THE SOVIET UNION'S TREATMENT OF ITS JEWISH CITIZENRY *)

Violations of the UNESCO Convention Against Discrimination in Education and the International Convention on the Elimination of All Forms of Racial Discrimination

Alan L. KOVACS

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INTRODUCTION

Various Jewish groups, ranging from Bnai Brith to the Jewish Defense League, have made allegations about the mistreatment by the Soviet Union of its Jewish citizens. They claim that the Soviet Union has embarked on anti-religious and anti-Zionist campaigns which involve a multitude of practices. It is alleged : that there is **discrimination** against Jews in the **party's** apparatus, in the upper echelons of the **military,** and in admission to the institutions of **higher education.** Thus, most roads to advancement are blocked, namely the party and the university. It is forther alleged that Jews are not afforded due process of law as guaranteed by the Soviet Constitution, and are punished more severely for petty crimes than others convicted of similar crimes ; that Jews are not allowed to study in schools taught in their native tongue, as peoples of other minorities are allowed ; that there is no program for the restoration of Jewish cultural life, and no Jewish theaters or paper. Yiddish publishing is supposedly limited to a single bi-monthly journal. The

(*) Alan L. Kovacs studeert aan de Columbia School of Law te New York. Hij schreef dit artikel, oorspronkelijk een seminariewerk voor Prof. Farer, speciaal voor de Columbia Journal of Transnational Law. Jura Falconis publiceert dit artikel in het kader van een samenwerkingsakkoord met het Amerikaanse tijdschrift. Wij hebben er de voorkeur aan gegeven deze bijdrage in de oorspronkelijke Engelse versie op te nemen. Dit heeft zijn grond. Een vertaling zou zich onttrekken aan de controle door de schrijver. Wij zijn bovendien van oordeel dat haast alle studenten van onze faculteit deze taal voldoende meester zijn om het artikel met vrucht te kunnen lezen.

Jewish population is not afforded its rights as a religious minority. Despite the fact that Jews are recognized as a religious group they are not permitted to set up any central coordinating body similar to those of various other denominations. Jews are not permitted to make pilgrimages, or make necessary religious artifacts. It is claimed that there is no adequate public Jewish religious instruction, as only a single Yeshiva exists in the Soviet Union ; that Jews are not permitted to emigrate freely ; and finally, that the Soviet Union has failed to take adequate measures against, but rather has incited popular anti-semitism (1).

The existence of such practices, in and of themselves, raises serious questions as to the moral obligations of any state, and in particular, of the Soviet Union, towards its citizens. In addition, however, they raise significant questions as to the international legal obligations of the Soviet Union. The Soviet Union has undertaken certain specific obligations, relative to human rights, as a signatory of the Unesco Convention Against Discrimination in Education (2), and the International Convention on the Elimination of All Forms of Racial Discrimination (3). Assuming the complaints registered to be true, the Soviet Union may be in violation of these treaty obligations. To analyze the nature of those obligations and the possibility of their violation is the object of this study.

I. THE UNESCO CONVENTION AGAINST DISCRIMINATION IN EDUCATION (4)

This Unesco Convention is concerned with the elimination and prevention of discrimination and the insurance of equality of opportunity in education (5). Such purpose is clearly consistent with the purported obligations of the Soviet Constitution (6). Two allegations made on behalf of Soviet Jews are relevant to this

(1) For more detailed analysis of the treatment of Jews in the Soviet Union, see: B. Tzion, *On the Jewish Question in the Soviet Union, New York Times Magazine,* May 3, 1970; W. Korey, *The Legal Position of the Jews in the Soviet Union,* MIDSTREAM, May, 1966; and Friedberg, *The State of Soviet Jewry,* COMMENTARY.

(2) Entered into force Oct. 24, 1968, 429 U.N.T.S. 6193.
As of Nov. 30, 1969, 53 member states had ratified the Convention, including the USSR [hereinaffer cited as UNESCO CONVENTION].

(3) Entered into force Jan. 4, 1969.
GA Res. 2106 A (XX), Dec. 21, 1965 ; GAOR (XX), Supp. No. 14 (A/6014).
The USSR signed this Convention on March 7, 1966, and ratified it on Feb. 4, 1969 [hereinafter cited as DISCRIMINATION CONVENTION].

(4) For the legislative history of this Convention see:
UNESCO/ED/DISC/5
E/CN. 4/Sub. 2/163-210.

(5) Unesco Convention, Preamble.

(6) *See,* Constitution, USSR, Dc. 5, 1936, Arts. 121 & 123.

convention : First, that there is discrimination against Jews in admission to the institutions of higher education ; Second, that Jewish children are not allowed to study in schools taught in their native tongue as are children of similar minority groups.

Under the Convention, the term «education» embraces all types and levels. It includes access to education, the standard and quality of education, and the conditions under which it is given (7). The definition of the term «discrimination» is based on the main factors included in the Declaration of Human Rights (8). Thus, it «includes any distinction, exclusion, limitation, or preference which, being based on race, color, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education ...» (9).

The Special Committee of government experts had adopted this objective formule so that it could not be interpreted as necessitating proof of intention, and of a cause and effect relationship, which would be difficult to establish (10).

Higher education would seem to be embraced within the term «education», and a distinction made between Jews and others, whether based on language, religion, or national origin, would seem to be embraced by the term «discrimination». Art. 1 (a) clearly makes discriminatory any distinction so based which has the effect of «depriving any person or group of persons of access to education of any type or any level». Article 3, which deals with the specific undertakings of state, directed towards «prevention» as well as «elimination» of discrimination (11), makes it mandatory upon the Soviet Union «to insure by legislation where necessary, that there is no discrimination in the admission of pupils to educational institutions» (12).

Although the essential purpose of the article really is to bind member states to discharge «in fact» the obligation set out in Article 3 (13), such obligation may be discharged by the Soviet Union if it can be shown that she is seeking to or has in fact enacted relevant legislation. However, notwithstanding such legislative action, there may still be a violation of the convention for not abrogating any administrative instructions or not discontinuing any administrative practices which involve discrimination in edu-

(7) UNESCO CONVENTION, Art. I (2). *See also,* Report of the Special Committee of Government Expert, E/CN. 4/Sub. 2/210, Annex 2, at 18]hereinafter cited as SPECIAL COMMITTEE].
(8) SPECIAL COMMITTEE, at 18.
(9) UNESCO CONVENTION, Art. I (I).
(10) SPECIAL COMMITTEE, at 19.
(11) *Id.* at 20.
(12) UNESCO CONVENTION, Art. 3 (b).
(13) SPECIAL CONVENTION, at 20.

cation (14). Further, under Article 4, the Soviet Union «undertakes to formulate, develop, and apply a national policy which ... will tend to promote equality of opportunity and of treatment in the matter of education and in particular : (a) To ... make higher education equally accessible to **all** on the basis of individual **capacity**». Merely by contrasting the precatory language of Article 4 with the obligatory language of Article 3, it is evident that a mere showing of discrimination in admission to institutions of higher education would not justify a finding of violation of the former article.

The question of the right under the Unesco Convention of Soviet Jews to have their children educated in schools taught in their native language presents an even more complicated problem. There is, in the first instance, a commendation that primary education be free and compulsory and secondary educations in its different forms generally available and accessible to all (15). Then, Article 5 states :

> 1. The States Parties to this Convention agree that :
> (c) It is essential to recognize the right of members of national minorities to carry on their own educational activites, including the maintenance of schools and, depending on the educational policy of each State, the use or the teaching of **their own** language, provided however :
> (i) That this right is not exercised in a manner which prevents the members of these minorities from understanding the culture and language of the community as a whole and from participating in its activities, or which prejudices national sovereignty ;
> (ii) That the standard of education is not lower than the general standard laid down or approved by the competent authorities ; and
> (iii) That attendance at such schools is optional.

The nature of the obligations imposed by Article 5 is defined in paragraph 2 of that article, which reads :

> 2. The States Parties to this Convention undertake to take all necessary measures to ensure the application of the principles enunciated in paragraph 1 of this Article.

Thus, Article 5 is clearly not as explicit as Article 3 in imposing obligations upon Member States. Nevertheless, the obligatory nature of this article is not necessarily negated. Whereas in the original text the States Parties only undertook «to give full weight to the principles set forth in the preceeding paragraph in the application of this Convention» the Committee, bearing in mind the capital importance of these principles, stipulated that «States Parties to

(15) *Id.*, Art. 4 (a).
(14) UNESCO CONVENTION, Art. 3 (a).

this convention undertake to take all necessary measures to insure the application of the principles enunciated in paragraph 1 of this article» (16). This change was also accepted by the Working Party on the Draft Convention (17), and thus became the actual text.

Another problem arises from the fact that Article 5 (1) (c) affords the rights only to «members of **national** minorities». The question presented is whether or not Soviet Jews are indeed embraced by this term for purposes of the right. Under the normal definition, which requires such national minorities to have a territorial base (18), the answer is clearly in the negative. However, the debate over this provision by the Special Committee suggests that it believed **all** minorities, other than imigrant minorities, were embraced (19). There was also discussion by the Committee over the meaning to be ascribed to the term «minorities», during which it was pointed out that the Sub-commission on Prevention of Discrimination and Protection of Minorities itself had not been able to arrive at an adequate definition. The Committee then decided upon «national minorities» in preference to «ethnic or linguistic minorities» (20). Along with the general definition of national minority, this affirmative preference might create a strong presumption that Jews are not to be afforded such right. An amendment to add the words «ethnic and linguistic» was later rejected by the Working Party by 6 votes to 1, with 8 abstentions. At that point it was suggested to the Working Party that the definition of the concept of minority thereby fell back on the interpretation of the State in which the minority - or the persons who claimed to constitute it - were resident (21).

Still another barrier to the enforcement of this right by Soviet Jews is that the phrase «the use or the teaching of their own language» is modified by the phrase «depending on the educational policy of each state». The phrase «depending on the national policy of each state», recommended by the Special Committee, was rejected because that form gave too much freedom to the state. A more objective test, embraced by the words «depending on particular circumstances» as also rejected. Thus, if the Soviet Union could show that its «educational policy» is **not** to permit the use or the

(16) SPECIAL COMMITTEE, at 21.

(17) Report of the Working Party on the Draft Convention and Recommendations Against Discrimination in Education, E/CN. 4/Sub. 2/210, Annex 3, at 30 [hereinafter cited as WORKING PARTY].

(18) KORVEY, supra note 1, at 4.

(19) SPECIAL COMMITTEE, at 22. There was a lengthy discussion on this matter during which some delegates pointed out that it was neither desirable nor possible to accord immigrant minorities the right to open schools in which teaching would be given in their mother tongues. It was suggested that a distinction be drawn between the rights of minorities who have always been regarded as such, in particular by the state within whose territory they live, and those who arrive as immigrants.

(20) *Id.* at 22.

(21) WORKING PARTY, at 32.

teaching of their own language in a state school by the minority class to which the Soviet Jews belong, than there is no violation (23).

Finally, it must be recognized that the right to use a particular language is also qualified by conditions specifically laid down in the Convention. Even assuming that Soviet Jews are a «national minority» within the purview of Soviet Law, and that it is Soviet «educational policy» to afford the right to such groups, the Soviet Union would still have two additional defenses to discrimination against Jews in particular.

First, it might be asserted the right would be exercised in a manner which prevented Jews from understanding the culture and language of the community as a whole or which prejudiced national sovereignty (23). Second, it could be asserted that by permitting this practice, the standard of education becomes lower than the general standard laid down by the competent authorities (27). One must indeed ask if those able to teach in the native language of Soviet Jews are also qualified to teach according to the prescribed standards.

II. THE U.N. CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMATION (25)

This U.N. Convention is based upon the considerations that «all human beings are born free and equal in dignity and rights

(22) It is worthy to note here the «Belgium Linguistics» Case, Legal News Council of Europe C (68) 27, July 23, 1968: The European Court of Human Rights dealt with a complaint by a group of French-speaking Belgian citizens that they had been denied certain rights to be educated in their own languages by the state of Belgium in violation of Art. 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Court decided that the principle of equality of treatment was only violated where distinctions made between one group and another had no «objective and reasonable basis». More important, for purpose of this study, the Court held that the Convention had been violated by Belgium insofar as certain French-speaking children living in a Dutch unilingual region had been refused access to French-language schools in the same communes where Dutch-speaking children living in a French-unilingual region had access to Dutch language schools.

(23) UNESCO CONVENTION, Art. 5 (I) (c) (i).

(24) *Id.*, Art. 5 (I) (c) (ii).

(25) For the legislative history of this Convention see:

1. Report of the 16 th Session of the Sub-Committee on the Prevention of Discrimination and Protection of Minorities, Jan. 13-31, 1964, U.N. Doc. E/CN. 4/873.
2. Commission on Human Rights Report of the 20 th Session, Feb. 17 - Mar. 18, 1964, Economic and Social Council Official Recs., 37 sess. Supp. No. 8, U.N. Doc. E/3773.
3. Gen. Ass. 20 sess. (1965), Agenda item 58, Draft International Convention Elimination of All Forms of Racial Discrimination, Rept. of the Third Committee, Dec. 18, 1965, U.N. Doc. A/6181.

and that everyone is entitled to all the rights and freedoms set out therein (the Universal Declaration), without distinctions of any kind, in particular as to race, color, or national origin», and «that all human beings are equal before the law and are entitled to equal protection of the law against any discrimination and against any incitement to discrimination» (26). The obvious purpose of the Discrimination Convention is thus to proscribe most distinctions which result in inequality of treatment with respect to certain rights enumerated therein. If Soviet Jews are «discriminated against», this Convention is relevant.

«Racial Discrimination» is defined in Article 1. It requires that there take place a certain action or omission, described as distinction, exclusion, restriction, or preference ; that the action or omission, to come within the definition must be based on certain grounds : race, color, descent, or national or ethnic origin ; and that the action must have a certain purpose or effect : that of nullifying or impairing the recognition, enjoyment, or exercise of human rights and fundamental freedoms «in the political, economic, social, cultural or any other field of public life» (27). The all-inclusiveness of this definition becomes clear when viewed in various contexts. Although the convention deals only with «racial discrimination», these words comprise not only discrimination based on «race» in a **narrow** sense, but also discrimination on the grounds of «color, descent, or national or ethnic origin». The intent of the drafters was clearly to cover all kind of acts of discrimination among persons, as long as they were based on motivation of a racial nature, in the **broad** sense of the word.

The four kinds of acts considered discriminatory in given circumstances, distinction, exclusion, restriction, or preference, were seen as sufficient to cover all aspects of discrimination which should be taken into account (28). And, the Convention is more encompassing in proscribing such acts than the U.N. Charter which proscribes distinctions as to race, sex, language, or religion (29), or the Universal Declaration of Human Rights which adds «color, political, or other opinion, national or social origin, prosperity, birth or other status» (30). In any case, Jews inside the Soviet Union, whether considered as individuals or a group, would seem to be afforded the protection of the Discrimination Convention.

Although proscription of discrimination on the ground of

(26) DISCRIMINATION CONVENTION, Preamble.
(27) Schwelb, *The International Convention on the Elimination of All Forms of Racial Discrimination,* 1966 INT' I & COMP. LAW QUARTERLY 996, at 1001 [hereinafter cited as SCHWELB].
(28) N. Lerner, *The U.N. Convention on the Elimination of All Forms of Racial Discrimination,* at 41 [hereinafter cited as LERNER].
(29) U.N. Charter, Arts. I (3), 13 (I) (b), 55 [c], 76 [c].
(30) G.A. Res. 217, U.N. Doc. A/810 at 71 (1948).

religion has been reserved for a completely separate instrument (31), Soviet Jews need not assert their rights based on religious origin. Rather, for purposes of this Discrimination Convention, they have a right not to be discriminated against either on the basis of descent, ethnic origin, or national origin. «Descent's» normal connotation is ancestral derivation, and thus any distinction of a Jew based on his birth into a particular group would be prohibited. However, there is no indication of the situations that «descent» was intended to cover which would be distinct from the concepts of national or ethnic origin (32). Ethnic origin relates specifically to race and cultural patterns, and is recognized as being different from national origin (33). Nevertheless, because of linguistic difficulties, the term «ethnic» origin in connection with «national origin» leads to a mis-understanding which will often arise when problems of this type are dealt with on the international level (34). There are several possible meanings to the term «national origin» or «nationality». As the representative of Austria pointed out, the terms have been widely used as relating to persons who were citizens of or held passports issued by a given state, or to those having a certain culture, language and traditional way of life peculiar to a nation but who lived within another state (35). In the former instance, the terms are used in a politico-legal sense denoting membership of a state, and in the latter in a historico-biological sense denoting membership of a nation (36). There was no clear agreement as to which sense the term «national origin» was to be understood. For the practical purposes of interpretation of the Discrimination Convention therefore, the three terms «descent», «national origin», and «ethnic origin», among them cover distictions both on the ground of present or previous nationality in the «ethnographical» sense and on the grounds of previous nationality in the «politico-legal» sense of citizenship (37).

(31) Draft International Convention on the Elimination of All Forms of Religious Intolerance, U.N. Doc. E/CN. 4/800, at 53.

(32) SCHWELB, *supra* note 28, at 1003.

(33) LERNER, *supra* note 29, at 42.

(34) SCHWELB, *supra* note 28, at 1003.

(35) LERNER, *supra* note 29, at 42.

(36) SCHWELB, *supra* note 28, at 1006. The historico-biological term would also include those situations in which a politically organized nation was included within a different State and continued to exist as a nation in the social and cultural senses even without being a sovereign State. Such a classification is distinguished from an ethnic group. *See* Lerner, *supra* note 29, at 42.

(37) *Id.* at 1007. This interpretation would thus reflect the Hungarian Representative's desire to find a clear formulation prohibiting discrimination against persons who were full blown citizens of a State but had a different 'nationality' in the sense of another mother tongue, different cultural traditions, and so forth. And, see Lerner, at 43, explaining that such an interpretation would not interfere in the internal legislation of any State as far as differences in the rights of citizens and non-citizens are concerned. It would only mean that any particular nationality should not be discriminated against.

In practice, the Soviet Union maintains two different policies with respect to the status of a Jew. On one hand, the U.S.S.R. maintains that the Jewish community is not a nationality in the historical context because it lacks a distinct geographical national base (38). On the other hand, the Jewish community has a fixed legal status as a nationality ; so too do individuals born of Jewish parents. Jewish legal identity in the U.S.S.R. is a matter of strict juridical procedure. The determining legal factor is not the distinctive attributes, supposed or real, of the ethnic group, but rather the simple biological fact of having been born of Jewish parents (39). Although there is also a legal status accorded to the Jewish religious community, and participation in that legal community is, from a legal viewpoint, exclusively a voluntary act on the part of the Jew (or any citizen), there is no semantic difference between designation of a Jew by religion and a Jew by nationality. Thus the Jew often takes on the character of an objective category in which both nationality and religion are cojoined (40).

Whatever the particular categorization of Jews may be by the U.S.S.R., that anti-Semitism is considered a form of racial discrimination was made clear in the discussion of Article 111 (41). During the 20 th session of the Commission on Human Rights, the United States of America prepared an amendment to Article 111 in order to replace the words «racial segregation and apartheid» by «racial segregation, apartheid and **anti-Semitism**» (42). It was argued that anti-Semitism was a present danger, and that the vast majority of Jews shared, in addition to their religion, an historic, cultural, and linguistic past, which constituted a common ethnic origin. The Soviet Union then introduced an amendment extending the listing in the United States Proposal including and equating Zionism and colonialism with anti-Semitism, Nazism, etc. (44). Yet, it added

(38) KOREY, *supra* note 1, at 4.

(39) A decree adopted on Dec. 27, 1932, by the Central Executive Committed and the Council of Peoples' Commissars called for the creation of a «single passport system» for the USSR. The Decree stipulated that all passports were to indicate the 'nationality' of the bearer. Urban residents sixteen years of age and over were obligated to acquire passports. If both parents of the bearer are of the same nationality, that nationality is inserted on the passport. The only option is in the case of parents of different nationalities. Then the sixteen year old may select either of the two nationalities as his own. This legal categorization has particular significance for the Jews since, unlike most other nationalites, they lack a distinct geographic national base. Sees *id.* at 4.

(40) *Id.* at 6.

(41) «State particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.»
For a complete discussion of the debates, *see* LERNER, *supra* note 29, at 78-82.

(42) *Id.* at 78.

(43) U.N. Doc. E/CN. 4/SR 807.

(44) SCHWELB, *supra* note 28, at 1012.

that «all members of the Commission agreed that anti-Semitism in all its manifestations, past or present, was a repugnant form of racial discrimination, and a dangerous social and political phenomenon» (43). It was then suggested that according to the definition given in Article 1, discrimination based on ethnic origin came under «racial discrimination», and consequently, anti-semitism definitely came within the scope of the draft (44). In light of further expressions of doubt as to the desirability of any such additions (45) and in order to avoid confrontation of the various views (46), the Third Committee decided not to include in the Convention any reference to **specific** forms of racial discrimination (47). However, it was clearly not the intention of the participating delegations to exclude from the operation of the Convention specific phenomena such as anti-Semitism, but the consensus was in favor of a legal test of general scope covering them **all** without the necessity of listing them (48). Anti-Semitism thus is clearly one of the phenomena which the Convention condemns, declares punishable, and attempts to eliminate.

The fundamental obligations of the States, parties to the Convention, are enumerated within Article 11. Paragraph (1) begins with a general 'condemnation' of racial discrimination, and as such is merely promotional (49). The obligations, undertaken by State Parties, which are more than merely promotional are set forth in sub-paragraphs (a) to (d) (50). Thus the U.S.S.R., a State Party, and its subdivisions, must not themselves engage in racially discriminatory acts or practices (a) ; this involves a negative obligation, and the U.S.S.R. must ensure that all agents, on the national and local level, act in conformity with it. It must not sponsor, defend or support racial discrimination by any persons or organizations (b). This also involves a negative obligation, referring to the duty of the State to refrain from supporting discriminatory acts committed by any persons or organizations, that may or may not depend on the State (52). The U.S.S.R. is under obligation to review its governmental policies, and amend or nullify any laws or regulations which have the effect of creating or perpetuating racial discrimination (c). This is clearly an **affirmative obligation** to review and modify their own legal provisions that could be a source of racial

(45) LERNER, *supra* note 29, at 81.
(46) SCHWELB, *supra* note 28, at 1013.
(47) U.N. Doc. A/6181.
(48) SCHWELB, *supra* note 28, at 1014.
(49) Promoting a defined objective rather than an obligation to maintain a defined standard. See *id.* at 1016.
(50) *Id.* at 1016.
(51) LERNER, *supra* note 29, at 49.
(52) *Id.* at 49. «Thus, for instance, an official publishing house (Izvestia) that prints a racist book, or a local government that gives financial support to a school that engages in racial discrimination, would be violating subparagraph (b).»

discrimination (53). Finally, it «must prohibit and bring an end to, by all appropriate means, including legislation as required by circumstances, racial discrimination» (d).

This last clause is perhaps the most important and for reaching of all the substantive provisions of the Convention (54). First, it is an **«immediatly applicable»** provision, as distinct from a «promotional» provision (55). However, if there should be no racial discrimination in a country, or if the law of a country already prohibits racial discrimination, then no legislation, or at least no new legislation, is necessary. Second, it goes beyond almost any existing international instrument or draft instrument in the field (56). The term «prohibit» included therein, clearly makes it the most severe undertaking of the four subparagraphs. Nevertheless, failure to abide by the obligations of any of the four subparagraphs would be a violation of the Convention. In the context of this discussion, the U.S.S.R. might indeed be committing violations under subparagraphs a, b, or c. On the other hand, there does not seem to be any violation by the Soviet Union of its obligations under (d). Indeed, Article 123 of the 1936 Constitution of the U.S.S.R. provides :

> «Any direct or indirect restriction of the rights of, or, conversely, the establishment of any direct or indirect privileges for, citizens on account of their race or nationality ... is **punishable** by law.»

This constitutional provision is supplemented by different articles of the Criminal Code ; for example, by Article 74 of the Criminal Code of the R.S.F.S.R. which specifies that «any direct or indirect privileges» on grounds of race or nationality, will be punished by deprivation of freedom for a period of from six months to three years or by exile from two to five years.

In compliance with the fundamental obligations laid down in Article 11, the Soviet Union, by Article V, has undertaken to prohibit and eliminate racial discrimination and to guarrantee the right of everyone, notably in enjoyment of the rights expressly enumerated in the Article. The pertinent rights therein are : the right to equal treatment before the tribunals and all other organs administering justice (a) ; the right to nationality (c) (iii) ; the right

(53) *Id.* at 50.

(54) SCWELB, *supra* note 28, at 1017.

(55) *Id.* at 1017. The United Kingdom had proposed a text which did not contain the words «to prohibit», and under which each State Party would have undertaken to «adopt all necessary measures, including legislation if appropriate, for the purpose of bringing to an end all discrimination by any person, group, or organization». See U.N. Doc. E/3873, para. 108. This amendment was not accepted by the Commission, as evinced by the text itself.

(56) *Id.* at 1018. The Universal Declaration proclaims that everyone is entitled to all the rights and freedoms «set forth in it» (art. 2) and states that «all are entitled to equal protection against any discrimination in violation of this Declaration». (art. 7).

to freedom of thought, conscience, and religion (c) (vii) ; the right to freedom of opinion and expression (c) (viii) ; the right to work (e) (i) ; and the right to education and training (e) (v). Again, assuming that the allegations, referred to in the introduction could be proven, the U.S.S.R. would be in **violation** of the Convention because of its **failure** to prohibit racial discrimination in relation to the above rights.

III. REMEDIES

It is important to recognize that the validity of the law does not depend on its observance or not, or on the existence, or not, of channels for the implementation of legal obligations and rights. Observance of the law and channels for its implementation are however pertinent to the efficacy of the legal system involved. Both the Unesco Convention and the Discrimination Convention do provide for effective implementation of the legal systems which they create.

Article 6 of the Discrimination Convention first provides that :

> States Parties shall assure to everyone within their jurisdiction effective protection and remedies through the competent national tribunals and other State institutions against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Conventions, as well as the right to seek from such tribunals just and adequate reparation or statisfaction for any damage suffered as a result of such discrimination.

This article essentially incorporates into the Convention the right of everyone «to an **effective remedy** by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law» (57). It insures that the party responsible for causing injury as a result of racial discrimination, whether it be the State or a private party, should provide an effective remedy (58). Furthermore, the article implies that the internal legal system of a State Party must conform with the provisions of the Convention. Otherwise, the competent national tribunals would not be in a position to grant the required protection and remedies (59).

Pursuant to Article 8, a **Committee** on the Elimination of Racial Discrimination (referred to as the Committee) is established. A primary function of the Committee is the making of reports, recommendations, and suggestions pursuant to Article 9. Under Articles 11 to 13 however, the Committee is authorized to handle,

(57) Universal Declaration of Human Rights, *supra* note 30, Art. 8.
(58) LERNER, *supra* note 29, at 72.
(59) SCHWELB, *supra* note 28, at 1028.

with a view to their conciliation, inter-State disputes concerning the application of the Convention. If a State Party considers that another State Party is not giving effect to the provisions of the Convention, it may bring the matter to the attention of the Committee. The Committee must then transmit the communication to the State Party which, within three months, must submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been tagen (60).

If the matter is not adjusted to the satisfaction of both parties within six months, either State has the right to again refer the matter to the Committee (61). The Committee may then deal with the matter if it ascertains that all available domestic remedies have been invoked and exhausted, or it the application of the remedies is unduly delayed (62). At this point, the Conciliation Procedure begins. After the Committee has obtained and collated all the information necessary, the Chairman must appoint an **ad hoc** Conciliation Commission (referred to as the Commission) (63). The primary task of the Commission is to reach an «amicable solution of the matter on the basis of respect» for the Convention (64).

The Commission receives all information obtained by the Committee, and may also call upon the states concerned to supply any other relevant information (65). After the Commission has fully considered the matter, it then must prepare and submit to the Chairman of the Committee a report embodying its findings on all questions of fact relevant to the issue between the parties and containing such recommendations as it may think proper for the amicable solution of the dispute (66). The report of the Commission is then to be communicated to each of the States Parties to the dispute. These states, within three months, then must inform the Chairman whether or not they accept the recommendations (67). The recommendations are, however, **not mandatory** (68). Aside from the procedural requirement to report within three months, the State may be under an obligation to do what the Commission recommends since they are a party to the Convention, which is binding on them (69). After the three months period, the report of the Commission and the declarations of the States concerned are submitted to the other States Parties to the Convention (70). The

(60) DISCRIMINATION CONVENTION, Art. 11 (1).
(61) *Id.*, Art. 11 (2).
(62) *Id.*, Art. 11 (3).
(63) *Id.*, Art. 12 (1).
(64) *Id.*, Art. 12 (1) (a).
(65) *Id.*, Art. 12 (8).
(66) *Id.*, Art. 13 (1).
(67) *Id.*, Art. 13 (2).
(68) LERNER, *supra* note 29, at 90. SCHWELB, *supra* note 28, at 1041.
(69) SCWELB, *supra* note 28, at 1041.
(70) DISCRIMINATION CONVENTION, Art. 13 (3).

convention does not provide that any report shall state an opinion as to whether the facts found disclose a breach by the State of its obligations under the Convention. And, there is no provision under which the Comittee may reconsider the problem until a satisfactory solution is reached (71).

Article 14 of the Discrimination Convention further provides that the Committee may receive and consider communications from **individuals.** However, this «right to petition» arises **only** if a State Party recognized the competence of the Committee to receive communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that state party of any of the rights set forth in the Convention. This system is thus completely **optional.** If the Committee determines that the petitioner has exhaused all available domestic remedies, or that application of remedies by the State Party concerned has been unreasonable prolonged, it may then consider the communication (72).

The Committee must then confidentially bring the communication to the attention of the State Party alleged to be violating any provision of the Convention. But, identity of the petitioner is not revealed without consent (73). Within three months, the receiving State must then submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State (74). Then, the Committee considers the communications in the light of all information made available to it by the State Party concerned and by the petitioner (75), and forwards its suggestions and recommendations, if any, to the same (76). Finally, the Committee includes in its annual report a summary of the communications and, where appropriate, a summary of the explanations and statements of the State Parties concerned and of its own suggestions and recommendations (77).

In December of 1962, the General Conference of the United Nations Educational, Scientific and Cultural Organization adopted a Protocol to the **Unesco** Convention Against Discrimination in Education (78). The Unesco Protocol provided for the implementation of the Unesco Convention, and adopted procedures basically similar to those of the Discrimination Convention for the consideration of inter-State disputes. Its purpose was to institute a conciliation and good offices commission to be responsible for seeking

(71) In fact, an amendment to add such provision to paragraph 3 of Article 13 was not adopted. *See* U.N. Doc. A/C. 3/SR. 1356 : A/6181 para. 143 (c).
(72) DISCRIMINATION CONVENTION, Art. 14 (7) (a).
(73) *Id.*, Art. 14 (6) (a).
(74) *Id.*, Art. 14 (6) (b).
(75) *Id.*, Art. 15 (7) (a).
(76) *Id.*, Art. 14 (7) (b).
(77) *Id.*, Art. 14 (8).
(78) U.N. Doc. E/CN. 4/Sub 2/234, Annex 111.

the settlement of any disputes which might arise between States Parties to the Unesco Convention.

Article 1 of the Protocol provides for the establihment of a Conciliation and Good Offices Commission (referred to as the Commission), to be responsible for the amicable settlement of disputes between States Parties, concerning the application or interpretation of the Unesco Convention. If a State Party to the Protocol considers that another State Party is not giving effect to the provisions of the Convention, it may bring the matter to the attention of that State. Within three months, the receiving State must afford the complaining state an explanation of the matter concerned and references to procedures or remedies taken, pending, or available in the matter (79). If the matter is not adjusted to the satisfaction of both parties, by any procedure open to them, either State may then refer the matter to the Commission (80). Again, before dealing with the matter referred to it, the Commission must determine that all domestic remedies have been exhaused (81).

The Commission then must call upon the States concerned to supply any relevant information (82). After it has obtained all necessary information, the Commission ascertains the facts and makes itself available to the States concerned with a view to an amicable solution on the basis of respect for the Convention (83). The Commission also must draw up a report and send it to the States concerned as well as to the Director General for publication (84). If a solution has been reached the report is to be confined to a statement of the facts and of the solution reached. Otherwise, the report is to state the facts and indicate the recommendations which the Commission made with a view to conciliation (85). Finally, the Commission may recommend to the Executive Board, or the General Conference, that the International Court of Justice be requested to give an advisiory opinion of any legal question connected with a matter laid before the Commission (68).

CONCLUSION

At present, the Unesco Convention and the Discrimination Convention are clearly two sources of international law which can

(79) *Id.*, Art. 12 (1).
(80) *Id.*, Art. 12 (2). It should also be noted that this procedure does not preclude the States Parties from recourse to other procedures for settling disputes including that of referring disputes by mutual consent to the Permanent Court of Arbitration at the Hague. *See id.*, Art. 12 (3).
(81) *Id.*, Art. 14.
(82) *Id.*, Art. 16.
(83) *Id.*, Art. 17 (1).
(84) *Id.*, Art. 17 (2).
(85) *Id.*, Art. 17 (3).
(86) *Id.*, Art. 18.

be referred to for purposes of determining the legality of Soviet treatment of its Jewish citizenry. As is evident from this study, each convention points to possible violations of international law by the Soviet Union, and each seeks to afford appropriate remedies. Nevertheless, they do not themselves give rise to such violations as a result of Soviet acts or omissions related to all those freedoms to which Soviet Jews assert a right.

In the **first** instance, while the Discrimination Convention prohibits any discrimination in the enjoyment of religion (87), it does not of necessity imply the **scope** of the right. Therefore, the allegation that the Jewish population is not afforded its rights as a religious minority may have no, or minimal, legal significance. Many questions of interpretation of that right thus arise. Is the scope of the right of religion defined by the Universal Declaration of Human Rights or some other source of international law ? Does the right embrace only the individual aspect of religious freedom, or the communal aspect as well ? If it does embrace the right to worship im community with others, do these terms imply simply freedom of assembly for the purposes of worship, observance, teaching or practice, or do they also imply the right to organize on a permanent basis ? Are there any limitations upon the right which are relevant to superior state interests ?

In the **second** instance, a violation of the Discrimination Convention necessarily implies that there has been «discrimination». With respect of the rights of Jews a religious group, it might be shown that such rights were denied not as a result of discrimination, but rather because the exercise of such rights involved groups which cause harm to the health of citizens or other infringement of the person or rights of citizens, or induce citizens to refuse calls to social activity or to perform civic duties or induce minors to enter such a group (88). With respect to the right to equal protection under the laws of the Soviet Union, it has been asserted that the imprisonment for ten years of those Jews who hijacked a Soviet airliner amounts to unfair and «discriminatory» punishment. While it may be relatively simple to determine if such punishment is discriminatory, it should be noted that in the United States, such a crime carries with it a possible sentence of life in prison.

Moreover, the procedures for implementation established by

(87) DISCRIMINATION CONVENTION, Art. 5 (a) (vii). To be more explicit, the provision states :

In compliance with the fundamental obligations laid down in Article 2, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights :

(d) Other civil rights, in particular :

(vii) the right to freedom of thought, conscience and religion.

(88) USSR, Criminal Code of the RSFSR, Art. 227.

each of the Conventions do **not** provide aggrieved individuals with **adequate** remedies. The Discrimination Convention provides that the Committee may receive complaints from individuals, but only if the State Party which has allegedly committed a violation has assented to the competence of the Committee to entertain such petitions. The net effect of the «optional» provision, is that the remedies of the Discrimination Convention are unavailable unless the victim is able to get a state other than his own to make out a complaint against his government. Public opinion, of course, may be sufficient to persuade individual States Parties to made such a declaration.

The Unesco Convention and Protocol, on the other hand, do not provide for the possibility of an individual right of petition. Also, though the appropriate bodies under each Convention are called upon to take action in inter-state disputes, its action is severely limited. Under Articles 11 and 12 of the Discrimination Convention and Articles 12, 16 and 17 of the Unesco Protocol, the respective bodies are deprived of **investigative** and **fact finding** power. In other words, they have no independent power. Also, neither the Committee's nor the Commission's recommendations are obligatory. Neither is afforded the ability to consider a particular inter-state dispute until a satisfactory solution is reached.

The rendering of reports (89) however, in supplement to the other measures of implementation, may serve to make the Conventions a bit more effective. In the Discrimination Convention, the States Parties undertake to submit to the Secretary General for consideration by the Committee reports on the legislative, judicial, administrative or other measures that they have adopted and that give effect to the provisions of the Convention. The Committee also reports annually to the General Assembly on its activities and makes suggestions and general recommendations based on the examination of the reports and information received from the States Parties. Similarly, the Commission reports to the General Conference on its activities. Thus, continued violation of obligations arising under either of the Conventions may be brought before a public forum be it the General Assembly or the General Conference.

Finally, the Unesco Protocol goes a step further to provide adequate remedies. Under Article 18, the Commission itself may recommend that the International Court of Justice be requested to give an advisory opinion. In addition, Article 25 provides that any state may, declare that it agrees, with respect to any other state assuming the same obligation, to refer to the International Court of Justice, after the drafting report provided for in Article 17, any

(89) DISCRIMINATION, Art. 9. And *see,* UNESCO PROTOCOL, Art. 19, which states: The Commission shall submit to the General Conference at each of its regular sessions a report on its activities, which shall be transmitted to the General Conference by the Executive Board.

dispute covered by the Protocol on which an amicable solution has been reached in accordance with Article 17, paragraph 1. Because of the uncertain potential of these provisions, however, the measures of implementation as provided by Unesco Protocol remain, as do the measures of implementation afforded by the Discrimination Convention, something less than desirable judicial proceedings or arrangements for quasi-judicial settlement of complaints.