

1999

Travaux Preparatoires of the Fair Trial Provisions--Articles 8 to 11--of the Universal Declaration of Human Rights

David Weissbrodt
University of Minnesota Law School, weiss001@umn.edu

Mattias Hallendorff

Follow this and additional works at: https://scholarship.law.umn.edu/faculty_articles



Part of the [Law Commons](#)

Recommended Citation

David Weissbrodt and Mattias Hallendorff, *Travaux Preparatoires of the Fair Trial Provisions--Articles 8 to 11--of the Universal Declaration of Human Rights*, 21 HUM. RTS. Q. 1061 (1999), available at https://scholarship.law.umn.edu/faculty_articles/413.

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in the Faculty Scholarship collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

***Travaux Préparatoires* of the Fair Trial Provisions—Articles 8 to 11— of the Universal Declaration of Human Rights**

David Weissbrodt & Mattias Hallendorff***

I. INTRODUCTION

On 10 December 1948, the United Nations General Assembly adopted the Universal Declaration of Human Rights.¹ In view of the fiftieth anniversary of the Declaration, this article reviews its origins. The article then focuses principally upon the drafting and meaning of the fair trial provisions of the Declaration. Rather than looking at the Declaration's provisions article by article in numerical order, the article first considers the overall drafting history of the Declaration; second, it focuses on the principal fair trial provisions, Articles 10 and 11; and then deals with the drafting of Articles 8 and 9, which are complementary.

* *David Weissbrodt* is the Fredrikson & Byron Professor of Law and Co-Director of the Human Rights Center at the University of Minnesota.

** *Mattias Hallendorff* received his LL.M. from the University of Minnesota Law School in 1998 and his Juris Kandidat degree from Göteborg University, Sweden, in 1996.

1. Universal Declaration of Human Rights, adopted 10 Dec. 1948, G.A. Res. 217A (III), U.N. GAOR, 3d Sess. (Resolutions, pt. 1), at 71, U.N. Doc. A/810 (1948), reprinted in 43 AM. J. INT'L L. SUPP. 127 (1949) [hereinafter UDHR]. The best summary of the discussion leading to the adoption of the Universal Declaration of Human Rights can be found in ALBERT VERDOODT, *NAISSANCE ET SIGNIFICATION DE LA DÉCLARATION UNIVERSELLE DES DROITS DE L'HOMME* (1964). In addition, much of this chronology can be found in summarized form in 1946–47 U.N.Y.B.; 1947–48 U.N.Y.B.

II. GENERAL PROCEDURE

During the drafting of the UN Charter at the San Francisco Conference of 1945, representatives of Cuba,² Mexico,³ and Panama⁴ each proposed the inclusion of a Declaration on the Rights and Duties of Nations and a Declaration on the Essential Rights of Man.⁵ President Truman (United States), in his final remarks at the San Francisco conference, anticipated an International Bill of Rights to be attached to the Charter,⁶ and Field Marshall Smuts (South Africa) also envisioned the addition of a human rights instrument to the Charter.⁷ The San Francisco Conference decided, instead, to adopt Article 55 of the Charter, which set forth the purposes of the UN to promote "universal respect for, and observance of, human rights,"⁸ and Article 56 which obligated member States to "take joint and separate action" for the achievement of the purposes of the UN set forth in Article 55, including the promotion of human rights.⁹ The Charter also refers to human rights in the Preamble and Articles 1, 13, 62, 68, and 76. The more detailed drafting of an International Declaration on Human Rights or an International Bill of Rights¹⁰ was deferred until the establishment of the UN Commission on Human Rights.

On 16 February 1946, the Commission on Human Rights (Commission) was established by the Economic and Social Council (Council) acting under Article 68 of the UN Charter, which anticipated the creation of the Commission.¹¹ The Commission was established, as a subsidiary body of the Council, to submit proposals, recommendations, and reports to the Council regarding:

- (a) an international bill of rights;
- (b) international declarations or conventions on civil liberties, the status of women, freedom of information and similar matters;
- (c) the protection of minorities;
- (d) the prevention of discrimination on grounds of race, sex, language or religion;

2. Doc. 2, G/7 (g), at 8 et seq., 3 U.N.C.I.O. Docs. 500 (1945).

3. Doc. 2, G/7 (c), at 10, 3 U.N.C.I.O. Docs. 64 (1945).

4. Doc. 2, G/7 (g)(2), at 2 et seq., 3 U.N.C.I.O. Docs. 266 (1945).

5. The proposals used different names for a declaration.

6. Doc. 1209, P/19, at 26, 1 U.N.C.I.O. Docs. 683 (1945).

7. Doc. 55, P/13, at 10, 1 U.N.C.I.O. Docs. 425 (1945).

8. UDHR, *supra* note 1, art. 55.

9. *Id.* art. 56.

10. Different names for what became the Universal Declaration were used in the early stages of the drafting process.

11. U.N. Doc. PC/20, at 28 (23 Dec. 1945); 1947 Y.B. ON H.R. 420 (1949).

(e) any other matter concerning human rights not covered by items (a), (b), (c), and (d).¹²

The Commission was initially created as a provisional "nuclear" Commission with nine members, appointed in their individual capacity, who held their first meetings from 26 April to 20 May 1946 at Hunter College in New York City. The nuclear Commission discussed the composition of the full Commission, how its future work should be conducted,¹³ and the draft declarations submitted by Cuba¹⁴ and Panama.¹⁵ The nuclear Commission, however, limited its work on an International Bill of Rights to preparing for the full Commission and did not put forward any substantive proposals.¹⁶

The Council studied the report from the nuclear Commission¹⁷ during its Second Session, 25 May to 21 June 1946. In resolution 2/9, the Council decided that the full Commission should consist of eighteen member States rather than individuals.¹⁸ In light of the drafting of an International Bill of Rights, the Council also asked the Secretary-General to make arrangements for "the collection and publication of plans and declarations on human rights by specialized agencies and non-governmental, national and international organizations."¹⁹

This preparatory work was accomplished by the UN Secretariat Division of Human Rights, which also studied the draft declarations submitted by Panama (on behalf of the American Law Institute),²⁰ Chile (on behalf of the Inter-American Juridical Committee),²¹ Cuba,²² and the American Federation of Labor.²³ The First Session of the full Commission on Human Rights was held at Lake Success, New York, from 27 January to 10 February 1947.

12. E.S.C. Res. 1/5, *adopted* 16 Feb. 1946, U.N. ESCOR, 1st Sess., at 163, U.N. Doc. E/20, at 3 (1946), *quoted in* 1946-47 U.N.Y.B. 523 (1947). The Preparatory Commission of the United Nations (1945) proposed, in its report, the establishment of the Commission, and the General Assembly approved the report during its First Session, 10 Jan.-14 Feb. 1947. The Preparatory Commission was created on 26 June 1945, when the Charter was signed, with the objective of preparing for the first regular session of the General Assembly and charged with setting up the principal organs of the United Nations. See *Interim Arrangements Concluded by the Governments Represented at the United Nations Conference on International Organization*, Doc. 1165, ST/15 (1), at ¶ 1, *reprinted in* THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION: SELECTED DOCUMENTS 982 (1946). See also U.N. Doc. PC/20, *supra* note 11.

13. U.N. Docs. E/HR/6, 8-13, 15, 16, 20, 23-31 (May 1946).

14. U.N. Doc. E/HR/1 (23 Apr. 1946).

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

16. U.N. Doc. E/HR/15, at 5 (10 May 1946).

17. U.N. Doc. E/38/Rev.1 (21 May 1946).

18. E.S.C. Res. 2/9, *adopted* 21 June 1946, U.N. ESCOR, 2d Sess., at 401 (1946).

19. *Id.* at 401.

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

21. U.N. Doc. E/CN.4/2 (8 Jan. 1947).

22. U.N. Doc. E/HR/1 (23 Apr. 1946).

23. U.N. Doc. E/CT.2/2 (20 Aug. 1946).

Upon a proposal of Dr. Chang (China), the Commission decided initially to work under the assumption that the bill would be adopted as a General Assembly resolution.²⁴ Hence, the Commission would draft a declaration rather than a convention because a declaration could be more promptly adopted by the General Assembly. The Commission also decided that the three members of the Commission's Bureau,²⁵ together with the Secretariat, would act as a drafting group with the objective of submitting a draft international bill of rights to the Second Session of the Commission.²⁶

During the Fourth Session of the Council, from 28 February to 29 March 1947, the small drafting group met resistance from Mr. Morozov (USSR), Mr. Papanek (Czechoslovakia), and others. In response to the resistance, Mrs. Roosevelt, in a letter, proposed²⁷ to convert the drafting group into a larger and more representative drafting committee (Drafting Committee) consisting of representatives from the following members of the Commission: Australia, Chile, China, France, Lebanon, the Soviet Union, the United Kingdom, and the United States. The Council endorsed this proposal and at the same time also decided to ask the Division of Human Rights in the Secretariat to prepare an outline for a declaration.²⁸ Accordingly, the Division of Human Rights, headed by John Humphrey (Canada), prepared the Secretariat Outline²⁹ of a draft declaration and appended the underlying proposals from governments, organizations, and private persons, such as Cuba,³⁰ India, the United States,³¹ the American Federation of Labor,³² the American Law Institute (presented by Panama),³³ the Inter-American Juridical Committee (presented by Chile),³⁴ and individual proposals by Dr. Lauterpacht, Mr.

24. U.N. Doc. E/CN.4/SR.7, at 3 (31 Jan. 1947); U.N. Doc. E/259, at 3 (27 Jan. to 10 Feb. 1947).

25. Mrs. Roosevelt (Chairman) (United States), Mr. Chang (China) and Mr. Malik (Lebanon). The group only met once, in the home of Mrs. Roosevelt. See JOHN HUMPHREY, *NO DISTANT MILLENNIUM: THE INTERNATIONAL LAW OF HUMAN RIGHTS* 147 (1989).

26. U.N. Doc. E/CN.4/SR.12, at 5 (3 Feb. 1947); U.N. Doc. E/259, at 2 (27 Jan. to 10 Feb. 1947).

27. U.N. Doc. E/383 (24 Mar. 1947). The resistance appears to have been of a political rather than a practical character.

28. E.S.C. Res. 46 (IV), *adopted* 28 Mar. 1947, U.N. ESCOR, 4th Sess., Supp. No. 3, at 31-33, U.N. Doc. E/325 (1947).

29. U.N. Doc. E/CN.4/AC.1/3 (4 June 1947). For a personal description of the events taking place and the drafting, see 1 JOHN P. HUMPHREY, *ON THE EDGE OF GREATNESS: THE DIARIES OF JOHN HUMPHREY, FIRST DIRECTOR OF THE UNITED NATIONS DIVISION OF HUMAN RIGHTS 1948-1949* (A.J. Hobbins ed., 1994); JOHN P. HUMPHREY, *HUMAN RIGHTS & THE UNITED NATIONS: A GREAT ADVENTURE* (1984).

30. U.N. Doc. E/HR/1 (23 Apr. 1946).

31. U.N. Doc. E/CN.4/4 (28 Jan. 1947).

32. U.N. Doc. E/CT.2/2 (20 Aug. 1946).

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

34. U.N. Doc. A/C.1/38 (6 Nov. 1946); U.N. Doc. E/CN.4/2 (8 Jan. 1947).

McNitt, H.G. Wells et al.³⁵ The Secretariat Outline also took into account a compilation of the constitutions of almost all UN member governments.³⁶

The enlarged Drafting Committee held its First Session from 9 to 25 June 1947 and had before it the Secretariat Outline,³⁷ the proposed declarations from Chile, Cuba, and Panama; a draft bill of rights proposed by the United Kingdom,³⁸ and various proposals by the United States³⁹ for rewording the Secretariat Outline. At the first meeting of the Drafting Committee, Lord Dukestone (United Kingdom), submitted a formal proposal⁴⁰ for preparing a draft convention or treaty concerning human rights. The Committee examined the United Kingdom proposal together with the Secretariat Outline. The Committee approved the British proposal and decided to prepare three documents: (1) a draft international bill of human rights, (2) a convention on human rights flowing from these principles, and (3) measures of implementation designed to ensure observance of human rights.⁴¹

The Drafting Committee formed a temporary working group consisting of the representatives from France, Lebanon, and the United Kingdom (and *ex officio* Mrs. Roosevelt)⁴² with the objectives of suggesting: (a) a logical rearrangement of the articles of the Secretariat Outline, (b) a new draft of various articles in the light of the very preliminary discussion in the Drafting Committee, and (c) the division of the substance of the articles between a declaration and a convention.⁴³

In order to create a document of greater unity, the temporary working group decided to request Professor René Cassin (France) to prepare a draft declaration based on those articles in the Secretariat Outline "which he considered should go into such a Declaration."⁴⁴ The preamble and the first six articles of the Cassin Draft were revised by the temporary working group before they were submitted to the Drafting Committee,⁴⁵ while the rest of the articles were transmitted in the form suggested by Professor Cassin.⁴⁶ The Committee considered this working group draft declaration as well as the proposed text of the United Kingdom proposal for a convention on human rights to which the temporary working group had made several

35. U.N. GAOR, 3rd Sess., 180th mtg., at 858, U.N. Doc. A/810 (1948).

36. U.N. Doc. E/CN.4/AC.1/3/Add.1, Sec. III, at 29–245 (2 June 1947).

37. U.N. Doc. E/CN.4/AC.1/3 (4 June 1947).

38. U.N. Doc. E/CN.4/AC.1/4 (5 June 1947).

39. U.N. Doc. E/CN.4/AC.1/8/Rev.1 & Rev.2 (11 June 1947).

40. U.N. Doc. E/CN.4/AC.1/4 (5 June 1947).

41. U.N. Doc. E/CN.4/21, at 3; U.N. Doc. E/CN.4/AC.1/SR.1 (9 June 1947).

42. U.N. Doc. E/CN.4/AC.1/SR.6 (16 June 1947).

43. U.N. Doc. E/CN.4/21, at 3–4 (1 July 1947).

44. *Id.* at 4, 48.

45. U.N. Doc. E/CN.4/AC.1/W.1, at 48.

46. U.N. Doc. E/CN.4/AC.1/W.2/Rev.1; U.N. Doc. E/CN.4/21/Annex D (1 July 1947).

amendments. Based on the work done by the temporary working group, the Committee submitted suggestions for articles of an International Declaration on Human Rights.⁴⁷

The Drafting Committee reported on its First Session to the Commission's Second Session, which was held in Geneva from 2 to 17 December 1947.⁴⁸ The Commission decided to prepare three documents which were to form the International Bill of Human Rights: (1) an International Declaration of Human Rights, (2) an International Covenant on Human Rights, and (3) Measures for Implementation.⁴⁹ Furthermore, the Commission decided to establish a working group for each document; this article will examine primarily the Working Group on the Declaration (Working Group).⁵⁰ The Working Group met from 5 to 9 December 1947, and reviewed the version submitted by the Drafting Committee from its First Session.⁵¹ The Working Group recommended several changes in the Committee's draft and proposed a resolution for adoption by the Commission.⁵² The Commission welcomed the initial Working Group Draft Declaration and requested comments from "governments, U.N. agencies, and non-governmental organizations" for the Drafting Committee's Second Session.

At its Second Session, from 3 to 21 May 1948, in Lake Success, the Drafting Committee studied the Working Group's Draft⁵³ in the light of comments received from governments,⁵⁴ the Conference on Freedom of Information,⁵⁵ the Commission on the Status of Women,⁵⁶ and the Bogotá Declaration.⁵⁷ During this Second Session, the Committee members were

47. U.N. Doc. E/CN.4/21, at 73-81 (1 July 1947).

48. *Id.*

49. U.N. ESCOR, 2d Year, 6th Sess., Supp. No. 1, at 5, ¶ 18, U.N. Doc. E/600 (17 Dec. 1947).

50. *Id.* at 4, ¶ 16.

51. *Id.*

52. U.N. Doc. E/CN.4/57, at 5 et seq. (10 Dec. 1947).

53. *Id.*

54. U.N. Doc. E/CN.4/85 (1 May 1948).

55. U.N. Doc. E/CN.4/84 (30 Apr. 1948) (relevant only to articles 17 and 18 of the draft declaration with regard to the freedom of speech and information). The Conference was a United Nations sponsored forum for a discussion among states, intergovernmental organizations (IGOs), and nongovernmental organizations (NGOs) on the issues surrounding the right to freedom of speech.

56. U.N. Doc. E/CN.4/81 (24 Mar. 1948) (recommendations made by the Commission on the Status of Women regarding the protection of the rights of women in the Declaration).

57. O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, O.A.S. Doc. OEA/Ser.L.V/II.82, doc.6, rev.1, at 17 (1992). Also, see the proceedings of the Bogota session of the Organization of American States (OAS) General Assembly. See THOMAS BURGENTHAL & ROBERT NORRIS, 1 HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM BOOKLET 5, at i & 9 (1985).

divided as to whether the Declaration should be general and abstract,⁵⁸ or should include more specific provisions.⁵⁹ As to each clause, the Committee found a compromise between those two views and produced its redraft of the Declaration. The Committee submitted its new proposed text on an International Declaration on Human Rights (Committee Draft)⁶⁰ with the report on its Second Session to the Third Session of the Commission on Human Rights.

The Commission met for its Third Session at Lake Success, 24 May to 18 June 1948, where it thoroughly examined the individual articles of the proposed Committee Draft,⁶¹ and adopted a new and revised text which was submitted to the General Assembly for final consideration.⁶² The General Assembly referred the draft Declaration to its Third Committee where the last preparations for adoption took place.⁶³ The Third Committee decided to consider only the proposed Declaration and not the Covenant or the measures for implementation, because only the first was considered to be ready for adoption. The Third Committee adopted most of the articles by unanimous vote, but with abstentions, explanations, and reservations entered by the member States, and the final draft was submitted to the General Assembly for adoption.⁶⁴ The Third Committee also established a sub-committee, in order to deal with the many amendments, and the necessary reorganization of the Declaration. The General Assembly adopted the proposal by the Third Committee with only one alteration, which put Article 3 as a second paragraph of Article 2, hence, changing the numbering of all the following articles. The UN General Assembly finally adopted the Universal Declaration of Human Rights on 10 December 1948 by a vote of forty-eight in favor and none against, with eight abstentions.⁶⁵

58. *E.g.*, United States, France, United Kingdom, and Lebanon.

59. *E.g.*, Soviet Union, China, and Chile.

60. U.N. Doc. E/CN.4/95/Annex A, at 5–15 (21 May 1948).

61. U.N. Doc. E/CN.4/SR.54–56 (1948) (referring particularly to discussion of the fair trial provisions on 1 and 2 June 1948).

62. U.N. Doc. E/800 (28 June 1948).

63. U.N. GAOR 3rd Comm., 3rd Sess., pt. 1, at 229–75, U.N. Doc. A/C.3/SR.111–16 (23–29 Oct. 1948) (containing the records relevant to the fair trial provisions) [hereinafter U.N. Doc. A/C.3/SR.111–16].

64. U.N. Doc. A/777 (7 Dec. 1948).

65. UDHR, *supra* note 1. *In favor*: Burma, Canada, Chile, China, Colombia, Costa Rica, Cuba, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Iceland, India, Iran, Iraq, Lebanon, Liberia, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Siam, Sweden, Syria, Turkey, United Kingdom, United States of America, Uruguay, Venezuela, Afghanistan, Argentina, Australia, Belgium, Bolivia, and Brazil. *Abstaining*: Byelorussian Soviet Socialist Republic, Czechoslovakia, Poland, Saudi Arabia, Ukrainian Soviet Socialist Republic, Union of South Africa, Union of Soviet Socialist Republics, and Yugoslavia. It is worth noting that all the fair trial articles addressed in this article were adopted unanimously in the individual votes.

This general description of the drafting process captures the broad history of the Universal Declaration but does not completely reflect all the procedural steps taken by the Commission and its Drafting Committee in these early days of the United Nations when ad hoc approaches were sometimes used. The basic steps in drafting the Universal Declaration of Human Rights were as follows:⁶⁶

- "Nuclear" Commission (26 April to 20 May 1946), report: U.N. Doc E/38 Rev.1 (21 May 1946).
- First Session of the Commission on Human Rights (27 January to 10 February 1947), report: U.N. Doc E/259 (10 February 1947).
- Drafting Group (converted into the Drafting Committee by the Economic and Social Council during the Fourth Session), report: U.N. Doc E/259 (10 February 1947).
- First Session of the Drafting Committee (9 to 25 June 1947) (The Secretariat Outline was presented to this Session: U.N. Doc. E/CN.4/AC.1/3 (4 June 1947)), report: U.N. Doc. E/CN.4/21 (1 July 1947).
- Temporary Working Group, intra-sessional, Professor Cassin's proposal: U.N. Doc. E/CN.4/AC.1/W.2/Rev.1; E/CN.4/21, Annex D (1 July 1947).
- Second Session of the Commission on Human Rights (2 to 17 December 1947), report: U.N. Doc. E/600 (17 December 1947).
- Working Group, intra-sessional (5 to 9 December 1947), report: U.N. Doc. E/CN.4/57 (10 December 1947).
- Second Session of the Drafting Committee (3 to 21 May 1948), report: U.N. Doc. E/CN.4/95 (21 May 1948).
- Third Session of the Commission on Human Rights (24 May to 18 June 1948), report (forwarded through the Economic and Social Council): U.N. Doc. E/800 (28 June 1948).
- Third Committee of the General Assembly (30 September to 7 December 1948), report: U.N. Doc. A/777 (7 December 1948).
- Sub-Committee 4, intra-sessional, of the Third Committee of the General Assembly, report: A/C.3/400 and 400 Rev.1.

66. Cf. THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMENTARY 3 (chart) (Asbjørn Eide et al. eds., 1992). See also VERDOODT, *supra* note 1, at 17–24 (for a compilation of relevant documents).

- General Assembly, Third Session, First Part, 183rd plenary meeting: Adoption of the Universal Declaration of Human Rights in G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (10 December 1948).

This article turns now to the drafting of each article relevant to the right to a fair trial, referring to the general description above and mentioning occasional variations. As to each provision of the Universal Declaration, this article sets forth the final text, an account of the discussion, and interpretive comments based on the drafting history. Rather than looking at the Universal Declaration article by article in numerical order, this article first considers Articles 10 and 11, which are the core fair trial provisions of the Universal Declaration. The article then turns to Articles 8 and 9, which relate less directly to fair trial.

III. ARTICLE 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.⁶⁷

A. Discussion

In preparing the Secretariat Outline, the Division of Human Rights focused principally on three proposals and relevant provisions of thirty-four constitutions.⁶⁸ The first proposals came from Cuba: "The right to protection from competent courts free from all influence contrary to justice."⁶⁹ "The right to trial without undue delay, to self defense, and to protection from sentences except in pursuance of law in force prior to the act with which he is charged."⁷⁰ The Division of Human Rights also considered a text from the American Law Institute, presented by Panama:

Every one has the right to have his criminal and civil liabilities and his rights determined without undue delay by fair public trial by a competent tribunal before which he has had opportunity for a full hearing. The state has a duty to maintain adequate tribunals and procedures to make this right effective.⁷¹

67. UDHR, *supra* note 1, art. 10.

68. U.N. Doc. E/CN.4/AC.1/3/Add.1, at 235 et seq. (2 June 1947).

69. U.N. Doc. E/HR/1 at 4, art. 17 (23 Apr. 1946).

70. *Id.* art. 18.

71. U.N. Doc. E/HR/3, at 6, art. 7 (26 Apr. 1946).

And third, Chile presented a proposal from the Inter-American Juridical Committee: "Every person accused of crime shall have the right to a fair public hearing of the case, to be confronted with witnesses, and to be judged by established tribunals and according to the law in force at the time the act was committed."⁷² On the basis of those sources, the Division of Human Rights proposed: "There shall be access to independent and impartial tribunals for the determination of rights and duties under the law. Every one has the right to consult with and to be represented by counsel."⁷³

In the temporary working group established by the Drafting Committee during its First Session, from 9 to 25 June 1947, Professor Cassin suggested that the Universal Declaration should include separate fair trial provisions for criminal and civil proceedings. Hence, the Cassin Draft⁷⁴ dealt with criminal trials in Articles 11 and 12. Article 11 delineated the provisions on: (1) presumption of innocence; (2) punishment without judgment; (3) independent and impartial courts; (4) fair and public trials; and (5) the guarantees necessary for the defense.⁷⁵ Article 12 stated the principle of nonretroactivity of law and punishment.⁷⁶

The Cassin Draft Article 20, dealing with the determination of civil matters, states, "Every person shall have access whether as a plaintiff or defendant, to independent and impartial tribunals for the determination of his rights, liabilities and obligations under the law. He shall have the right to obtain legal advice and, if necessary, to be represented by counsel."⁷⁷ This Draft Article 20, relating to civil proceedings, formed the principal basis for discussion in the Committee. During a discussion of the right to be represented by counsel, Mrs. Roosevelt suggested removing the qualification "if necessary" from the Cassin Draft.⁷⁸ Professor Cassin explained that there were some countries where counsel was secured in civil but not criminal proceedings. Cassin proposed alternative language for the French version: "He shall have the right to consult with and, any time his personal appearance is not required by law, to be represented by counsel."⁷⁹ The Committee decided to remove the words "if necessary" and accepted Cassin's proposal as an alternative for the French text. The Committee also

72. U.N. Doc. E/CN.4/2, at 7, art. 12 (8 Jan. 1947).

73. U.N. Doc. E/CN.4/AC.1/3, at 10, art. 27 (4 June 1947).

74. U.N. Doc. E/CN.4/AC.1/W.2/Rev.1; U.N. Doc. E/CN.4/21/Annex D, at 48 (1 July 1947).

75. *Id.* at 53, art. 11.

76. *Id.* at 53, art. 12.

77. *Id.* at 57, art. 20.

78. U.N. Doc. E/CN.4/AC.1/SR.13, at 12 (3 July 1947); the discussion relates to article 15, which is the number the article had in the Committee's proposal.

79. U.N. Doc. E/CN.4/21, at 76, art. 15 (unofficial translation of the following text: "*Il aura le droit d'être assisté et, toutes les fois que sa comparution personnelle ne sera pas exigée par la loi, représenté par un conseil.*") (1 July 1947).

removed the words "whether as a plaintiff or defendant" from the Cassin Draft in the English version only⁸⁰ while leaving that language in the French version. Otherwise, the Committee accepted the Cassin Draft.

During its First Session, the Committee adopted the following wording in English: "Every one shall have access to independent and impartial tribunals for the determination of his rights, liabilities and obligations under the law. He shall have the right to consult with and to be represented by counsel."⁸¹ The Commission at its Second Session, from 2 to 17 December 1947, established the Working Group on the Declaration to review the Drafting Committee's work at its First Session. The Commission's Working Group recommended and the Commission agreed later to combine, into one fair trial Article (now Article 10), the two Cassin draft provisions on civil and criminal proceedings. At the same time, the Commission decided to delineate a separate article (which later became Article 11) on specific protections applicable to criminal proceedings.⁸² Professor Cassin redrafted the articles on that basis for submission to the Working Group.⁸³

Thus, the Working Group accepted a redrafted and slightly amended version of the general fair trial provision, proposed by Cassin, with the wording: "Everyone shall have access to independent and impartial tribunals for the determination of his rights and obligations. He shall be entitled to aid of counsel, and, when he appears personally, to understand the procedure and to use a language he speaks."⁸⁴

The provision on the right of the accused to use his own language in court appeared in the text during the discussion in the Working Group, on the proposal of Mr. Stepanenko (Byelorussia). He was supported by General Romulo (Philippines) who also stated that the right to use the individual's own language was not confined to national minorities but also covered "... persons belonging to trust territories and non-self governing regions as well as with foreigners."⁸⁵

The Commission received the report from the Working Group on the Declaration, but was also influenced by the work taking place simultaneously on the International Convention on Human Rights. Accordingly, during its Second Session, the full Commission added even more detail to this provision. Mr. Hodgson (Australia) proposed the inclusion of the words "... of any criminal charge against him . . ." and Mr. Dukeston (United

80. *Id.* at 43 (unofficial translation of the wording, "*en demand comme en défense*").

81. *Id.* at 76, art. 15.

82. U.N. Doc. E/CN.4/AC.2/SR.3, at 12 (6 Dec. 1947).

83. U.N. Doc. E/CN.4/AC.2/SR.4, at 6 (8 Dec. 1947).

84. *Id.* at 7; U.N. Doc. E/CN.4/57, at 7 (10 Dec. 1947).

85. U.N. Doc. E/CN.4/AC.2/SR.3, at 11 (6 Dec. 1947).

Kingdom) recommended the inclusion of the words ". . . qualified [representative] of his own choice. . . ." ⁸⁶

Hence, the Commission at its Second Session adopted the following wording in English:

Every one shall have access to independent and impartial tribunals in the determination of any criminal charge against him, and of his rights and obligations. He shall be entitled to a fair hearing of his case and to have the aid of a qualified representative of his own choice, and if he appears in person to have the procedure explained to him in a manner in which he can understand it and to use a language which he can speak. ⁸⁷

During the Second Session of the Drafting Committee, from 3 to 21 May 1948, the text adopted by the Second Session of the Commission was not altered.

During the Third Session of the Commission, from 24 May to 18 June 1948, the text was altered, however, pursuant to a proposal by India and the United Kingdom. Their proposal was substantially shorter: "Everyone, in the determination of his rights and obligations or of any criminal charge against him, is entitled to a fair hearing by an impartial tribunal." ⁸⁸ It is noteworthy that the reference to the right to counsel as well as the right to use one's own language were removed in this proposal. India and the United Kingdom suggested, and other delegations appeared to agree, that such specific provisions belonged in the Convention rather than the Declaration. ⁸⁹

The Commission, however, did accept one addition to the Indian and United Kingdom proposal, which was proposed by Mr. Pavlov (USSR). He suggested that equality before the law, as already contained in Article 2, was not necessarily the same as equality before the court and proposed the inclusion of that principle. ⁹⁰

While the Commission did not accept most of Mr. Pavlov's larger amendment, Professor Cassin absorbed his suggestion on equality before the courts into a compromise proposal with the following wording: "Everyone is entitled in full equality to a fair hearing by an independent and impartial tribunal in the determination of his rights . . ." ⁹¹ The Commission accepted the Cassin proposal and Mr. Larrain (Chile) noted that the words "in full equality" included the question of language.

The Indian-United Kingdom joint proposal was amended with Cassin's

86. U.N. ESCOR, 2d Year, 6th Sess., Supp. No. 1, Annex A, at 15, art. 6, U.N. Doc. E/600 (17 Dec. 1947); U.N. Doc. E/CN.4/SR.36, at 9-10 (13 Dec. 1947).

87. U.N. Doc. E/CN.4/95/Annex A, at 5, art. 7 (21 May 1948).

88. U.N. Doc. E/CN.4/99, at 2, art. 7 (24 May 1948).

89. U.N. Doc. E/CN.4/SR.54, at 7-12 (1 June 1948).

90. *Id.* at 8 (referring to E/CN.4/95, at 29 (21 May 1948)).

91. *Id.* at 11 (1 June 1948).

proposal, and the final text submitted by the Commission to the Third Committee of the General Assembly became the following: "In the determination of his rights and obligations and of any criminal charge against him, everyone is entitled in full equality to a fair hearing by an independent and impartial tribunal."⁹² When the Third Committee considered the Commission proposal, from 30 September to 7 December 1948, a number of amendments were suggested by governments.⁹³

Prior to the Third Committee's deliberations, Cuba proposed the insertion of the right to a public trial.⁹⁴ Mr. Pérez Cisneros (Cuba) explained the importance of the inclusion of the right to public hearings in this article because it applied to both civil and criminal proceedings. Mr. Pérez Cisneros noted the right to a public trial in the following article, but that provision was limited to criminal cases. In response to opposition from the Chilean representative, the Cuban delegate admitted that there were situations when secret trials might be acceptable, but he successfully insisted on the insertion of public trials in Article 10.⁹⁵

During the deliberations in the Third Committee the delegates preferred the slightly amended original formulation of Cassin⁹⁶ over the Commission draft, so that on 28 October 1948 the Third Committee adopted the final wording of Article 10, which was incorporated in the Declaration: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."⁹⁷ The article was adopted unanimously, without abstention, by the General Assembly.⁹⁸

B. Interpretation

Article 10 expresses the basic right to a fair trial in both civil and criminal proceedings. This right applies to the individual in all cases, whether he or she initiates the proceedings or is the defending party.

The article repeats the right to full equality expressed in Article 2 and reflects the right to equality before the law. The Committee discussed this duplication between Article 2 and Article 10 but decided to keep the equality concept in both articles. Nehemiah Robinson⁹⁹ speculated that

92. U.N. Doc. A/C.3/277, at 1 (14 Oct. 1948).

93. *Id.*

94. U.N. Doc. A/C.3/224 (6 Oct. 1948).

95. U.N. Doc. A/C.3/SR.111-16, *supra* note 63.

96. U.N. Doc. E/CN.4/SR.54, at 11 (1 June 1948).

97. U.N. Doc. A/777, at 4, art. 11 (7 Dec. 1948); UDHR, *supra* note 1, art. 10.

98. UDHR, *supra* note 1.

99. NEHEMIAH ROBINSON, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ITS ORIGIN, SIGNIFICANCE, APPLICATION, AND INTERPRETATION 114 (1958).

equality was kept in Article 10 to deal with possible distinctions peculiar to the judicial process. Article 2 prohibits discrimination on such grounds "... as race, colour, sex, language, religion, political or other opinion, national, or social origin, property, birth or other status." Article 10 would prohibit discrimination on those grounds plus inappropriate distinctions, based for example, on the type of crime committed, the gravity of the case, or the relationship between the claimant and the respondent in civil matters.

As noted by a number of the delegates during the discussions on the article, there are situations when secret hearings might be necessary. Such situations are covered by the provision in then Article 27, now 29, which is the only limitation on the individual's right to a public hearing.

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.¹⁰⁰

Article 11 elaborates on what is considered to be a fair trial in the case of criminal charges and how such a charge should be evaluated. While Article 10 regulates the relationship between an individual and the tribunal, Article 11 regulates the relationship between the law and the individual in criminal cases.

IV. ARTICLE 11

1. Everyone charged with a penal offense has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.

2. No one shall be held guilty of any penal offense on account of any act or omission which did not constitute a penal offense, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offense was committed.¹⁰¹

A. Discussion

In preparing its Outline for this article, the Secretariat had before it a number of proposals, including texts from Cuba¹⁰² and the Inter-American Juridical Committee. The latter proposal was more complete:

100. UDHR, *supra* note 1, art. 29, § 2.

101. *Id.* art. 11.

102. U.N. Doc. E/HR/1 (23 Apr. 1946).

Every person has the right to a fair public hearing of the case, to be confronted with witnesses, and to be judged by established tribunals and according to the law in force at the time the act was committed. No fines shall be imposed except in accordance with the provisions of general laws; and no cruel or unusual punishment.¹⁰³

The American Law Institute also submitted a proposal which relates to the retroactivity of laws and which is clearly visible in the second section of the article: "No one shall be convicted of crime except for violation of a law in effect at the time of the commission of the act charged as an offense, nor be subject to a penalty greater than that applicable at the time of the commission of the offense."¹⁰⁴ Based on the early proposals, the Secretariat Outline of 4 June 1947 contained the following provisions which later became Article 11:

No one shall be convicted of crime except by judgment of a court of law, in conformity with the law, and after a fair trial at which he has had an opportunity for a full hearing. Nor shall anyone be convicted of crime unless he has violated some law in effect at the time of the act charged as an offense, nor be subject to a penalty greater than that applicable at the time of the commission of the offense.¹⁰⁵

The next major version of this article can found in the Cassin Draft of 14 to 16 June 1947, prepared on behalf of the Drafting Committee's temporary working group. It had two articles that dealt with the right to a fair trial in criminal cases, Articles 11 and 12. Article 11 stated:

Every accused shall be presumed innocent until found guilty. No person may be punished except in pursuance of a judgment of an independent and impartial court of law, delivered after a fair and public trial, at which he has had a full hearing or has been legally summoned, and has been given all the guarantees necessary for his defense.¹⁰⁶

Article 12 provided, "No person may be convicted of a crime unless he has violated a law in force at the time of the act charged as an offense, nor suffer a penalty greater than that legally applicable at the time of the commission of the offense."¹⁰⁷

During the Committee's First Session, from 9 to 25 June 1947, Mrs. Roosevelt proposed to remove the words "or has been legally summoned" in draft Article 11 and to add the phrase "or punished for a crime" after the

103. U.N. Doc. E/CN.4/2, at 7, art. XII (8 Jan. 1947).

104. U.N. Doc. E/HR/3 at 8, art. 9 (26 Apr. 1946).

105. U.N. Doc. E/CN.4/AC.1/3, at 10, art. 26 (4 June 1947).

106. U.N. Doc. E/CN.4/AC.1/W.2/Rev.1; U.N. Doc. E/CN.4/21/Annex D, at 53, art. 11 (1 July 1947).

107. *Id.* art. 12.

word "convicted" in draft Article 12.¹⁰⁸ She also believed that it would be helpful to add the right of the individual to be confronted with the witnesses against him, the right to a process for obtaining witnesses in his favor, and the right to counsel.¹⁰⁹ Professor Cassin thought these proposals belonged in a convention rather than in a declaration, since they applied principles of fairness, rather than enunciating the principles themselves.¹¹⁰

During the Second Session of the Commission, from 2 to 17 December 1947, the Working Group on the Declaration decided to limit this article to criminal cases, relegating to the preceding article more general rules for court proceedings, and confining the present article to specific rules pertaining to criminal trials. Professor Cassin re-edited the article pursuant to those directives and presented the following wording:

No one shall be held guilty until proved guilty and convicted. No one shall be convicted or punished for crime or any other offense except after public trial at which he has been given all guarantees necessary for his defence and which shall be pursuant to law in effect at the time of the commission of the act charged.¹¹¹

Mrs. Roosevelt proposed an amendment to the English text of the first sentence to read: "Any person is presumed innocent until proved guilty," and she proposed deletion of the words "any other offense," in order to permit administrative authorities to deal with minor offenses without a public trial.¹¹² Furthermore, Mr. Amado (Panama) proposed inclusion of "fair" before the words "public trial" and the phrase "conducted by a competent court" afterwards.¹¹³ As a response to the proposals, Professor Cassin agreed to include the word "fair" but stated that the phrase "pursuant to law" already embodied the idea of the competence of the court. With regard to minor offenses, Cassin proposed the inclusion of a note, stating that the proposed text only referred to general cases and did not apply to cases of immorality heard *in camera* or to the reading of secret documents possibly harmful to public security, provided the verdict was pronounced in public.¹¹⁴ The Working Group then adopted the following wording:

Any person is presumed innocent until proved guilty. No one shall be convicted or punished for crime or any other offense except after fair public trial at which

108. U.N. Doc. E/CN.4/AC.1/SR.12, at 8, art. 9 (17 June 1947).

109. U.N. Doc. E/CN.4/AC.1/SR.8, at 5, art. 10 (17 June 1947).

110. *Id.* at 5, art. 10.

111. U.N. Doc. E/CN.4/AC.2/SR.4, at 7, art. 10 (8 Dec. 1947).

112. *Id.* at 8, art. 10.

113. *Id.*

114. *Id.*

he has been given all guarantees necessary for his defence and which shall be pursuant to law in effect at the time of the commission of the act charged.¹¹⁵

The Working Group added a note to the text summarizing its understanding of the text as follows:

This article 10 combines the former article 9 and the former article 10 of the Drafting Committee's text. It was understood that the question of a competent court raised by the delegate of Panama is covered equally by the passage concerning guarantees necessary for defence and that concerning the necessity to apply the law in effect at the time of the commission of the act charged. It was also understood that this text covers one of the general principles which are not applicable to minor administrative offenses that do not always require legal proceedings. It also does not prevent a court from holding closed sessions or reading secret documents provided that the sentence is pronounced in public.¹¹⁶

In the continued discussion during the Commission's Second Session, the interaction between the parallel drafting processes of the Declaration and the Convention became evident. Mr. Dehousse (Belgium) with the support of General Romulo (Philippines) and Lord Dukeston (United Kingdom) proposed an amendment with regard to the Nuremberg¹¹⁷ and Tokyo War Crime Trials, to be inserted after the first paragraph of the Working Group's draft article: "This provision shall not, however, preclude the trial and conviction of persons who have committed acts which, at the time of their commission, were regarded as criminal by virtue of the general principles of law recognised by civilized nations."¹¹⁸ It was pointed out by Professor Cassin that this language belonged in a convention rather than in the Declaration, but the Commission adopted the amendment to the Declaration at this stage.¹¹⁹

During the discussions in the Second Session of the Drafting Committee, from 3 to 21 May 1948, the interaction between the Covenant and the Declaration continued to be important, and the main focus of the Session was put on the Covenant. As will be seen in the following section,¹²⁰ there was also a minority text proposing to join the articles referring to the right of

115. *Id.* at 8, art. 10. It should be noted that, at this juncture, the Article also included a provision on cruel and inhuman punishment that later became Article 5 of the Declaration, but which lies beyond the scope of this article.

116. U.N. Doc. E/CN.4/57, at 8 (10 Dec. 1947).

117. The original *travaux préparatoires* consistently used the German spelling of this word.

118. U.N. Doc. E/CN.4/58 (12 Dec. 1947).

119. See *infra* text accompanying notes 120, 128–30 in which this addition is discussed again and does not appear further in the Declaration, but the words "under national or international law" covers the idea.

120. See *infra* text accompanying note 166.

a fair trial and the protection from arbitrary arrest.¹²¹ In practice, the Committee ended up forwarding to the Third Session of the Commission a wording identical to the one adopted by the Second Session of the Commission.

Accordingly, the Second Session of the Committee submitted the following wording to the Third Session of the Commission, which took place from 24 May to 18 June 1948:

1. Any person is presumed to be innocent until proved guilty. No one shall be convicted or punished for crime or other offense except after fair public trial at which he has been given all guarantees necessary for his defence. No person shall be held guilty of any offense on account of any act or omission which did not constitute such an offense at the time when the offense was committed, nor shall he be liable to any greater punishment than that prescribed for such offense by the law in force at the time when the offense was committed.

2. Nothing in this article shall prejudice the trial and punishment of any person for the commission of any act which, at the time it was committed, was criminal according to the general principles of law recognized by civilized nations.¹²²

The United Kingdom together with India also submitted an alternative proposal to the Commission's Third Session, which was substantially shorter: "No one shall be held guilty of any offense on account of any act or

121. U.N. Doc. E/CN.4/95, at 6, art. 8 (21 May 1948). The alternative article combined the substance of Articles 6, 7, and 8 through the following wording:

1. No one may be arbitrarily deprived of his liberty. Arrest, detention or imprisonment may be allowed only according to pre-existing law and in accordance with due process.

2. Every one who has been deprived of his liberty has the right to be promptly informed of the reasons for his detention. Every one placed under arrest, detention or imprisonment shall have the right to immediate judicial determination of the legality of any detention to which he may be subject and to trial within a reasonable time or to release.

3. No one shall be imprisoned merely on the grounds of inability to meet a contractual obligation.

4. Every one has the right to compensation in respect of any unlawful arrest or deprivation of liberty.

5. The right and obligations of each person and the criminal accusations against him must be determined or judged by independent and impartial tribunals, before which tribunals all persons are equal.

6. Every one accused of an offense must be judged within a reasonable time by courts established beforehand and in accordance with pre-existing law in a public trial. The foregoing provision shall not prejudice the trial and punishment of any person for the commission of any act which, at the time it was committed, was criminal according to the general principles of law recognized by civilized nations. During the trial, every one is entitled to:

(a) the right to a fair hearing;

(b) the right, in all criminal cases, to be presumed innocent until proved guilty; and

(c) the right of defence. When any person who does not know the national language is prosecuted, he shall be assured full knowledge of all the material in the case through an interpreter and shall also have the right to address the court in his native language.

Id. The text was forwarded even though the Drafting Committee rejected it by a vote of two in favor, three against, and two abstaining.

122. U.N. Doc. E/CN.4/95, at 6, art. 8 (21 May 1948). The article also contained a third paragraph referring to the protection from torture, or cruel or inhumane punishments.

omission which did not constitute such an offense at the time when it was committed.”¹²³ Mr. Wilson (United Kingdom) explained the proposed omission in the United Kingdom-Indian version of a large portion of the content of this article. For example, as to the principle of non-retroactivity pertaining to the punishment, Mr. Wilson argued that it sometimes might be “. . . unwise to permit offenders to weigh the pre-established penalty against the profits they hope to make.”¹²⁴ Furthermore, he stated that the question of penalty was not a fundamental human right and, therefore, should be considered on a different basis.

A number of delegates¹²⁵ expressed their support for retaining the second paragraph of the Committee’s proposal and emphasized its importance with regard to the Nuremberg trials.¹²⁶ In order for the Commission to take into account the views expressed, a sub-committee was appointed to reformulate the article, consisting of Mr. Wilson (United Kingdom), Mrs. Metha (India), Professor Cassin, Dr. Chang (China), and Mr. Vilfan (Yugoslavia). There are no records of their meeting, but they produced a proposal that was very close to the wording adopted by the Commission as the final version:

1. Everyone is presumed to be innocent until proved guilty according to law (in a public trial at which he has had all guarantees necessary for his defence).
2. No one shall be held guilty of any offense on account of any act or omission which did not constitute an offense, under national or international law, at the time when it was committed.¹²⁷

In the French version of the sub-committee text, the word “*accusée*” was used to modify “Everyone” in the first paragraph of the article. Accordingly, the Commission’s Third Session decided to add the words “charged with a penal offense” after “Everyone,” so that the English and the French texts would be in complete agreement.¹²⁸ This amendment was also added to emphasize that the article dealt with criminal law. The continued discussion revolved primarily around the words put within parentheses¹²⁹ and the understanding of international law.

123. U.N. Doc. E/CN.4/99, at 3, art. 8 (24 May 1948).

124. U.N. Doc. E/CN.4/SR.54, at 13 (1 June 1948).

125. Mr. Bienenfeld (World Jewish Congress), Mr. Hood (Australia), Mr. Lebeau (Belgium), and Mr. Vilfan (Yugoslavia).

126. U.N. Doc. E/CN.4/SR.54, at 15, 16 (1 June 1948). At this meeting, the future Article 5 received its final wording, on the proposal of Mr. Lebeau (Belgium): “No one shall be subjected to torture, or to cruel, inhuman or degrading treatment or punishment.”

127. U.N. Doc. E/CN.4/SR.55, at 13 (2 June 1948).

128. *Id.*

129. Although the draft uses parentheses, the members of the Commission referred to this text as in “brackets” to reflect its provisional character.

With regard to the right to a public trial in the parenthetical phrase, Mr. Pavlov (USSR) urged an exception as prescribed by law with regard to public morals and national security. He also noted his understanding that the accused was entitled to the guarantees necessary for his defense, whether his trial was public or *in camera*.¹³⁰ The Commission decided by a vote to delete the words within parenthesis,¹³¹ but in the following meeting the Commission decided to adopt a joint amendment proposed by the representatives from the Soviet Union, France, and Lebanon: "Trials shall be public."¹³²

The Commission also discussed their understanding of the words "international law" in the second paragraph. Mr. Lebeau (Belgium) referred to the Nuremberg and Tokyo trials and expressed his concern that the phrase "international law" might be interpreted narrowly, to include only written law found in conventions. Therefore, he proposed the broader wording "general principles of international law." Mr. Wilson (United Kingdom), however, pointed out that the term international law as defined in Article 38 of the Statute of the International Court of Justice,¹³³ was not confined to written instruments. It was based on international conventions, international customs, recognized principles, judicial decisions, and the teachings of the most highly qualified publicists of various nations.¹³⁴ The Commission accepted the British understanding of the words "international law," when adopting the second paragraph of the article.¹³⁵

The Commission adopted and submitted, through the Economic and Social Council, to the Third Committee, which met from 30 September to 7 December 1948, the following wording:

1. Everyone charged with a penal offense has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all guarantees necessary for his defence.
2. No one shall be held guilty of any offense on account of any act or omission which did not constitute an offense, under national or international law, at the time when it was committed.¹³⁶

130. U.N. Doc. E/CN.4/SR.55, at 14 (2 June 1948).

131. *Id.* at 16. The words "in a public trial at which he has had all guarantees necessary for his defence" were deleted with eight votes in favor, six against, and two abstaining.

132. U.N. Doc. E/CN.4/SR.56, at 3 (2 June 1948), adopted with 10 votes for, one against, and five abstentions.

133. Statute of the International Court of Justice, Ch. II, art. 38, *annexed to U.N. CHARTER, signed 26 June 1945*, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153 (*entered into force* 24 Oct. 1945).

134. U.N. Doc. E/CN.4/SR.56, at 6 (2 June 1948).

135. *Id.* Twelve votes in favor to none against, and three abstentions.

136. U.N. Doc. A/777, at 4, art. 12 (7 Dec. 1948); U.N. Doc. A/C.3/278 (14 Oct. 1948). Paragraph 1 was adopted with seven votes in favor to four against, and five abstaining. U.N. Doc. E/CN.4/SR.56, at 3 (2 June 1948). Paragraph 2 was adopted with 12 votes in favor to none against, and three abstaining. *Id.* at 7.

When Article 11 (then Article 9) was submitted to the Third Committee of the General Assembly, several Commission members proposed amendments.¹³⁷ The Third Committee adopted two amendments correcting the French version of the text¹³⁸ and two substantive amendments discussed below.

Mr. De La Ossa (Panama) put forward an amendment proposing a new second paragraph protecting the individual from *ex post facto* laws with the following new wording of the second paragraph.

No one shall be held guilty of any offense on account of any act or omission which did not constitute an offense, under national or international law, at the time when it was committed. Neither can anyone be imposed a heavier penalty than the one that was applicable at the time the offense was committed.¹³⁹

The Third Committee accepted the Panamanian proposal with a minor revision in diction and adopted the following second paragraph:

No one shall be held guilty of any offense on account of any act or omission which did not constitute an offense, under national or international law, at the time when it was committed, *nor shall a heavier penalty be imposed* than the one that was applicable at the time the offense was committed.¹⁴⁰

The second amendment was put forward by Mrs. Roosevelt on behalf of the United States to clarify that the article and particularly the second paragraph related to criminal matters only.¹⁴¹ This objective was achieved by inserting the word "penal" before the word "offense" each time it was used in the second paragraph.¹⁴² With regard to this amendment, Mr. Contoumas (Greece) suggested the use of the expression "*acte délictueux*" instead of the word "*infraction*" in the French version because the latter would have covered not only criminal offenses but also possibly civil matters.¹⁴³ The US amendment, with the Greek change in translation, was adopted by the Third Committee.¹⁴⁴

Count Carton de Wiart (Belgium), fearing that the adoption of the second paragraph of the article would render the Nuremberg judgments

137. U.N. Doc. A/C.3/278 (14 Oct. 1948).

138. France, U.N. Doc. A/C.3/SR.111-16, *supra* note 63 (referring to U.N. Doc. A/C.3/244); Greece, U.N. Doc. A/C.3/SR.111-16, *supra* note 63, at 270 (29 Oct. 1948).

139. Panama initially proposed this language as a separate article, U.N. Doc. A/C.3/220 at 2 (4 Oct. 1948), but in the Third Committee, Panama presented it as a new second paragraph. U.N. Doc. A/C.3/SR.111-16, *supra* note 63, at 265.

140. U.N. Doc. A/C.3/SR.111-16, *supra* note 63, at 269 (new language in italics).

141. *Id.* at 265 (28 Oct. 1948).

142. U.N. Doc. A/C.3/230 at 10 (6 Oct. 1948) (with reference to A/C.3/223).

143. U.N. Doc. A/C.3/SR.111-16, *supra* note 63, at 270.

144. *Id.* at 273 (29 Oct. 1948), adopted with 16 votes in favor to eight against, and 14 abstaining.

illegal, raised the issue of the judgments' relationship to the concept of nonretroactivity of law. He, however, stated that he agreed with the view that the Nuremberg trials ". . . had been based on the laws of the human conscience which were higher than any national law."¹⁴⁵ Mr. Aquino (Philippines) addressed the issue by stating that "considerations of international peace and welfare must supersede national considerations."¹⁴⁶

Mr. Pavlov (USSR) stated that there was no doubt but that "aggression and intention of aggression constituted crimes under international law."¹⁴⁷ Only Mr. Pérez Cisneros (Cuba) expressed the view that his support of the article could not be taken as a direct or indirect approval of the Nuremberg judgments.¹⁴⁸

The USSR raised another issue by proposing an amendment limiting the right to a public trial.¹⁴⁹ The objective of the proposal was to restrict the right to public trial with regard to public morality or national security. It was concluded during the discussion, however, that this proposal should be handled under the general limitations clause of Article 27, in the same fashion as had been the case for the preceding Article 8, now 10. Article 27 stated:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.¹⁵⁰

The Third Committee adopted and forwarded to the General Assembly the final wording:

1. Everyone charged with a penal offense has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.

2. No one shall be held guilty of any penal offense on account of any act or omission which did not constitute a penal offense, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offense was committed.¹⁵¹

145. *Id.* at 266 (28 Oct. 1948).

146. *Id.* at 265.

147. *Id.* at 271 (29 Oct. 1948).

148. *Id.* at 268.

149. U.N. Doc. A/C.3/278 (14 Oct. 1948).

150. UDHR, *supra* note 1, art. 29, § 2.

151. U.N. Doc. A/777 (7 Dec. 1948) at 4, art. 11; UDHR, *supra* note 1, art. 11; U.N. Doc. A/C.3/SR.111-16, *supra* note 63, at 274. Adopted with 42 votes in favor to none against, and two abstaining.

The article was adopted unanimously, without abstentions, by the General Assembly (10 December 1948).¹⁵²

B. Interpretation

During the process of drafting, this article was increasingly restricted to criminal cases. The article was not, however, limited to court proceedings but also applied to administrative hearings dealing with criminal matters.

The article forbids retroactive penalties, but most of the drafters believed that it did not preclude the punishment imposed during the Nuremberg and Tokyo trials. Accordingly, the article refers to penal offenses under national or international law. "International law" was interpreted broadly by the drafters to include international conventions, international customs, recognized principles, judicial decisions, and doctrine.

Article 11 guarantees the right to a public trial in criminal cases, but this provision must be interpreted in the light of the general limitations in the Universal Declaration, Article 29, "as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."¹⁵³ The drafters, however, understood that if cases are decided *in camera*, the sentence must be pronounced in public. That understanding was made explicit in Article 14(1) of the Civil and Political Covenant.¹⁵⁴

V. ARTICLE 9

No one shall be subjected to arbitrary arrest, detention or exile.¹⁵⁵

A. Discussion

While drafting the Secretariat Outline, the Division of Human Rights had before it a number of proposals regarding protection from arbitrary arrest, for example, the texts of the Inter-American Juridical Committee¹⁵⁶ (proposed

152. UDHR, *supra* note 1.

153. *Id.* art. 29.

154. International Covenant on Civil and Political Rights, adopted 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, art. 14(1), U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force 23 Mar. 1976).

155. UDHR, *supra* note 1, art. 9.

156. U.N. Doc. A/C.1/38, full text in U.N. Doc. E/CN.4/2 (8 Jan. 1947).

by Chile), the American Law Institute¹⁵⁷ (presented by Panama), and the text proposed by Cuba.¹⁵⁸ Latin American countries had considerable influence in drafting this article because they had previously discussed several drafts that were presented to the Division of Human Rights. The Division of Human Rights also reviewed thirty-two national constitutions containing relevant provisions.¹⁵⁹ Chile presented the Inter-American Juridical Committee text, which stated: "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*. He shall have the right to prompt and to proper treatment during the time he is in custody."¹⁶⁰

It is noteworthy that this proposal was limited to a "person accused of crime," which would have significantly limited the application of Article 9 as compared with the broad final wording. The Chilean proposal also required a "warrant duly issued"; that requirement was not expressly incorporated within Article 9, but it was probably understood within the meaning of "arbitrary" in the final text.

The text presented by Panama, emanating from the American Law Institute, stated: "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."¹⁶¹ This proposal was reflected in the Secretariat Outline but was later removed in the drafting process (during the Third Session of the Commission) from Article 9. The basic idea reappeared, however, at a very late stage in the drafting of the Declaration during the discussion on Article 8 and is also reflected in Article 9(3) and 9(4) of the Covenant on Civil and Political Rights.

Cuba proposed that the Division of Human Rights recognize "[t]he right to immunity from arbitrary arrest and to a review of the regularity of his arrest by ordinary tribunals."¹⁶² The Secretariat Outline dealt with the protection from arbitrary arrest in the two draft Articles 6 and 7. Article 6 stated:

No one shall be deprived of his personal liberty save by a judgment of a court of law, in conformity with the law and after a fair public trial at which he has had an opportunity for a full hearing, or pending his trial which must take place within a reasonable time after his arrest. Detention by purely executive order shall be unlawful except in time of national emergency.¹⁶³

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

158. U.N. Doc. E/HR/1 (23 Apr. 1946).

159. U.N. Doc. E/CN.4/AC.1/3/Add.1, at 47-58 (2 June 1947).

160. U.N. Doc. E/CN.4/2, at 7, art. 11. See art. 12 (8 Jan. 1947).

161. U.N. Doc. E/HR/3, at 7, art. 8. See art. 7 (26 April 1946).

162. U.N. Doc. E/HR/1, at 4, art. 19. See art. 18 (23 April 1946).

163. U.N. Doc. E/CN.4/AC.1/3, at 4, art. 6 (4 June 1947).

Article 7 provided that “[e]veryone shall be protected against arbitrary and unauthorized arrest. He shall have the right to immediate judicial determination of the legality of any detention to which he may be subject.”¹⁶⁴

In the temporary working group, Professor Cassin reformulated and considerably simplified the Secretariat Outline as follows: “No person may be arrested or detained save in the case provided for and in accordance with the procedure prescribed by law. Any person arrested or detained shall have the right to immediate judicial determination of the legality of the proceedings taken against him.”¹⁶⁵

In the report on the work of the First Session of the Drafting Committee, from 9 to 25 June 1947, to the Second Session of the Commission, from 2 to 17 December 1947, the Cassin proposal was slightly modified to read as follows: “No one shall be deprived of his personal liberty or kept in custody except in cases prescribed by law and after due process. Everyone placed under arrest or detention shall have the right to immediate judicial determination of the legality of any detention to which he may be subject.”¹⁶⁶ The Drafting Committee also reported an alternative second sentence suggested by Mrs. Roosevelt: “Every one placed under arrest or detention shall have the right to release on bail and if there is a question as to the correctness of the arrest shall have the right to have the legality of any detention to which he might be subject determined in reasonable time.”¹⁶⁷

In the Commission’s Working Group, Cassin noted the advantage of the proposed US wording because it mentioned the importance of giving a judgment within a reasonable time. Because his proposal included another idea inspired by the constitution of the Soviet Union, the “verification of the conditions of detention,”¹⁶⁸ he suggested including the US idea in the draft.¹⁶⁹

The Commission, during its Second Session, accepted the text proposed by Cassin in the Working Group, which included the Roosevelt addition, and adopted the following wording:

No one shall be deprived of his personal liberty or kept in custody except in cases prescribed by law and after due process. Everyone placed under arrest or detention shall have the right to immediate judicial determination of the legality

164. *Id.* art. 7.

165. U.N. Doc. E/CN.4/AC.1/W.2/Rev.1; U.N. Doc. E/CN.4/21/Annex D, at 53 (1 July 1947).

166. U.N. Doc. E/CN.4/21, at 74, art. 8 (1 July 1947).

167. *Id.* at 75.

168. U.N. Doc. E/CN.4/AC.2/SR.3, at 9 (6 Dec. 1947); U.N. Doc. E/CN.4/AC.1/3/Add. 1, at 44 (2 June 1947). The USSR Constitution Article 127: “[N]o person may be placed under arrest except by decision of a court or with the sanction of a procurator.” It is hard to tell whether this article actually served as an inspiration to Professor Cassin or if his statement is more an example of diplomacy.

169. U.N. Doc. E/CN.4/AC.2/SR.3, at 9 (6 Dec. 1947).

of any detention to which he may be subject and to trial within a reasonable time or to be released.¹⁷⁰

With regard to the adopted wording, Dr. Bienenfeld (World Jewish Congress) pointed out that the word "law" did not specify the nature of the law and that under the Nazi regime thousands of people were deprived of their liberty under perfectly valid laws. He therefore suggested that the word "law" ought to be defined as "law conforming to the principles of the United Nations."¹⁷¹

During the Second Session of the Drafting Committee (from 3 to 21 May 1948), the members disagreed as to how detailed this provision should be.¹⁷² Their difference of opinion resulted in two drafts—one identical to the text adopted by the Second Session of the Commission¹⁷³ and the other a more detailed text proposed by a minority of the Commission. The text adopted by the Committee contained four main elements: (1) no arrest or detention except in cases prescribed by law; (2) due process; (3) immediate judicial determination of the legality of detention; and (4) trial within a reasonable time or release. The minority text contained an additional four elements: (5) arrest or detention must be in accordance with preexisting law; (6) the person arrested must be informed of the reason for the detention; (7) there must be no imprisonment for inability to fulfill contractual obligations; and (8) there must be compensation for false arrest. The minority text was intended as a substitute for not only the article discussed in this section, but also the two preceding articles governing the rights to a fair trial in criminal and civil cases.¹⁷⁴

During the Commission's Third Session, from 24 May to 18 June 1948, the advocates for brevity succeeded in adopting a wording that removed most of the draft adopted by its Second Session. Mrs. Metha (India) and Mr. Wilson (United Kingdom),¹⁷⁵ supported by Mr. Chang (China),¹⁷⁶ proposed that "[n]o one shall be subjected to arbitrary arrest or detention."¹⁷⁷ The simplicity of the article was favorably received and was adopted by the Commission because the more detailed wording was considered to belong in the Covenant rather than in the Declaration.¹⁷⁸

170. *Id.* at 9; U.N. Doc. E/CN.4/57, at 7 (10 Dec. 1947). Adopted with four votes in favor to none against, and two abstaining.

171. U.N. Doc. E/CN.4/SR.36, at 3 (13 Dec. 1947). *See also* U.N. Doc. E/CN.4/AC.2/SR/3, at 9 (6 Dec. 1947).

172. U.N. Doc. E/CN.4/SR.54, at 3 (10 June 1948).

173. U.N. Doc. E/CN.4/95, at 5 (21 May 1948).

174. *Id.* at 6.

175. U.N. Doc. E/CN.4/99 (24 May 1948).

176. U.N. Doc. E/CN.4/102 (27 May 1948).

177. U.N. Doc. E/CN.4/99 (24 May 1948).

178. U.N. Doc. E/CN.4/SR.54, at 4–6 (10 June 1948), adopted with 10 votes in favor to four against, and two abstaining. It should be noted that the United Kingdom delegation

The text adopted by the Third Session of the Commission was reported to the Third Committee with a number of amendments.¹⁷⁹ Most of the proposed amendments were later synthesized into a joint detailed text, which was considered and rejected by the Third Committee. The wording of the composite or "synthesized" text was thought to belong more appropriately in the Covenant but is relevant to an understanding of the article.¹⁸⁰ The synthesized text read as follows (with the proponents in parentheses):

No one may be deprived of his freedom (Cuba, Ecuador, USSR, Uruguay), nor exiled (Cuba, Ecuador, Uruguay), except in the cases and according to the procedure prescribed by prior legislation (Cuba, Ecuador, USSR, Uruguay). Anyone deprived of his freedom has the right to be informed without delay of the grounds for his detention, to have the legality of the action taken against him confirmed without delay by a judge and also to have his case brought before the court without undue delay or to be liberated (Cuba, Ecuador, France, USSR, Uruguay). Everyone is entitled to compensation for illegal (Cuba, Ecuador, USSR, Uruguay) arrest or deprivation of liberty (Cuba, Ecuador, USSR, Uruguay). No one may be deprived of his freedom on account merely of failure to carry out obligations of a purely civil character (Cuba, Ecuador, Mexico, USSR, Uruguay) or violation of a work contract (Cuba, Ecuador, Mexico, Uruguay).¹⁸¹

During the discussions in the Third Committee (30 September to 7 December 1948), Mr. Aquino (the Philippines) pointed out that the different amendments to the Commission's proposal went further than should be included in the Declaration and that they belonged in the future Covenant. The word "arbitrary" was, however, crucial and possessed a "very wide and progressive historical meaning, particularly in Anglo-Saxon law."¹⁸² Therefore, he considered it important that the understanding and implication of the word "arbitrary" had to be decided by the different governments themselves. Mr. Azkoul (Lebanon) agreed with the Philippine representative as to the understanding of the word "arbitrary" and also maintained that the "governments concerned should decide the legal implications of the article."¹⁸³ Mr. Pavlov (USSR), however, considered that the use of the word "arbitrary" would open the door for "subjective interpretations" of the article, and the Cuban and the Uruguayan amendments would guarantee its concrete character. Accordingly, Mr. Pavlov

proposed the first draft of the Convention and, thus, was influential here in distinguishing between the role of the Declaration and the role of the Convention.

179. U.N. Doc. A/C.3/276 (14 Oct. 1948).

180. VERDOODT, *supra* note 1, at 123.

181. U.N. Doc. A/C.3/313 (26 Oct. 1948).

182. U.N. Doc. A/C.3/SR.111-16, *supra* note 63, at 245.

183. *Id.* at 247.

preferred a more detailed provision with less reliance on the word "arbitrary."¹⁸⁴

Mr. Davies (United Kingdom) focused on the word "arbitrary" as the key word in the article and opposed deleting the word because it would diminish the strength of the article. Since some countries might allow arbitrary arrest, he argued, "[t]he object of the article was to show that the United Nations disapproved of such practices, national legislation should be brought into line with the standards of the United Nations. Right should not derive from law, but law from rights."¹⁸⁵

Having rejected the synthesized version of the article,¹⁸⁶ the Third Committee adopted the relatively simple text reported by the Third Session

184. *Id.* at 258 (27 Oct. 1948).

185. *Id.* at 248 (26 Oct. 1948).

186. *Id.* at 252–55. The text was rejected part by part according to the following: "No one may be deprived of his freedom" was rejected by 20 votes to 14, with eight abstentions. "No one may be exiled" was rejected by 21 votes to 16, with five abstentions. "Except in the cases and according to the procedure prescribed by prior legislation" was rejected by 21 votes to 15, with four abstentions. "Anyone deprived of his freedom has the right to be informed without delay of the grounds for his detention" was rejected by 20 votes to 18, with five abstentions. The remaining votes were taken by roll-call on the request by Mr. Pérez Cisneros (Cuba). "Anyone deprived of his freedom has the right to have the legality of the action taken against him determined [confirmed] without delay by a judge and also to have his case brought before the court without undue delay or to be liberated" was rejected by 20 votes to 18, with seven abstentions. In favor: Afghanistan, Argentina, Byelorussian Soviet Socialist Republic, Chile, Colombia, Costa Rica, Cuba, Czechoslovakia, Ecuador, France, India, Mexico, Panama, Poland, Ukrainian Soviet Socialist Republic, Uruguay, USSR, Yugoslavia. Against: Australia, Bolivia, Brazil, Canada, China, Denmark, Honduras, Lebanon, Netherlands, New Zealand, Norway, Peru, Philippines, Siam, Sweden, Syria, Turkey, Union of South Africa, United Kingdom, United States. Abstaining: Belgium, Burma, Dominican Republic, Ethiopia, Greece, Saudi Arabia, Venezuela. "Everyone is entitled to compensation for illegal arrest" was rejected by 22 votes to 15, with nine abstentions. In favor: Burma, Byelorussian Soviet Socialist Republic, Chile, Colombia, Costa Rica, Cuba, Czechoslovakia, Ecuador, Mexico, Panama, Poland, Ukrainian Soviet Socialist Republic, Uruguay, USSR, Yugoslavia. Against: Australia, Bolivia, Brazil, Canada, China, Denmark, France, Honduras, India, Lebanon, Netherlands, New Zealand, Norway, Peru, Philippines, Siam, Sweden, Syria, Turkey, Union of South Africa, United Kingdom, United States. Abstaining: Belgium, Burma, Dominican Republic, Egypt, Ethiopia, Greece, Saudi Arabia, Venezuela. "Everyone is entitled to compensation for illegal deprivation of liberty" was rejected by 22 votes to 17, with seven abstentions. In favor: Afghanistan, Argentina, Byelorussian Soviet Socialist Republic, Chile, Colombia, Costa Rica, Cuba, Czechoslovakia, Dominican Republic, Ecuador, Mexico, Panama, Poland, Ukrainian Soviet Socialist Republic, Uruguay, USSR, Yugoslavia. Against: Australia, Bolivia, Brazil, Canada, China, Denmark, France, Honduras, India, Lebanon, Netherlands, New Zealand, Norway, Peru, Philippines, Siam, Sweden, Syria, Turkey, Union of South Africa, United Kingdom, United States. Abstaining: Belgium, Burma, Egypt, Ethiopia, Greece, Saudi Arabia, Venezuela. "No one may be deprived of his freedom on account merely of failure to carry out obligations of a purely civil character" was rejected by 22 votes to 17, with seven abstentions. In favor: Afghanistan, Argentina, Byelorussian Soviet Socialist Republic, Chile, Colombia, Costa Rica, Cuba, Czechoslovakia, Dominican Republic, Ecuador, Mexico, Panama, Poland, Ukrainian Soviet

of the Commission with the small addition of a reference to the protection against arbitrary exile. Mr. Carrera Andrade (Ecuador) suggested that even though the Sixth Committee was considering arbitrary exile in the context of the draft Genocide Convention, the Declaration should protect the individual from forcible expulsion from his own country. He therefore proposed to add the words "or exile" at the end of the article. The Ecuadorian amendment received widespread support in the Third Committee,¹⁸⁷ which adopted and proposed to the General Assembly the final wording: "No one shall be subjected to arbitrary arrest, detention or exile."¹⁸⁸ The article was adopted unanimously, without abstention, by the General Assembly.¹⁸⁹

B. Interpretation

The key provision in the article is the word "arbitrary." The meaning of the word was debated on a number of occasions particularly as to whether "arbitrary" would qualify particular clauses within the synthesized text. In the final text, the word "arbitrary" obviously applies to "arrest, detention or exile" and imports much of the substance in the overly detailed synthesized text.

There remains a question as to whether governments should be permitted to interpret the word "arbitrary" for themselves, as proposed by

Socialist Republic, Uruguay, USSR, Yugoslavia. Against: Australia, Bolivia, Brazil, Canada, China, Denmark, France, Honduras, India, Lebanon, Netherlands, New Zealand, Norway, Peru, Philippines, Siam, Sweden, Syria, Turkey, Union of South Africa, United Kingdom, United States. Abstaining: Belgium, Burma, Egypt, Ethiopia, Greece, Saudi Arabia, Venezuela. "No one may be deprived of his freedom on account merely of violation of a work contract" was rejected by 22 votes to 16, with eight abstentions. In favor: Argentina, Byelorussian Soviet Socialist Republic, Chile, Colombia, Costa Rica, Cuba, Czechoslovakia, Dominican Republic, Ecuador, Mexico, Panama, Poland, Ukrainian Soviet Socialist Republic, Uruguay, USSR, Yugoslavia. Against: Australia, Bolivia, Brazil, Canada, China, Denmark, France, Honduras, India, Lebanon, Netherlands, New Zealand, Norway, Peru, Philippines, Siam, Sweden, Syria, Turkey, Union of South Africa, United Kingdom, United States. Abstaining: Afghanistan, Belgium, Burma, Egypt, Ethiopia, Greece, Saudi Arabia, Venezuela.

187. U.N. Doc. A/C.3/SR.111-16, *supra* note 63, at 257. Adopted with 37 votes in favor to one against, and six abstaining. The vote was taken by roll-call on the request by Mr. Carrera Andrade (Ecuador), as follows. In favor: Afghanistan, Argentina, Australia, Belgium, Bolivia, Brazil, Burma, Byelorussian Soviet Socialist Republic, Chile, Costa Rica, Cuba, Czechoslovakia, Denmark, Dominican Republic, Ecuador, Ethiopia, Honduras, India, Lebanon, Mexico, New Zealand, Panama, Peru, Philippines, Poland, Siam, Sweden, Syria, Turkey, Ukrainian Soviet Socialist Republic, Union of South Africa, United Kingdom, United States, Uruguay, USSR, Venezuela, Yugoslavia. Against: Canada. Abstaining: China, France, Greece, Netherlands, Norway, Saudi Arabia.

188. U.N. Doc. A/777, at 4, art. 10 (7 Dec. 1948); UDHR, *supra* note 1, art. 9; U.N. Doc. A/C.3/SR.111-16, *supra* note 63, at 257, adopted with 43 votes in favor to none against, and one abstaining.

189. UDHR, *supra* note 1.

the delegates from the Philippines and Chile. Alternatively, the United Kingdom representative proposed an international meaning for the word "arbitrary" in which "national legislation should be brought into line with the standards of the United Nations."¹⁹⁰ The discussion in the Third Committee appears to lend greater support for the British approach. Each of the proposed additions in the synthesized version of this article was apparently suggested so as to forbid various sorts of governmental abuse and create uniform protections for those who are arrested, detained, or exiled. Hence, the word "arbitrary" would appear to have an objective, unitary, and global content rather than a subjective, diverse, or national content.

This interpretation is consistent with the concerns expressed during the Third Session of the Commission by Dr. Bienenfeld (World Jewish Congress). Dr. Bienenfeld wanted to be reassured that the article would forbid the Nazi laws that permitted many arbitrary arrests. Because the word "arbitrary" is to be given an international meaning, specific governments must conform their arrests to the human rights principles of the United Nations.

Even though the more detailed provisions in the synthesized version of the article were not accepted as such, the drafters of Article 9 expected that this general provision would ensure the particular procedures identified during the discussions in the Third Committee, that is to: (1) inform anyone arrested, detained, or exiled of the reason for the action; (2) have a judge verify the legality of the action and if the action was wrongful, free the detainee without delay; and (3) forbid depriving anyone of their liberty because of purely civil reasons or for having broken a work contract.¹⁹¹

VI. ARTICLE 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.¹⁹²

A. Discussion

Article 8 was introduced very late in the drafting of the Declaration. Mr. Campos Ortiz (Mexico) proposed the substance of the article as an

190. U.N. Doc. A/C.3/SR.111-16, *supra* note 63, at 248, ¶ 72 (quoting Mr. Davies (United Kingdom)).

191. VERDOODT, *supra* note 1, at 125.

192. UDHR, *supra* note 1, art. 8.

amendment to Article 6, now Article 7, when the article was discussed in the Third Committee of the General Assembly (from 30 September to 7 December 1948).¹⁹³ There was strong support for the Mexican amendment—particularly from the delegates of Latin American countries.

The strong support for this amendment arose principally from the long experience of Spain and Latin American nations with the remedy of *amparo* (or protection suit). In advocating for this new provision of the Universal Declaration, Mr. Campos Ortiz noted that *amparo* is embedded within the constitutions of most Latin American countries and the substance of *amparo* had already been introduced in Article 18 of the American Declaration of the Rights and Duties of Man¹⁹⁴ adopted during May 1948. The article in the American Declaration states: "Every person has the right to petition the government for redress of grievances or to petition in respect of any other matter of public or private interest. This right may be exercised by individual action or in conjunction with others."¹⁹⁵ Indeed, the entire American Declaration was circulated as a UN document.¹⁹⁶

Mr. Campos Ortiz proposed the following amendment to the Universal Declaration: "There should likewise be available to every person a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights."¹⁹⁷ He explained the amendment as "a statement of a fundamental right recognized by most national legislation: the right to take legal proceedings, on the basis of a prompt and simple procedure which assured protection against the acts of public authorities who violated a person's fundamental rights."¹⁹⁸

Mr. Campos Ortiz also mentioned that this issue had been discussed by the Commission at its Third Session, from 24 May to 18 June 1948, during its debate on the right to petition.¹⁹⁹ The Commission did not adopt a provision reflecting the right to petition at the time because the Commission then emphasized its character as a measure of implementation on the international level. The Commission wanted the Declaration to establish fundamental principles and not incorporate implementation mechanisms. The Mexican representative, however, pointed out that his proposal dealt with national and not international measures.

Mr. Jimenez de Arechaga (Uruguay)—followed by Mr. Santa Cruz (Chile), Mr. Perez Cisneros (Cuba), and Mr. Plaza (Venezuela)—supported

193. U.N. Doc. A/C.3/SR.111-16, *supra* note 63, at 229-43.

194. O.A.S. Res. XXX, *supra* note 57.

195. *Id.* art. 18.

196. U.N. Doc. E/CN.4/122 (10 June 1948).

197. U.N. Doc. A/C.3/266 (12 Oct. 1948).

198. U.N. Doc. A/C.3/SR.111-16, *supra* note 63, at 230.

199. U.N. Doc. E/CN.4/SR.61 & 78. See VERDOODT, *supra* note 1, at 281-87.

the article²⁰⁰ and stated that the Mexican amendment reflected both the Anglo-Saxon remedy of *habeas corpus* and the old Spanish/Latin American right of *amparo*.²⁰¹

Mr. Santa Cruz (Chile) noted that the Declaration had previously lacked an article protecting the individual against abuses by the authorities and that the proposed amendment covered that potential omission in the Declaration. He also pointed out that the text of the Declaration, as presented to the Third Session of the Commission, had contained a *habeas corpus* clause:²⁰² "No one shall be deprived of his personal liberty or kept in custody except in cases prescribed by law and after due process."²⁰³ That clause had been deleted during the Commission's Third (and last) Session; all that remained was the right to public trial.²⁰⁴

Mr. Perez Cisneros (Cuba) referred to a previous proposal of his government, resembling the Mexican amendment, which stated: "Every person should have available to him a simple, brief procedure for obtaining the protection of the courts against acts of authority that, to his prejudice, affect any of the rights established by the present Declaration."²⁰⁵ In support of the Mexican amendment to Article 6 many delegates, including the Cuban representative, wanted to emphasize this principle by adopting a separate article in the Declaration. They also thought that the right to a remedy did not fit particularly well as an amendment to the right of an individual to equality before the law.

The Mexican delegate responded to the Uruguayan and the Cuban remarks by proposing a new, separate, and shortened article: "Everyone has the right to an effective judicial remedy for acts violating his fundamental constitutional rights."²⁰⁶ The discussion on the article focused on two issues: (1) whether the judiciary should be authorized to review decisions of the executive; and (2) whether the article had any international implications.

Mr. Radevanovic (Yugoslavia) objected to the Mexican proposal because it would authorize the judicial branch to correct the executive branch of a government. Hence, he believed that the Mexican amendment would only be appropriate where there was a clear separation of governmental powers, such as for the countries in the Western Hemisphere which had adopted the American Declaration.²⁰⁷

200. *Id.* at 230-38 (23-25 Oct. 1948).

201. U.N. Doc. A/C.3/SR.111-16, *supra* note 63, at 245.

202. *Id.* at 233.

203. U.N. Doc. E/CN.4/95 at 5; part of Article 6 which became Article 9 of the Universal Declaration (21 May 1948).

204. U.N. Doc. A/C.3/SR.111-16, *supra* note 63, at 233.

205. U.N. Doc. A/C.3/310 (25 Oct. 1948).

206. U.N. Doc. A/C.3/308 (25 Oct. 1948).

207. U.N. Doc. A/C.3/SR.111-16, *supra* note 63, at 235.

Mr. Plaza (Venezuela) proposed a change in the beginning of the revised Mexican proposal, by adding the words "by the competent national tribunals."²⁰⁸ This change would have resulted in the following wording: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating his fundamental constitutional rights."

A number of the delegates (Australia, France, and the United Kingdom) suggested that the proposed amendment should not be part of the Declaration, but rather, it should be in the proposed Covenant. Mr. Grumbach (France) expressed concern that the phrase "constitutional rights" might raise issues of domestic jurisdiction; therefore, he believed that the article belonged in the proposed Covenant.²⁰⁹

Mrs. Corbet (United Kingdom) supported the French idea of transferring this article to the proposed Covenant and also objected to mentioning "the constitution," which would not apply to her country where no constitution exists. Mr. Santa Cruz (Chile) proposed a way of avoiding this problem by adding "the constitution or by law."²¹⁰

At the beginning of the next meeting of the Third Committee, Mexico, Chile, and Venezuela proposed a consolidated version of the article: "Everyone has the right to an effective judicial remedy by the competent national tribunal for acts violating the fundamental rights granted him by the constitution or by law."²¹¹ In introducing this proposal, Chairman Malik (Lebanon) noted that the word "judicial" appeared in the text by mistake and should be removed.²¹² Dr. Chang (China), however, raised an issue about the consolidated proposal. A number of countries had provincial courts that could not be considered national courts. Therefore, he suggested keeping the original wording, "an effective judicial remedy,"²¹³ instead of replacing it with "an effective remedy by the competent national tribunals. . . ."²¹⁴

Mr. Plaza (Venezuela), however, noted that Dr. Chang's suggestion could be interpreted as implying that international courts were competent to provide a remedy because the word "judicial" did not limit the provision to national courts. Mr. Pavlov (USSR) supported this argument and was opposed to the possibility of any international competence.²¹⁵ Professor Cassin suggested that the expression "competent national tribunals" included

208. *Id.* at 235.

209. *Id.* at 236–37.

210. *Id.* at 237–38.

211. U.N. Doc. A/C.3/309 (25 Oct. 1948).

212. *Id.* at 241 (26 Oct. 1948).

213. U.N. Doc. A/C.3/308 (25 Oct. 1948).

214. U.N. Doc. A/C.3/309 (25 Oct. 1948).

215. U.N. Doc. A/C.3/SR.111–16, *supra* note 63, at 242.

the competent legal organs of a State, which might permit remedies not only for citizens but also for foreigners.²¹⁶

The Chairman (Malik, Lebanon) put the Mexican, Chilean, and Venezuelan proposal²¹⁷ (omitting the word "judicial") to a vote, and it was accepted with forty-six in favor, none against, and three abstaining.²¹⁸ The General Assembly adopted Article 8 unanimously, without abstention.²¹⁹

B. Interpretation

Article 8 was derived from the extreme simplification of Article 9. Originally, Article 9 contained a *habeas corpus* provision, but that wording was removed as a part of the simplification. The right to a remedy reappeared in Article 8 at the initiative of the Latin American delegates and with a combination of *habeas corpus* and *amparo*. By incorporating the concept of *amparo*, Article 8 confers a right to a remedy not only for persons who are detained, but also for all the other rights conferred on the individual by the constitution or by law.

Robinson suggested that there is a difference between Article 8 and Article 7.²²⁰ Article 7 provides for "equal protection of the law . . . [and] against any discrimination in violation of this Declaration. . . ."²²¹ Article 8 provides a right to an effective remedy "for acts violating the fundamental rights granted him by the constitution or by law."²²² Robinson noted the absence of a reference to the Declaration in Article 8. He also referred to the exchange between the British and the Chilean delegates during the drafting process, which appears to focus on national law. Hence, Robinson suggested that Article 8 has a more restricted scope of application and creates the right to petition against a violation of a constitutional or national legal right but does not create a means of enforcing the rights in the Declaration.²²³ The word "law," however, may include international law.

Another issue raised by Robinson is the question of how to interpret the

216. *Id.*

217. Professor Cassin proposed the final French wording to straighten out some linguistic difficulties in the translation: "*Toute personne a droit à un recours effectif devant les juridiction nationales compétentes contre les actes violant les droits fondamentaux qui lui sont reconnus par la Constitution ou par la loi.*" U.N. Doc. A/C.3/309 Rev.1 (25 Oct. 1948); VERDOODT, *supra* note 1, at 118.

218. U.N. Doc A/C.3/309 Rev.1, at 243 (26 Oct. 1948).

219. UDHR, *supra* note 1.

220. ROBINSON, *supra* note 99, at 112.

221. UDHR, *supra* note 1, art. 7.

222. *Id.* art. 8.

223. ROBINSON, *supra* note 99, at 112.

word "competent" in the article.²²⁴ The scope of the right expressed in the article would be substantially reduced if the word "competent" were interpreted to mean that the right to a remedy only existed if there were tribunals competent under national law. If no such tribunals could be found, there would not be any remedy. Such an interpretation would, however, undermine the objective of Article 8 and render it meaningless. In order for the article to be meaningful, it seems reasonable to conclude that the right to an effective remedy includes the right of access to a competent tribunal. If there exists no "competent tribunal," Article 8 requires the establishment of such a tribunal so that an effective remedy can be provided.

Interpretations and practices relevant to the understanding of Article 8 can be found in the literature on the concept of *amparo* because this article traces its roots directly from the Spanish/Latin American legal principle.²²⁵ In

224. *Id.*

225. Hector Fix Zamudio, *The Writ of Amparo in Latin America*, 13 *LAWYER OF THE AMERICAS* 361, 364–66 (1981). Three traditional bases or interpretations of the term *amparo* exist. First, the term was used as a synonym for "remedy" or means of challenging (*recurso o medio de impugnación*) judicial decisions. It originally appeared in the *Siete Partidas*, a compilation ordered by Alfonso the Wise (1221–1284), and greatly influenced law in the Spanish-American colonies. The introductory portion of title 23 of the third section employs the term "*amparo*" and "*amparamiento*" (protection) to designate methods for challenging court judgments. These ancient origins help explain the frequency with which the Latin American legal language used the phrase "remedy of *amparo*."

Second, the term "*amparo*" was utilized to designate a kind of injunction (*interdictos posesorios*), which in the majority of cases, according to Spanish law, would lie to protect real property rights. On occasion *amparo* was employed to safeguard personal rights as well. In the legislation and practice of the Spanish American colonies, the instruments used to protect real property rights came to be known as "royal *amparos*" (*amparos reales*) or "colonial *amparos*" (*amparos coloniales*). These safeguards were intended to protect the lands of Indian communities against confiscation by Spanish colonists, a protection entrusted by the Spanish King to the Viceroy, *Audiencias* (courts), and Captains-General. The term "*interdicto amparo*" still remains to specify the instrument for maintaining possessory rights over urban or rural properties against dispossession efforts by other private interests. It has been codified in the civil procedure of Bolivia, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and Venezuela. Bolivia and Venezuela permit the remedy to be sought from law enforcement authorities as well as from the courts. The proceeding is known as the "administrative *amparo*."

The third meaning of *amparo* relates to its role as a procedural instrument for securing the rights of the individual. Its central importance lies in its potential to enforce individual rights found in the national constitutions of Latin America. This function stems basically from the Aragonese complaint hearings, such as "the demonstration of persons" (*manifestación de las personas*). Prior to the royal absolutism of Phillip II at the end of the Sixteenth Century, this hearing achieved a wider scope of protection than did *habeas corpus*. The law of Aragon was not applied directly to the Spanish colonies even though the crowns of Castille and Aragon were united by the marriage of Isabel and Ferdinand in 1469. It was only through the Law of the Indies, created essentially under Castilian law, that the Aragonese practices were known to the colonial jurists and lawyers. By that time, those procedures had acquired a prestige, especially in regard to the legendary role of the *Justiciar* (*Justicia Mayor*), a kind of royal ombudsman.

short, *amparo* includes the protection afforded by *habeas corpus* against illegal detention but is broader than *habeas corpus* in guaranteeing a remedy for violations of other fundamental human rights. Hence, Article 8 would include the right to challenge unconstitutional laws, to review of judicial decisions, and to petition against administrative decisions. If Article 8 relies upon its origins in *amparo*, it is not limited to official acts but may extend to abuses by non-State entities.