] the possible difficulties in implementation which could result from using vague language did not bother the draftsmen either. They were confident of the fact that the term "arbitrary arrest or detention" could be interpreted by reference to generally accepted principles of justice.

The second main reason for the incorporation of "arbitrary" has to do with the "limitations." The indispensability of "arbitrary" was actually assured as soon as it was realized that it would be impossible to agree on a list of limitations that would be acceptable to all the legal systems. From the very beginning, various attempts were made to formulate a comprehensive list. Where, as in the European Convention of Human Rights, the treaty members represent a smaller geographical group and subscribe to approximately similar legal standards, it has been found possible to enumerate certain exceptions to the right to personal liberty. But the Covenant reflects a much wider participation. As has been pointed out, it is well to keep in mind that the Covenant is not the product of a single mind, conceived and executed within the framework of a definite philosophy; it is the expression of many creeds and many philosophies.[191] Because of the diverse cultures, and the different levels of economic, social, legal, and political development of the various members of the United Nations, it was soon apparent that any one list of limitations would conflict with several national legal systems. The futility of these attempts at "enumeration" was, in due time, realized and they were eventually abandoned.

Article 9, as it presently stands, if properly interpreted and applied, could provide better safeguards against governmental oppression of its peoples than any article with a detailed list of limitations.

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190. *See* U.N. Doc. E/AC.7/SR.148, at 17 (1950).

191. *See* Moskowitz, *The Covenants on Human Rights: Basic Issues of Substance*, 53 AM. SOC'Y INT'L L. PROCEEDINGS 230 (1959).