



INTERNATIONAL LAW  
FELLOWSHIP PROGRAMME

The Hague, The Netherlands  
22 June – 31 July 2015

INTERNATIONAL HUMAN RIGHTS LAW  
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**INTERNATIONAL HUMAN RIGHTS LAW**  
**SIR NIGEL RODLEY**

**Outline** 155

**REQUIRED READINGS** (*printed format*)

**Legal instruments and documents**

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For text, see *Charter of the United Nations and Statute of the International Court of Justice*
2. United Nations Economic and Social Council resolution 75(V) of 5 August 1947 (Communications concerning human rights) 158
3. Universal Declaration of Human Rights, 1948  
For text, see *The Core International Human Rights Treaties*, United Nations Publication, 2014, p. 3
4. United Nations Economic and Social Council resolution 728 F of 30 July 1959 (Communications concerning human rights) 160
5. International Covenant on Economic, Social and Cultural Rights, 1966  
For text, see *The Core International Human Rights Treaties*, p. 29
6. Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, 2008  
For text, see *The Core International Human Rights Treaties*, p. 43
7. International Covenant on Civil and Political Rights, 1966  
For text, see *The Core International Human Rights Treaties*, p. 57
8. Optional Protocol to the International Covenant on Civil and Political Rights, 1966  
For text, see *The Core International Human Rights Treaties*, p. 83
9. Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, 1989  
For text, see *The Core International Human Rights Treaties*, p. 89
10. United Nations Economic and Social Council resolution 1235 (XLII) of 6 June 1967 (Question of the violation of human rights and fundamental freedoms, including policies of racial discrimination and segregation and of apartheid, in all countries, with particular reference to colonial and other dependent countries and territories) 162
11. United Nations Economic and Social Council resolution 1503 (XLVIII) of 27 May 1970 (Procedure for dealing with communications relating to violations of human rights and fundamental freedoms) 166

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14.	Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (Economic and Social Council resolution 1989/65 of 24 May 1989, annex)	178
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23.	United Nations General Assembly resolution 68/268 of 9 April 2014 (Strengthening and enhancing the effective functioning of the human rights treaty body system)	236
24.	General Comment No. 35 on article 9 on liberty and security of person (adopted by the Human Rights Committee, 28 October 2014 (CCPR/C/GC/35))	242

## Case law

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## INTERNATIONAL HUMAN RIGHTS LAW

### *Course Outline*

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#### **A. Origins of International Human Rights Law**

1. United Nations Charter, especially arts. 1, 55 and 56
2. The International Bill of Human Rights
  - Universal Declaration of Human Rights
  - International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights and Optional Protocol(s)
  - Other 'core' human rights treaties

#### **B. Conceptual Challenges**

3. Civil and political rights v economic, social and cultural rights
  - Human Rights Committee General Comment 31 (2004)
  - Committee on Economic, Social and Cultural Rights General Comment 3 (1990)
  - Committee on Economic, Social and Cultural Rights General Comment 14 (2000)
4. Universality v cultural specificity
  - World Conference on Human Rights, Vienna Declaration and Programme of Action (1993), paragraphs 1 & 5
5. Vertical v horizontal obligations
  - Human rights Committee General Comment No. 31, paragraph 8
6. Relevance in armed conflict
  - ICJ, Nuclear Weapons Advisory Opinion, paragraphs 24-25
  - ICJ, Armed Activities in the Territory of the Congo (DRC v Uganda), paragraphs 215-221
  - Human Rights Committee, General Comment No. 31 (2004), paragraph 11
  - Human Rights Committee, General Comment No. 35 (2014), paragraphs 15 and 64

#### **C. Status of International Human Rights Law**

7. General International Law
  - ICJ, Barcelona Traction (Belgium v Spain), paragraphs 33-34
  - ICJ, United States Diplomatic and Consular Staff in Tehran (United States v Iran), paras. 85-86, 91
8. *Jus cogens*? Eg, prohibition of torture and cruel, inhuman or degrading treatment or punishment
  - ICJ, Obligation to Prosecute or Extradite (Belgium v Senegal), paragraphs 96-105
  - ICJ, Arrest Warrant Case (DRC v Belgium), paragraphs 56-61

#### **D. Selected Other Human Rights**

9. Right to life
  - United Nations Principles on the Effective Prevention and Investigation of Extra-legal, arbitrary and summary executions
  - United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials
  - United Nations Economic and Social Council Safeguards Guaranteeing the Rights of Those Facing the Death Penalty
  - Human Rights Committee, *Amirov v Russian Federation*
  - Human Rights Committee, *Thompson v St Vincent & the Grenadines*
  - Human Rights Committee, *Judge v Canada*
  - European Court of Human Rights, *McCann & Ors v United Kingdom*, paragraphs 145-214
10. Right to liberty and security of person
  - United Nations Body of Principles for the Protection of All Persons under Any Form of detention or Imprisonment
  - Human Rights Committee, General Comment No. 35 (2014)
  - Inter-American Court of Human Rights, *Velasquez Rodriguez v Honduras*
11. The state under stress: states of emergency
  - Human Rights Committee, General Comment No. 29 (2001)
  - European Court of Human Rights, *Aksoy v Turkey*, paragraphs 65-87

#### **E. The International Protection System**

12. Treaty monitoring bodies
  - the 'core' United Nations human rights treaties
  - ICJ, *Diallo case (Guinea v DRC)*, paragraphs 63-85
  - United Nations General Assembly resolution 68/268 (2014)
13. Charter-based bodies
  - United Nations Economic and Social Council resolutions 75 (V) (1947), 728F (1959), 1235 (XLII) (1967) and 1503 (XLVIII) (1970)
  - United Nations General Assembly resolution 60/251 (2006)
  - United Nations Human Rights Council resolution 5/1 (2007)
14. Treaty monitoring bodies and Charter-based bodies compared

**United Nations Economic and Social  
Council resolution 75(V) of 5 August 1947  
(Communications concerning human rights)**

of the Sub-Commission, "Examination of the concept of freedom of information"; and

(c) Takes note of chapter V of the report of the Sub-Commission, paragraph 1, "Relations with the International Telecommunications Union."

## 75 (V). Communications concerning human rights

*Resolution of 5 August 1947<sup>1</sup>*

*The Economic and Social Council,*

Having considered chapter V of the report of the first session of the Commission on Human Rights concerning communications (document E/259),

Approves the statement that "the Commission recognizes that it has no power to take any action in regard to any complaints concerning human rights";

Requests the Secretary-General

(a) To compile a confidential list of communications received concerning human rights, before each session of the Commission, with a brief indication of the substance of each;

(b) To furnish this confidential list to the Commission, in private meeting, without divulging the identity of the authors of the communications;

(c) To enable the members of the Commission, upon request, to consult the originals of communications dealing with the principles involved in the promotion of universal respect for and observance of human rights;

(d) To inform the writers of all communications concerning human rights, however addressed, that their communications have been received and duly noted for consideration in accordance with the procedure laid down by the United Nations. Where necessary, the Secretary-General should indicate that the Commission has no power to take any action in regard to any complaint concerning human rights;

(e) To furnish each Member State not represented on the Commission with a brief indication of the substance of any communication concerning human rights which refers explicitly to that State or to territories under its jurisdiction, without divulging the identity of the author;

Suggests to the Commission on Human Rights that it should at each session appoint an *ad hoc* committee to meet shortly before its next session for the purpose of reviewing the confidential list of communications prepared by the Secretary-General under paragraph (a) above and of recommending which of these communications, in original, should, in accordance with paragraph (c) above, be made available to members of the Commission on request.

<sup>1</sup> See document E/505.

la Sous-Commission, intitulé "Examen de la notion de liberté de l'information"; et

c) Prend acte du paragraphe I du chapitre V du rapport de la Sous-Commission, intitulé "Rapports avec l'Union internationale des télécommunications."

## 75 (V). Communications relatives aux droits de l'homme

*Résolution du 5 août 1947<sup>1</sup>*

*Le Conseil économique et social,*

Ayant examiné le chapitre V, relatif aux communications, du rapport de la première session de la Commission des droits de l'homme (document E/259),

Approuve la déclaration aux termes de laquelle "la Commission estime n'être habilitée à prendre aucune mesure au sujet de réclamations relatives aux droits de l'homme";

Prie le Secrétaire général

a) De dresser, avant chaque session de la Commission, une liste confidentielle des communications reçues qui concernent les droits de l'homme, comprenant un bref aperçu de la teneur de chacune;

b) De communiquer cette liste confidentielle à la Commission, à huis clos, sans divulguer l'identité des auteurs des communications;

c) De permettre aux membres de la Commission, sur leur demande, de consulter les originaux des communications traitant des principes qui sont à la base du respect universel des droits de l'homme;

d) De faire savoir aux auteurs de toute communication relative aux droits de l'homme, sous quelque forme qu'ils l'aient adressée, que leur communication a été reçue et qu'il en a été pris bonne note pour l'examiner selon la procédure fixée par l'Organisation des Nations Unies. Quand il le faudra, le Secrétaire général devra indiquer que la Commission n'est habilitée à prendre aucune mesure au sujet de réclamations relatives aux droits de l'homme;

e) De fournir à chaque Etat Membre non représenté à la Commission un bref aperçu de la teneur de toute communication relative aux droits de l'homme qui concernerait expressément cet Etat ou des territoires placés sous sa juridiction, cela sans divulguer l'identité de son auteur;

Suggère à la Commission des droits de l'homme de constituer à chaque session un comité spécial, qui se réunirait peu de temps avant la session suivante de la Commission pour examiner la liste confidentielle de communications dressée par le Secrétaire général conformément à l'alinéa a) ci-dessus et pour indiquer quelles sont celles dont l'original devrait, conformément à l'alinéa c) ci-dessus, être mis à la disposition des membres de la Commission qui en feraient la demande.

<sup>1</sup> Voir le document E/505.

**United Nations Economic and Social Council  
resolution 728 F of 30 July 1959  
(Communications concerning human rights)**

## D

### DISCRIMINATION IN RESPECT OF EMPLOYMENT AND OCCUPATION

*The Economic and Social Council,*

*Having considered* resolution 7 (XV) adopted by the Commission on Human Rights,<sup>69</sup>

1. *Notes with great satisfaction* the adoption by the International Labour Organisation of a Convention and a Recommendation concerning Discrimination in Respect of Employment and Occupation;<sup>70</sup>

2. *Invites* the Governments of States Members of the United Nations and members of the International Labour Organisation to ratify or to take other appropriate action with regard to the said Convention, and to adjust their policies to the said Recommendation.

*1088th plenary meeting,  
30 July 1959.*

## E

### MEMBERSHIP OF THE SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES

*The Economic and Social Council,*

*Having considered* resolution 11 (XV) adopted by the Commission on Human Rights,<sup>71</sup>

1. *Approves* the decision of the Commission on Human Rights to increase the membership of the Sub-Commission on Prevention of Discrimination and Protection of Minorities from twelve to fourteen;

2. *Decides* to elect the two new members of the Sub-Commission at the resumed twenty-eighth session of the Council.

*1088th plenary meeting,  
30 July 1959.*

## F

### COMMUNICATIONS CONCERNING HUMAN RIGHTS

*The Economic and Social Council,*

*Having considered* chapter V of the report of the Commission on Human Rights on its first session,<sup>72</sup> concerning communications, and chapter IX of the report of the Commission on its fifteenth session,<sup>73</sup>

1. *Approves* the statement that the Commission on Human Rights recognizes that it has no power to take any action in regard to any complaints concerning human rights;

<sup>69</sup> *Official Records of the Economic and Social Council, Twenty-eighth Session, Supplement No. 8 (E/3229), para. 214.*

<sup>70</sup> Convention No. III and recommendation No. III, see International Labour Office, *Official Bulletin*, vol. XLI, 1958, No. 2.

<sup>71</sup> *Official Records of the Economic and Social Council, Twenty-eighth Session, Supplement No. 8 (E/3229), para. 240.*

<sup>72</sup> *Ibid.*, Fourth Session, Supplement No. 3 (E/259).

<sup>73</sup> *Ibid.*, Twenty-eighth Session, Supplement No. 8 (E/3229).

### 2. *Requests* the Secretary-General :

(a) To compile and distribute to members of the Commission on Human Rights before each session a non-confidential list containing a brief indication of the substance of each communication, however addressed, which deals with the principles involved in the promotion of universal respect for, and observance of, human rights and to divulge the identity of the authors of such communications unless they indicate that they wish their names to remain confidential;

(b) To compile before each session of the Commission a confidential list containing a brief indication of the substance of other communications concerning human rights, however addressed, and to furnish this list to members of the Commission, in private meeting, without divulging the identity of the authors of communications except in cases where the authors state that they have already divulged or intend to divulge their names or that they have no objection to their names being divulged;

(c) To enable the members of the Commission, upon request, to consult the originals of communications dealing with the principles involved in the promotion of universal respect for, and observance of, human rights;

(d) To inform the writers of all communications concerning human rights, however addressed, that their communications will be handled in accordance with this resolution, indicating that the Commission has no power to take any action in regard to any complaint concerning human rights;

(e) To furnish each Member State concerned with a copy of any communication concerning human rights which refers explicitly to that State or to territories under its jurisdiction, without divulging the identity of the author, except as provided for in sub-paragraph (b) above;

(f) To ask Governments sending replies to communications brought to their attention in accordance with sub-paragraph (e) whether they wish their replies to be presented to the Commission in summary form or in full;

3. *Resolves* to give members of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, with respect to communications dealing with discrimination and minorities, the same facilities as are enjoyed by members of the Commission on Human Rights under the present resolution;

4. *Suggests* to the Commission on Human Rights that it should at each session appoint an *ad hoc* committee to meet shortly before its next session for the purpose of reviewing the list of communications prepared by the Secretary-General under paragraph 2 (a) above and of recommending which of these communications, in original, should, in accordance with paragraph 2 (c) above, be made available to members of the Commission on request.

*1088th plenary meeting,  
30 July 1959.*

**United Nations Economic and Social Council resolution  
1235 (XLII) of 6 June 1967 (Question of the violation of  
human rights and fundamental freedoms, including policies  
of racial discrimination and segregation and of apartheid, in  
all countries, with particular reference to colonial and other  
dependent countries and territories)**

mittee shall be entitled to attach to it a separate opinion. Any written or oral submission made by the parties to the case shall also be attached to the report.

#### Article XXVI

1. The Committee may receive petitions addressed to the Secretary-General of the United Nations from any person or groups of individuals claiming to be the victim of a violation of this Convention by any State Party, or from any non-governmental organization in consultative status with the Economic and Social Council of the United Nations, alleging that a State Party is not giving effect to this Convention, provided that the State Party complained of has declared that it recognizes the competence of the Committee to receive such petitions.

2. The declaration of a State Party mentioned in paragraph 1 of this article may be made in general terms, or for a particular case or for a specific period, and shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties.

3. In considering petitions submitted under this article, the Committee shall be guided as far as possible by the principles and procedures outlined in articles XVII, XVIII and XIX of this Convention.

#### Article XXVII

The Committee may recommend to the Economic and Social Council of the United Nations that the Council request the International Court of Justice to give an advisory opinion on any legal question connected with a matter with which the Committee is dealing.

#### Article XXVIII

The Committee shall submit to the Economic and Social Council of the United Nations, through the Secretary-General of the United Nations, an annual report on its activities.

#### Article XXIX

The States Parties to this Convention agree that any State Party complained of or lodging a complaint may, if no solution has been reached within the terms of article XXV, paragraph 1, bring the case before the International Court of Justice after the report provided for in article XXV, paragraph 3, has been drawn up.

#### Article XXX

The provisions of this Convention shall not prevent the States Parties to the Convention from submitting to the International Court of Justice any dispute arising out of the interpretation or application of the Convention in a matter within the competence of the Committee, or from resorting to other procedures for settling the dispute, in accordance with general or special international agreements in force between them.

### 1234 (XLII). Question of the violation of human rights and fundamental freedoms, including policies of racial discrimination and segregation and of apartheid, in all countries, with particular reference to colonial and other dependent countries and territories

*The Economic and Social Council,*

*Having considered* the report of the Commission on Human Rights on its twenty-third session,<sup>52</sup>

1. *Notes with satisfaction* the provisions of resolution 5 (XXIII) of the Commission on Human Rights,<sup>53</sup>

2. *Notes* that since the adoption of General Assembly resolution 2145 (XXI) of 27 October 1966, South West Africa is to be designated as the Territory of

<sup>52</sup> *Ibid.*, Supplement No. 6 (E/4322 and Corr.1).

<sup>53</sup> *Ibid.*, para. 350.

South West Africa under the direct responsibility of the United Nations and that wherever reference is made to this Territory in the resolutions adopted by the Commission on Human Rights at its twenty-third session and in its report on that session, it should read accordingly;

3. *Recommends* that the General Assembly continue to encourage all eligible States to sign and ratify forthwith the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenants on Human Rights and the other conventions and protocols which aim at protecting human rights and fundamental freedoms.

*1479th plenary meeting,  
6 June 1967.*

### 1235 (XLII). Question of the violation of human rights and fundamental freedoms, including policies of racial discrimination and segregation and of apartheid, in all countries, with particular reference to colonial and other dependent countries and territories

*The Economic and Social Council,*

*Noting* resolutions 8 (XXIII) and 9 (XXIII) of the Commission on Human Rights,<sup>54</sup>

1. *Welcomes* the decision of the Commission on Human Rights to give annual consideration to the item entitled "Question of the violation of human rights and fundamental freedoms, including policies of racial discrimination and segregation and of apartheid, in all countries, with particular reference to colonial and other dependent countries and territories," without prejudice to the functions and powers of organs already in existence or which may be established within the framework of measures of implementation included in international covenants and conventions on the protection of human rights and fundamental freedoms; and concurs with the requests for assistance addressed to the Sub-Commission on Prevention of Discrimination and Protection of Minorities and to the Secretary-General;

2. *Authorizes* the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities, in conformity with the provisions of paragraph 1 of the Commission's resolution 8 (XXIII), to examine information relevant to gross violations of human rights and fundamental freedoms, as exemplified by the policy of apartheid as practised in the Republic of South Africa and in the Territory of South West Africa under the direct responsibility of the United Nations and now illegally occupied by the Government of the Republic of South Africa, and to racial discrimination as practised notably in Southern Rhodesia, contained in the communications listed by the Secretary-General pursuant to Economic and Social Council resolution 728 F (XXVIII) of 30 July 1959;

3. *Decides* that the Commission on Human Rights may, in appropriate cases, and after careful consideration of the information thus made available to it, in conformity with the provisions of paragraph 1 above, make a thorough study of situations which reveal a consistent pattern of violations of human rights, as exemplified by the policy of apartheid as practised in

<sup>54</sup> *Ibid.*, paras. 394 and 404.

the Republic of South Africa and in the Territory of South West Africa under the direct responsibility of the United Nations and now illegally occupied by the Government of the Republic of South Africa, and racial discrimination as practised notably in Southern Rhodesia, and report, with recommendations thereon, to the Economic and Social Council;

4. *Decides* to review the provisions of paragraphs 2 and 3 of the present resolution after the entry into force of the International Covenants on Human Rights;

5. *Takes note* of the fact that the Commission on Human Rights, in its resolution 6 (XXIII),<sup>55</sup> has instructed an *ad hoc* study group to study in all its aspects the question of the ways and means by which the Commission might be enabled or assisted to discharge functions in relation to violations of human rights and fundamental freedoms, whilst maintaining and fulfilling its other functions;

6. *Requests* the Commission on Human Rights to report to it on the result of this study after having given consideration to the conclusions of the *ad hoc* study group referred to in paragraph 5 above.

1479th plenary meeting,  
6 June 1967.

**1236 (XLII). Question of the violation of human rights and fundamental freedoms, including policies of racial discrimination and segregation and of apartheid, in all countries, with particular reference to colonial and other dependent countries and territories**

*The Economic and Social Council,*

*Having considered* resolution 2 (XXIII), adopted by the Commission on Human Rights on 6 March 1967,<sup>56</sup>

1. *Welcomes* the decisions of the Commission on Human Rights set out in that resolution;

2. *Condemns* the Government of the Republic of South Africa for refusing to co-operate with the United Nations in expediting the work of the *Ad Hoc* Working Group of Experts established under that resolution.

1479th plenary meeting,  
6 June 1967.

**1237 (XLII). Question concerning the implementation of human rights through a United Nations High Commissioner for Human Rights or some other appropriate international machinery**

*The Economic and Social Council,*

*Recommends* to the General Assembly the adoption of the following draft resolution:

*"The General Assembly,*

*"Having considered* the recommendation contained in Economic and Social Council resolution 1237 (XLII) of 6 June 1967,

"1. *Decides* to establish a United Nations High Commissioner's Office for Human Rights, the Office to be so organized within the framework of the United Nations that the High Commissioner will possess the degree of independence and prestige

required for the performance of his functions under the authority of the General Assembly;

"2. *Instructs* the United Nations High Commissioner for Human Rights to assist in promoting and encouraging universal and effective respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion, as set forth in the Charter of the United Nations and in declarations and instruments of the United Nations or of the specialized agencies, or of intergovernmental conferences convened under their auspices for this purpose without prejudice to the functions and powers of organs already in existence or which may be established within the framework of measures of implementation included in international conventions on the protection of human rights and fundamental freedoms; in particular:

"(a) He shall maintain close relations with the General Assembly, the Economic and Social Council, the Secretary-General, the Commission on Human Rights, the Commission on the Status of Women and other organs of the United Nations and the specialized agencies concerned with human rights, and may, upon their request, give advice and assistance;

"(b) He may render assistance and services to any State Member of the United Nations or member of any of its specialized agencies or of the International Atomic Energy Agency, or to any State Party to the Statute of the International Court of Justice, at the request of that State; he may submit a report on such assistance and services with the consent of the State concerned;

"(c) He shall have access to communications concerning human rights, addressed to the United Nations, of the kind referred to in Economic and Social Council resolution 728 F (XXVIII) of 30 July 1959 and may, whenever he deems it appropriate, bring them to the attention of the Government of any of the States mentioned in sub-paragraph (b) above to which any such communications explicitly refer;

"(d) He shall report to the General Assembly through the Economic and Social Council on developments in the field of human rights, including his observations on the implementation of the relevant declarations and instruments adopted by the United Nations and the specialized agencies, and his evaluation of significant progress and problems; these reports shall be considered as separate items on the agenda of the General Assembly, the Economic and Social Council and the Commission on Human Rights, and before submitting such reports, the High Commissioner shall consult, when appropriate, any Government or specialized agency concerned, taking due account of these consultations in the preparation thereof;

"3. *Decides* that the High Commissioner shall be appointed by the General Assembly, on the recommendation of the Secretary-General, for a term of five years, and that his emoluments shall not be less favourable than those of an Under-Secretary;

"4. *Decides* to establish a panel of expert consultants to advise and assist the High Commissioner in carrying out his functions the panel shall not exceed seven in number, the members to be appointed by the Secretary-General in consultation

<sup>55</sup> *Ibid.*, para. 368.

<sup>56</sup> *Ibid.*, para. 268.



**United Nations Economic and Social Council resolution  
1503 (XLVIII) of 27 May 1970 (Procedure for dealing  
with communications relating to violations of human  
rights and fundamental freedoms)**

to report to the Commission on Human Rights at its twenty-seventh session on the measures taken to publicize the report of the *Ad Hoc* Working Group of Experts.”

*1693rd plenary meeting,  
27 May 1970.*

**1502 (XLVIII). Question of the realization of the economic, social and cultural rights contained in the Universal Declaration of Human Rights and in the International Covenant on Economic, Social and Cultural Rights, and the study of special problems relating to human rights in developing countries**

*The Economic and Social Council,*

Recalling its resolution 1421 (XLVI) of 6 June 1969,

Noting resolution 11 (XXVI) of the Commission on Human Rights,<sup>25</sup>

1. *Requests* the Special Rapporteur to complete his study as soon as possible, taking into account the views expressed at the twenty-sixth session of the Commission on Human Rights, and to submit his final report to the Commission if possible at the twenty-seventh session, but in any case no later than the twenty-eighth session in 1972;

2. *Requests* the Secretary-General to continue providing to the Special Rapporteur all assistance necessary for the early completion of the report and, in particular, to urge once again those Governments and specialized agencies which have not yet done so to submit information on the effectiveness of the methods and means used by them in the realization of economic, social and cultural rights.

*1693rd plenary meeting,  
27 May 1970.*

**1503 (XLVIII). Procedure for dealing with communications relating to violations of human rights and fundamental freedoms**

*The Economic and Social Council,*

Noting resolutions 7 (XXVI)<sup>26</sup> and 17 (XXV)<sup>27</sup> of the Commission on Human Rights and resolution 2 (XXI)<sup>28</sup> of the Sub-Commission on Prevention of Discrimination and Protection of Minorities,

1. *Authorizes* the Sub-Commission on Prevention of Discrimination and Protection of Minorities to appoint a working group consisting of not more than five of its members, with due regard to geographical distribution, to meet once a year in private meetings for a period not exceeding ten days immediately before the sessions of the Sub-Commission to consider all communications, including replies of Governments thereon, received by the Secretary-General under Council resolution 728 F (XXVIII) of 30 July 1959 with a view to bringing to the attention of the Sub-Commission those communications, together with replies

<sup>25</sup> See *Official Records of the Economic and Social Council, Forty-eighth Session, Supplement No. 5 (E/4816)*, chap. XXIII.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*, *Forty-sixth Session*, document E/4621, chap. XVIII.

<sup>28</sup> E/CN.4/976, chap. VI.

of Governments, if any, which appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms within the terms of reference of the Sub-Commission;

2. *Decides* that the Sub-Commission on Prevention of Discrimination and Protection of Minorities should, as the first stage in the implementation of the present resolution, devise at its twenty-third session appropriate procedures for dealing with the question of admissibility of communications received by the Secretary-General under Council resolution 728 F (XXVIII) and in accordance with Council resolution 1235 (XLII) of 6 June 1967;

3. *Requests* the Secretary-General to prepare a document on the question of admissibility of communications for the Sub-Commission's consideration at its twenty-third session;

4. *Further requests* the Secretary-General:

(a) To furnish to the members of the Sub-Commission every month a list of communications prepared by him in accordance with Council resolution 728 F (XXVIII) and a brief description of them, together with the text of any replies received from Governments;

(b) To make available to the members of the working group at their meetings the originals of such communications listed as they may request, having due regard to the provisions of paragraph 2 (b) of Council resolution 728 F (XXVIII) concerning the divulging of the identity of the authors of communications;

(c) To circulate to the members of the Sub-Commission, in the working languages, the originals of such communications as are referred to the Sub-Commission by the working group;

5. *Requests* the Sub-Commission on Prevention of Discrimination and Protection of Minorities to consider in private meetings, in accordance with paragraph 1 above, the communications brought before it in accordance with the decision of a majority of the members of the working group and any replies of Governments relating thereto and other relevant information, with a view to determining whether to refer to the Commission on Human Rights particular situations which appear to reveal a consistent pattern of gross and reliably attested violations of human rights requiring consideration by the Commission;

6. *Requests* the Commission on Human Rights after it has examined any situation referred to it by the Sub-Commission to determine:

(a) Whether it requires a thorough study by the Commission and a report and recommendations thereon to the Council in accordance with paragraph 3 of Council resolution 1235 (XLII);

(b) Whether it may be a subject of an investigation by an *ad hoc* committee to be appointed by the Commission which shall be undertaken only with the express consent of the State concerned and shall be conducted in constant co-operation with that State and under conditions determined by agreement with it. In any event, the investigation may be undertaken only if:

(i) All available means at the national level have been resorted to and exhausted;

(ii) The situation does not relate to a matter which is being dealt with under other procedures prescribed in the constituent instruments of, or conventions adopted by, the United Nations and the specialized agencies, or in regional con-

ventions, or which the State concerned wishes to submit to other procedures in accordance with general or special international agreements to which it is a party.

7. *Decides* that if the Commission on Human Rights appoints an *ad hoc* committee to carry on an investigation with the consent of the State concerned:

(a) The composition of the committee shall be determined by the Commission. The members of the committee shall be independent persons whose competence and impartiality is beyond question. Their appointment shall be subject to the consent of the Government concerned;

(b) The committee shall establish its own rules of procedure. It shall be subject to the quorum rule. It shall have authority to receive communications and hear witnesses, as necessary. The investigation shall be conducted in co-operation with the Government concerned;

(c) The committee's procedure shall be confidential, its proceedings shall be conducted in private meetings and its communications shall not be publicized in any way;

(d) The committee shall strive for friendly solutions before, during and even after the investigation;

(e) The committee shall report to the Commission on Human Rights with such observations and suggestions as it may deem appropriate;

8. *Decides* that all actions envisaged in the implementation of the present resolution by the Sub-Commission on Prevention of Discrimination and Protection of Minorities or the Commission on Human Rights shall remain confidential until such time as the Commission may decide to make recommendations to the Economic and Social Council;

9. *Decides* to authorize the Secretary-General to provide all facilities which may be required to carry out the present resolution, making use of the existing staff of the Division of Human Rights of the United Nations Secretariat;

10. *Decides* that the procedure set out in the present resolution for dealing with communications relating to violations of human rights and fundamental freedoms should be reviewed if any new organ entitled to deal with such communications should be established within the United Nations or by international agreement.

*1693rd plenary meeting,  
27 May 1970.*

#### **1504 (XLVIII). Report of the Commission on Human Rights**

*The Economic and Social Council*

*Takes note* of the report of the Commission on Human Rights on its twenty-sixth session.<sup>29</sup>

*1693rd plenary meeting,  
27 May 1970.*

<sup>29</sup> *Official Records of the Economic and Social Council, Forty-eighth Session, Supplement No. 5 (E/4816).*

#### **1505 (XLVIII). Activities arising out of the decisions taken by the Commission on Human Rights at its twenty-sixth session**

*The Economic and Social Council,*

*Having noted* the statement of financial implications prepared by the Secretary-General<sup>30</sup> on the decisions taken by the Commission on Human Rights at its twenty-sixth session,

1. *Decides* that the activities arising out of the decisions taken by the Commission on Human Rights at its twenty-sixth session in resolutions 8 (XXVI) and 10 (XXVI)<sup>31</sup> should be undertaken in 1970, in conformity with the relevant decisions of the Commission, bearing in mind the necessity to effect the maximum savings when allocating funds;

2. *Authorizes* the Secretary-General to inform the Advisory Committee on Administrative and Budgetary Questions that the Council, taking into account the provisions of paragraph 1 above, considers the relevant programmes and expenditures to be of an urgent nature.

*1693rd plenary meeting,  
27 May 1970.*

#### **1506 (XLVIII). Periodic reports on human rights**

*The Economic and Social Council,*

*Noting* resolution 13 (XXVI) of the Commission on Human Rights,<sup>32</sup>

*Authorizes* the *Ad Hoc* Committee on Periodic Reports on Human Rights, notwithstanding the provisions of resolution 1074 C (XXXIX) of 28 July 1965 of the Council, to submit its report to the Commission on Human Rights within one year following the receipt of the reports referred to in paragraph 6 of resolution 1074 C (XXXIX).

*1693rd plenary meeting,  
17 May 1970.*

#### **1509 (XLVIII). Allegations regarding infringements of trade-union rights**

*The Economic and Social Council,*

*Recalling* its resolution 1412 (XLVI) of 6 June 1969 in which it, *inter alia*, authorized the *Ad Hoc* Working Group of Experts to continue its investigations into the infringements of trade-union rights in the Republic of South Africa, Namibia and Southern Rhodesia,

*Also recalling* that the Council had in the same resolution, *inter alia*, requested the International Labour Organisation to prepare and forward to it a comprehensive report on the position concerning the infringements of trade-union rights in the Portuguese colonies in Africa,

<sup>30</sup> E/4816/Add.1.

<sup>31</sup> See *Official Records of the Economic and Social Council, Forty-eighth Session, Supplement No. 5, (E/4816) chap. XXIII.*

<sup>32</sup> *Ibid.*



**Safeguards guaranteeing protection of the rights of those facing  
the death penalty (United Nations Economic and Social Council  
resolution 1984/50 of 25 May 1984, annex)**

**1984/50. Safeguards guaranteeing protection of the rights of those facing the death penalty**

*The Economic and Social Council,*

*Having regard to the provisions bearing on capital punishment in the International Covenant on Civil and Political Rights,<sup>120</sup> in particular article 2, paragraph 1, and articles 6, 14 and 15 thereof,*

*Recalling General Assembly resolution 38/96 of 16 December 1983, in which, *inter alia*, the Assembly expressed its deep alarm at the occurrence on a large scale of summary or arbitrary executions,*

*Recalling also General Assembly resolution 36/22 of 9 November 1981, in which the Committee on Crime Prevention and Control was requested to examine the problem with a view to making recommendations,*

*Recalling further Council resolution 1983/24 of 26 May 1983, in which it decided that the Committee on Crime Prevention and Control should further study the question of death penalties that did not meet the acknowledged minimum legal guarantees and safeguards, as contained in the International Covenant on Civil and Political Rights and other international instruments, and welcomed the intention of the Committee that the issue should be discussed at the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders,*

*Acknowledging the work done by the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities in the areas of summary or arbitrary executions, including the reports of the Special Rapporteur,<sup>121</sup>*

*Considering the relevant views and comments of the Human Rights Committee established under the International Covenant on Civil and Political Rights,*

*Expressing its concern at the tragic incidence of arbitrary or summary executions in the world,*

*Having considered the note by the Secretary-General on arbitrary and summary executions,<sup>122</sup>*

*Guided by the desire to continue to contribute to the strengthening of the international instruments relating to the prevention of arbitrary or summary executions,*

1. *Takes note of the note by the Secretary-General on arbitrary and summary executions;*

2. *Again strongly condemns and deplors the brutal practice of arbitrary or summary executions in various parts of the world;*

3. *Approves the safeguards guaranteeing protection of the rights of those facing the death penalty, recommended by the Committee on Crime Prevention and Control and annexed to the present resolution, on the understanding that they shall not be invoked to delay or to prevent the abolition of capital punishment;*

4. *Invites the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders to consider the safeguards with a view to establishing an implementation mechanism, within*

the framework of the item of its provisional agenda<sup>123</sup> entitled "Formulation and application of United Nations standards and norms in criminal justice".

*21st plenary meeting  
25 May 1984*

**ANNEX**

**Safeguards guaranteeing protection of the rights of those facing the death penalty**

1. In countries which have not abolished the death penalty, capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences.

2. Capital punishment may be imposed only for a crime for which the death penalty is prescribed by law at the time of its commission, it being understood that if, subsequent to the commission of the crime, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

3. Persons below 18 years of age at the time of the commission of the crime shall not be sentenced to death, nor shall the death sentence be carried out on pregnant women, or on new mothers, or on persons who have become insane.

4. Capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts.

5. Capital punishment may only be carried out pursuant to a final judgement rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights,<sup>124</sup> including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings.

6. Anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals shall become mandatory.

7. Anyone sentenced to death shall have the right to seek pardon, or commutation of sentence; pardon or commutation of sentence may be granted in all cases of capital punishment.

8. Capital punishment shall not be carried out pending any appeal or other recourse procedure or other proceeding relating to pardon or commutation of the sentence.

9. Where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering.

**1984/51. Technical co-operation in crime prevention and criminal justice**

*The Economic and Social Council,*

*Recalling General Assembly resolution 36/21 of 9 November 1981, in which the Assembly urged the Department of Technical Co-operation for Development of the United Nations Secretariat and the United Nations Development Programme to increase their level of support to programmes of technical assistance in the field of crime prevention and criminal justice, and to encourage technical co-operation among developing countries,*

*Recalling also General Assembly resolution 35/171 of 15 December 1980, in which the Assembly endorsed*

<sup>120</sup> General Assembly resolution 2200 A (XXI), annex.

<sup>121</sup> E/CN.4/1983/16 and Add.1 and Corr.1; E/CN.4/1984/29.

<sup>122</sup> E/AC.57/1984/16.

<sup>123</sup> See Council resolution 1982/29, para. 1.

<sup>124</sup> General Assembly resolution 2200 A (XXI), annex.

**Body of Principles for the Protection of All Persons under Any  
Form of Detention or Imprisonment (General  
Assembly resolution 43/173 of 9 December 1988, annex)**

and co-operation among States in accordance with the Charter;

4. *Takes note* of the report of the Sub-Committee on Good-Neighbourliness,<sup>53</sup> which functioned within the Sixth Committee during the forty-third session of the General Assembly;

5. *Decides* to continue and to complete at its forty-fifth session, on the basis of the present resolution and the report of the Sub-Committee, the task of identifying and clarifying the elements of good-neighbourliness and to begin the elaboration of a suitable international document on the development and strengthening of good-neighbourliness between States within the framework of a sub-committee on good-neighbourliness;

6. *Decides* to include in the provisional agenda of its forty-fifth session the item entitled "Development and strengthening of good-neighbourliness between States".

76th plenary meeting  
9 December 1988

#### 43/172. Report of the Committee on Relations with the Host Country

*The General Assembly,*

*Having considered* the report of the Committee on Relations with the Host Country,<sup>54</sup>

*Recalling* Article 105 of the Charter of the United Nations, the Convention on the Privileges and Immunities of the United Nations<sup>55</sup> and the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations,<sup>2</sup>

*Recalling also* that the problems related to the privileges and immunities of all missions accredited to the United Nations, the security of the missions and the safety of their personnel are of great importance and concern to Member States, as well as the primary responsibility of the host country,

*Recognizing* that effective measures should continue to be taken by the competent authorities of the host country, in particular to prevent any acts violating the security of missions and the safety of their personnel,

*Conscious* of the increased interest shown by Member States in participating in the work of the Committee,

1. *Endorses* the recommendations and conclusions of the Committee on Relations with the Host Country contained in paragraph 81 of its report;

2. *Reaffirms its condemnation* of any criminal acts violating the security of missions accredited to the United Nations and the safety of their personnel;

3. *Urges* the host country to take all necessary measures to continue to prevent criminal acts, including harassment and violations of the security of missions and the safety of their personnel or infringements of the inviolability of their property, in order to ensure the existence and functioning of all missions, including practicable measures to prohibit illegal activities of persons, groups and organizations that encourage, instigate, organize or engage in the perpetration of acts and activities against the security and safety of such missions and representatives;

4. *Reiterates its request* to the parties concerned to follow consultations with a view to reaching solutions to the issues raised by certain Member States concerning the size of their missions, in accordance with the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations and in the spirit of co-operation;

5. *Urges* the host country, in the light of the consideration by the Committee of travel regulations issued by the host country, to continue to honour its obligations to facilitate the functioning of the United Nations and the missions accredited to it;

6. *Stresses* the importance of a positive perception of the work of the United Nations, expresses concern about a negative public image and, therefore, urges that efforts be continued to build up public awareness by explaining, through all available means, the importance of the role played by the United Nations and the missions accredited to it in the strengthening of international peace and security;

7. *Requests* the Secretary-General to remain actively engaged in all aspects of the relations of the United Nations with the host country and to continue to stress the importance of effective measures to avoid acts of terrorism, violence and harassment against the missions and their personnel, as well as the need for any pertinent legislation adopted by the host country to be in accord with the Agreement and its other relevant obligations;

8. *Requests* the Committee to continue its work, in conformity with General Assembly resolution 2819 (XXVI) of 15 December 1971;

9. *Decides* to include in the provisional agenda of its forty-fourth session the item entitled "Report of the Committee on Relations with the Host Country".

76th plenary meeting  
9 December 1988

#### 43/173. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

*The General Assembly,*

*Recalling* its resolution 35/177 of 15 December 1980, in which it referred the task of elaborating the draft Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment to the Sixth Committee and decided to establish an open-ended working group for that purpose,

*Taking note* of the report of the Working Group on the Draft Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,<sup>56</sup> which met during the forty-third session of the General Assembly and completed the elaboration of the draft Body of Principles,

*Considering* that the Working Group decided to submit the text of the draft Body of Principles to the Sixth Committee for its consideration and adoption,<sup>57</sup>

*Convinced* that the adoption of the draft Body of Principles would make an important contribution to the protection of human rights,

*Considering* the need to ensure the wide dissemination of the text of the Body of Principles,

<sup>53</sup> A/C.6/43/L.11; see also A/C.6/43/SC/CRP.3.

<sup>54</sup> *Official Records of the General Assembly, Forty-third Session, Supplement No. 26 and addendum (A/43/26 and Add.1).*

<sup>55</sup> Resolution 22 A (I).

<sup>56</sup> A/C.6/43/L.9.

<sup>57</sup> *Ibid.*, para. 4.

1. Approves the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the text of which is annexed to the present resolution;

2. Expresses its appreciation to the Working Group on the Draft Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment for its important contribution to the elaboration of the Body of Principles;

3. Requests the Secretary-General to inform the States Members of the United Nations or members of specialized agencies of the adoption of the Body of Principles;

4. Urges that every effort be made so that the Body of Principles becomes generally known and respected.

76th plenary meeting  
9 December 1988

#### ANNEX

#### Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

##### SCOPE OF THE BODY OF PRINCIPLES

These principles apply for the protection of all persons under any form of detention or imprisonment.

##### USE OF TERMS

For the purposes of the Body of Principles:

(a) "Arrest" means the act of apprehending a person for the alleged commission of an offence or by the action of an authority;

(b) "Detained person" means any person deprived of personal liberty except as a result of conviction for an offence;

(c) "Imprisoned person" means any person deprived of personal liberty as a result of conviction for an offence;

(d) "Detention" means the condition of detained persons as defined above;

(e) "Imprisonment" means the condition of imprisoned persons as defined above;

(f) The words "a judicial or other authority" mean a judicial or other authority under the law whose status and tenure should afford the strongest possible guarantees of competence, impartiality and independence.

##### Principle 1

All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.

##### Principle 2

Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose.

##### Principle 3

There shall be no restriction upon or derogation from any of the human rights of persons under any form of detention or imprisonment recognized or existing in any State pursuant to law, conventions, regulations or custom on the pretext that this Body of Principles does not recognize such rights or that it recognizes them to a lesser extent.

##### Principle 4

Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority.

##### Principle 5

1. These principles shall be applied to all persons within the territory of any given State, without distinction of any kind, such as race, colour, sex, language, religion or religious belief, political or other opinion, national, ethnic or social origin, property, birth or other status.

2. Measures applied under the law and designed solely to protect the rights and special status of women, especially pregnant women and nursing mothers, children and juveniles, aged, sick or handicapped persons shall not be deemed to be discriminatory. The need for, and the application of, such measures shall always be subject to review by a judicial or other authority.

##### Principle 6

No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.\* No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.

##### Principle 7

1. States should prohibit by law any act contrary to the rights and duties contained in these principles, make any such act subject to appropriate sanctions and conduct impartial investigations upon complaints.

2. Officials who have reason to believe that a violation of this Body of Principles has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial powers.

3. Any other person who has ground to believe that a violation of this Body of Principles has occurred or is about to occur shall have the right to report the matter to the superiors of the officials involved as well as to other appropriate authorities or organs vested with reviewing or remedial powers.

##### Principle 8

Persons in detention shall be subject to treatment appropriate to their unconvicted status. Accordingly, they shall, whenever possible, be kept separate from imprisoned persons.

##### Principle 9

The authorities which arrest a person, keep him under detention or investigate the case shall exercise only the powers granted to them under the law and the exercise of these powers shall be subject to recourse to a judicial or other authority.

##### Principle 10

Anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him.

##### Principle 11

1. A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.

2. A detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefor.

3. A judicial or other authority shall be empowered to review as appropriate the continuance of detention.

##### Principle 12

1. There shall be duly recorded:

(a) The reasons for the arrest;

(b) The time of the arrest and the taking of the arrested person to a place of custody as well as that of his first appearance before a judicial or other authority;

(c) The identity of the law enforcement officials concerned;

(d) Precise information concerning the place of custody.

2. Such records shall be communicated to the detained person, or his counsel, if any, in the form prescribed by law.

\* The term "cruel, inhuman or degrading treatment or punishment" should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time.

*Principle 13*

Any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively, with information on and an explanation of his rights and how to avail himself of such rights.

*Principle 14*

A person who does not adequately understand or speak the language used by the authorities responsible for his arrest, detention or imprisonment is entitled to receive promptly in a language which he understands the information referred to in principle 10, principle 11, paragraph 2, principle 12, paragraph 1, and principle 13 and to have the assistance, free of charge, if necessary, of an interpreter in connection with legal proceedings subsequent to his arrest.

*Principle 15*

Notwithstanding the exceptions contained in principle 16, paragraph 4, and principle 18, paragraph 3, communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days.

*Principle 16*

1. Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody.
2. If a detained or imprisoned person is a foreigner, he shall also be promptly informed of his right to communicate by appropriate means with a consular post or the diplomatic mission of the State of which he is a national or which is otherwise entitled to receive such communication in accordance with international law or with the representative of the competent international organization, if he is a refugee or is otherwise under the protection of an intergovernmental organization.
3. If a detained or imprisoned person is a juvenile or is incapable of understanding his entitlement, the competent authority shall on its own initiative undertake the notification referred to in the present principle. Special attention shall be given to notifying parents or guardians.
4. Any notification referred to in the present principle shall be made or permitted to be made without delay. The competent authority may however delay a notification for a reasonable period where exceptional needs of the investigation so require.

*Principle 17*

1. A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.
2. If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay.

*Principle 18*

1. A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.
2. A detained or imprisoned person shall be allowed adequate time and facilities for consultations with his legal counsel.
3. The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.
4. Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official.
5. Communications between a detained or imprisoned person and his legal counsel mentioned in the present principle shall be inadmissible as evidence against the detained or imprisoned person unless they are connected with a continuing or contemplated crime.

*Principle 19*

A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations.

*Principle 20*

If a detained or imprisoned person so requests, he shall if possible be kept in a place of detention or imprisonment reasonably near his usual place of residence.

*Principle 21*

1. It shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person.
2. No detained person while being interrogated shall be subject to violence, threats or methods of interrogation which impair his capacity of decision or his judgement.

*Principle 22*

No detained or imprisoned person shall, even with his consent, be subjected to any medical or scientific experimentation which may be detrimental to his health.

*Principle 23*

1. The duration of any interrogation of a detained or imprisoned person and of the intervals between interrogations as well as the identity of the officials who conducted the interrogations and other persons present shall be recorded and certified in such form as may be prescribed by law.
2. A detained or imprisoned person, or his counsel when provided by law, shall have access to the information described in paragraph 1 of the present principle.

*Principle 24*

A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge.

*Principle 25*

A detained or imprisoned person or his counsel shall, subject only to reasonable conditions to ensure security and good order in the place of detention or imprisonment, have the right to request or petition a judicial or other authority for a second medical examination or opinion.

*Principle 26*

The fact that a detained or imprisoned person underwent a medical examination, the name of the physician and the results of such an examination shall be duly recorded. Access to such records shall be ensured. Modalities therefore shall be in accordance with relevant rules of domestic law.

*Principle 27*

Non-compliance with these principles in obtaining evidence shall be taken into account in determining the admissibility of such evidence against a detained or imprisoned person.

*Principle 28*

A detained or imprisoned person shall have the right to obtain within the limits of available resources, if from public sources, reasonable quantities of educational, cultural and informational material, subject to reasonable conditions to ensure security and good order in the place of detention or imprisonment.

*Principle 29*

1. In order to supervise the strict observance of relevant laws and regulations, places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment.
2. A detained or imprisoned person shall have the right to communicate freely and in full confidentiality with the persons who visit the places

of detention or imprisonment in accordance with paragraph 1 of the present principle, subject to reasonable conditions to ensure security and good order in such places.

*Principle 30*

1. The types of conduct of the detained or imprisoned person that constitute disciplinary offences during detention or imprisonment, the description and duration of disciplinary punishment that may be inflicted and the authorities competent to impose such punishment shall be specified by law or lawful regulations and duly published.

2. A detained or imprisoned person shall have the right to be heard before disciplinary action is taken. He shall have the right to bring such action to higher authorities for review.

*Principle 31*

The appropriate authorities shall endeavour to ensure, according to domestic law, assistance when needed to dependent and, in particular, minor members of the families of detained or imprisoned persons and shall devote a particular measure of care to the appropriate custody of children left without supervision.

*Principle 32*

1. A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful.

2. The proceedings referred to in paragraph 1 of the present principle shall be simple and expeditious and at no cost for detained persons without adequate means. The detaining authority shall produce without unreasonable delay the detained person before the reviewing authority.

*Principle 33*

1. A detained or imprisoned person or his counsel shall have the right to make a request or complaint regarding his treatment, in particular in case of torture or other cruel, inhuman or degrading treatment, to the authorities responsible for the administration of the place of detention and to higher authorities and, when necessary, to appropriate authorities vested with reviewing or remedial powers.

2. In those cases where neither the detained or imprisoned person nor his counsel has the possibility to exercise his rights under paragraph 1 of the present principle, a member of the family of the detained or imprisoned person or any other person who has knowledge of the case may exercise such rights.

3. Confidentiality concerning the request or complaint shall be maintained if so requested by the complainant.

4. Every request or complaint shall be promptly dealt with and replied to without undue delay. If the request or complaint is rejected or, in case of inordinate delay, the complainant shall be entitled to bring it before a judicial or other authority. Neither the detained or imprisoned person nor any complainant under paragraph 1 of the present principle shall suffer prejudice for making a request or complaint.

*Principle 34*

Whenever the death or disappearance of a detained or imprisoned person occurs during his detention or imprisonment, an inquiry into the

cause of death or disappearance shall be held by a judicial or other authority, either on its own motion or at the instance of a member of the family of such a person or any person who has knowledge of the case. When circumstances so warrant, such an inquiry shall be held on the same procedural basis whenever the death or disappearance occurs shortly after the termination of the detention or imprisonment. The findings of such inquiry or a report thereon shall be made available upon request, unless doing so would jeopardize an ongoing criminal investigation.

*Principle 35*

1. Damage incurred because of acts or omissions by a public official contrary to the rights contained in these principles shall be compensated according to the applicable rules on liability provided by domestic law.

2. Information required to be recorded under these principles shall be available in accordance with procedures provided by domestic law for use in claiming compensation under the present principle.

*Principle 36*

1. A detained person suspected of or charged with a criminal offence shall be presumed innocent and shall be treated as such until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

2. The arrest or detention of such a person pending investigation and trial shall be carried out only for the purposes of the administration of justice on grounds and under conditions and procedures specified by law. The imposition of restrictions upon such a person which are not strictly required for the purpose of the detention or to prevent hindrance to the process of investigation or the administration of justice, or for the maintenance of security and good order in the place of detention shall be forbidden.

*Principle 37*

A person detained on a criminal charge shall be brought before a judicial or other authority provided by law promptly after his arrest. Such authority shall decide without delay upon the lawfulness and necessity of detention. No person may be kept under detention pending investigation or trial except upon the written order of such an authority. A detained person shall, when brought before such an authority, have the right to make a statement on the treatment received by him while in custody.

*Principle 38*

A person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial.

*Principle 39*

Except in special cases provided for by law, a person detained on a criminal charge shall be entitled, unless a judicial or other authority decides otherwise in the interest of the administration of justice, to release pending trial subject to the conditions that may be imposed in accordance with the law. Such authority shall keep the necessity of detention under review.

*General clause*

Nothing in this Body of Principles shall be construed as restricting or derogating from any right defined in the International Covenant on Civil and Political Rights.<sup>58</sup>

<sup>58</sup> See resolution 2200 A (XXI), annex.



**Principles on the Effective Prevention and Investigation  
of Extra-legal, Arbitrary and Summary Executions  
(Economic and Social Council resolution 1989/65 of 24  
May 1989, annex)**

**1989/65. Effective prevention and investigation of extra-legal, arbitrary and summary executions**

*The Economic and Social Council,*

*Recalling* that article 3 of the Universal Declaration of Human Rights<sup>106</sup> proclaims that everyone has the right to life, liberty and security of person,

*Bearing in mind* that paragraph 1 of article 6 of the International Covenant on Civil and Political Rights<sup>107</sup> states that every human being has the inherent right to life, that that right shall be protected by law and that no one shall be arbitrarily deprived of his or her life,

*Also bearing in mind* the general comments of the Human Rights Committee on the right to life as enunciated in article 6 of the International Covenant on Civil and Political Rights,

*Stressing* that the extra-legal, arbitrary and summary executions contravene the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights,

*Mindful* that the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, in its resolution 11 on extra-legal, arbitrary and summary executions,<sup>90</sup> called upon all Governments to take urgent and incisive action to investigate such acts, wherever they may occur, to punish those found guilty and to take all other measures necessary to prevent those practices,

*Mindful also* that in its resolution 1986/10, section VI, of 21 May 1986, it requested the Committee on Crime Prevention and Control to consider at its tenth session the question of extra-legal, arbitrary and summary executions with a view to elaborating principles on the effective prevention and investigation of such practices,

*Recalling* that the General Assembly in its resolution 33/173 of 20 December 1978 expressed its deep concern about reports from various parts of the world relating to enforced or involuntary disappearances and called upon Governments, in the event of such reports, to take appropriate measures to search for such persons and to undertake speedy and impartial investigations,

*Noting with appreciation* the efforts of non-governmental organizations to develop standards for investigations,<sup>112</sup>

*Emphasizing* that the General Assembly, in its resolution 42/141 of 7 December 1987, strongly condemned once again the large number of summary or arbitrary executions, including extra-legal executions, that continued to take place in various parts of the world,

*Noting* that in the same resolution the General Assembly recognized the need for closer co-operation between the Centre for Human Rights and the Crime Prevention and Criminal Justice Branch of the Centre for Social Development and Humanitarian Affairs of the Secretariat and the Committee on Crime Prevention and Control in efforts to bring to an end summary or arbitrary executions,

*Aware* that effective prevention and investigation of extra-legal, arbitrary and summary executions requires the provision of adequate financial and technical resources,

<sup>112</sup>See E/AC.57/1988/NGO/4.

1. *Recommends* that the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions annexed to the present resolution should be taken into account and respected by Governments within the framework of their national legislation and practices, and should be brought to the attention of law enforcement and criminal justice officials, military personnel, lawyers, members of the executive and legislative bodies of the Governments and the public in general;

2. *Requests* the Committee on Crime Prevention and Control to keep the above recommendations under constant review, taking into account the various socio-economic, political and cultural circumstances in which extra-legal, arbitrary and summary executions occur;

3. *Invites* Member States that have not yet ratified or acceded to international instruments that prohibit extra-legal, arbitrary and summary executions, including the International Covenant on Civil and Political Rights,<sup>107</sup> the Optional Protocol to the International Covenant on Civil and Political Rights<sup>107</sup> and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,<sup>113</sup> to become parties to these instruments;

4. *Requests* the Secretary-General to include the Principles in the United Nations publication entitled *Human Rights: A Compilation of International Instruments*;

5. *Requests* the United Nations regional and interregional institutes for the prevention of crime and the treatment of offenders to give special attention in their research and training programmes to the Principles, and to the International Covenant on Civil and Political Rights, the provisions of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Code of Conduct for Law Enforcement Officials,<sup>102</sup> the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power<sup>100</sup> and other international instruments relevant to the question of extra-legal, arbitrary and summary executions.

*15th plenary meeting  
24 May 1989*

**ANNEX**

**Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions**

**PREVENTION**

1. Governments shall prohibit by law all extra-legal, arbitrary and summary executions and shall ensure that any such executions are recognized as offences under their criminal laws, and are punishable by appropriate penalties which take into account the seriousness of such offences. Exceptional circumstances including a state of war or threat of war, internal political instability or any other public emergency may not be invoked as a justification of such executions. Such executions shall not be carried out under any circumstances including, but not limited to, situations of internal armed conflict, excessive or illegal use of force by a public official or other person acting in an official capacity or by a person acting at the instigation, or with the consent or acquiescence of such person, and situations in which deaths occur in custody. This prohibition shall prevail over decrees issued by governmental authority.

2. In order to prevent extra-legal, arbitrary and summary executions, Governments shall ensure strict control, including a clear chain of command over all officials responsible for apprehen-

<sup>113</sup>General Assembly resolution 39/46, annex.

sion, arrest, detention, custody and imprisonment, as well as those officials authorized by law to use force and firearms.

3. Governments shall prohibit orders from superior officers or public authorities authorizing or inciting other persons to carry out any such extra-legal, arbitrary or summary executions. All persons shall have the right and the duty to defy such orders. Training of law enforcement officials shall emphasize the above provisions.

4. Effective protection through judicial or other means shall be guaranteed to individuals and groups who are in danger of extra-legal, arbitrary or summary executions, including those who receive death threats.

5. No one shall be involuntarily returned or extradited to a country where there are substantial grounds for believing that he or she may become a victim of extra-legal, arbitrary or summary execution in that country.

6. Governments shall ensure that persons deprived of their liberty are held in officially recognized places of custody, and that accurate information on their custody and whereabouts, including transfers, is made promptly available to their relatives and lawyer or other persons of confidence.

7. Qualified inspectors, including medical personnel, or an equivalent independent authority, shall conduct inspections in places of custody on a regular basis, and be empowered to undertake unannounced inspections on their own initiative, with full guarantees of independence in the exercise of this function. The inspectors shall have unrestricted access to all persons in such places of custody, as well as to all their records.

8. Governments shall make every effort to prevent extra-legal, arbitrary and summary executions through measures such as diplomatic intercession, improved access of complainants to intergovernmental and judicial bodies, and public denunciation. Intergovernmental mechanisms shall be used to investigate reports of any such executions and to take effective action against such practices. Governments, including those of countries where extra-legal, arbitrary and summary executions are reasonably suspected to occur, shall co-operate fully in international investigations on the subject.

#### INVESTIGATION

9. There shall be a thorough, prompt and impartial investigation of all suspected cases of extra-legal, arbitrary and summary executions, including cases where complaints by relatives or other reliable reports suggest unnatural death in the above circumstances. Governments shall maintain investigative offices and procedures to undertake such inquiries. The purpose of the investigation shall be to determine the cause, manner and time of death, the person responsible, and any pattern or practice which may have brought about that death. It shall include an adequate autopsy, collection and analysis of all physical and documentary evidence, and statements from witnesses. The investigation shall distinguish between natural death, accidental death, suicide and homicide.

10. The investigative authority shall have the power to obtain all the information necessary to the inquiry. Those persons conducting the investigation shall have at their disposal all the necessary budgetary and technical resources for effective investigation. They shall also have the authority to oblige officials allegedly involved in any such executions to appear and testify. The same shall apply to any witness. To this end, they shall be entitled to issue summonses to witnesses, including the officials allegedly involved, and to demand the production of evidence.

11. In cases in which the established investigative procedures are inadequate because of lack of expertise or impartiality, because of the importance of the matter or because of the apparent existence of a pattern of abuse, and in cases where there are complaints from the family of the victim about these inadequacies or other substantial reasons, Governments shall pursue investigations through an independent commission of inquiry or similar procedure. Members of such a commission shall be chosen for their recognized impartiality, competence and independence as individuals. In particular, they shall be independent of any institution, agency or person that may be the subject of the inquiry. The commission shall have the authority to obtain all information necessary to the inquiry and shall conduct the inquiry as provided for under these Principles.

12. The body of the deceased person shall not be disposed of until an adequate autopsy is conducted by a physician, who shall, if possible, be an expert in forensic pathology. Those conducting the autopsy shall have the right of access to all investigative data, to the place where the body was discovered, and to the place where the death is thought to have occurred. If the body has been buried and it later appears that an investigation is required, the body shall be promptly and competently exhumed for an autopsy. If skeletal remains are discovered, they should be carefully exhumed and studied according to systematic anthropological techniques.

13. The body of the deceased shall be available to those conducting the autopsy for a sufficient amount of time to enable a thorough investigation to be carried out. The autopsy shall, at a minimum, attempt to establish the identity of the deceased and the cause and manner of death. The time and place of death shall also be determined to the extent possible. Detailed colour photographs of the deceased shall be included in the autopsy report in order to document and support the findings of the investigation. The autopsy report must describe any and all injuries to the deceased including any evidence of torture.

14. In order to ensure objective results, those conducting the autopsy must be able to function impartially and independently of any potentially implicated persons or organizations or entities.

15. Complainants, witnesses, those conducting the investigation and their families shall be protected from violence, threats of violence or any other form of intimidation. Those potentially implicated in extra-legal, arbitrary or summary executions shall be removed from any position of control or power, whether direct or indirect, over complainants, witnesses and their families, as well as over those conducting investigations.

16. Families of the deceased and their legal representatives shall be informed of, and have access to, any hearing as well as to all information relevant to the investigation, and shall be entitled to present other evidence. The family of the deceased shall have the right to insist that a medical or other qualified representative be present at the autopsy. When the identity of a deceased person has been determined, a notification of death shall be posted, and the family or relatives of the deceased shall be informed immediately. The body of the deceased shall be returned to them upon completion of the investigation.

17. A written report shall be made within a reasonable period of time on the methods and findings of such investigations. The report shall be made public immediately and shall include the scope of the inquiry, procedures and methods used to evaluate evidence as well as conclusions and recommendations based on findings of fact and on applicable law. The report shall also describe in detail specific events that were found to have occurred and the evidence upon which such findings were based, and list the names of witnesses who testified, with the exception of those whose identities have been withheld for their own protection. The Government shall, within a reasonable period of time, either reply to the report of the investigation, or indicate the steps to be taken in response to it.

#### LEGAL PROCEEDINGS

18. Governments shall ensure that persons identified by the investigation as having participated in extra-legal, arbitrary or summary executions in any territory under their jurisdiction are brought to justice. Governments shall either bring such persons to justice or co-operate to extradite any such persons to other countries wishing to exercise jurisdiction. This principle shall apply irrespective of who and where the perpetrators or the victims are, their nationalities or where the offence was committed.

19. Without prejudice to principle 3 above, an order from a superior officer or a public authority may not be invoked as a justification for extra-legal, arbitrary or summary executions. Superiors, officers or other public officials may be held responsible for acts committed by officials under their authority if they had a reasonable opportunity to prevent such acts. In no circumstances, including a state of war, siege or other public emergency, shall blanket immunity from prosecution be granted to any person allegedly involved in extra-legal, arbitrary or summary executions.

20. The families and dependents of victims of extra-legal, arbitrary or summary executions shall be entitled to fair and adequate compensation within a reasonable period of time.



**Basic Principles on the Use of Force and Firearms by  
Law Enforcement Officials (adopted by the Eighth  
United Nations Congress on the Prevention of Crime  
and the Treatment of Offenders, Havana, Cuba,  
27 August to 7 September 1990  
(A/CONF.144/28/Rev.1))**

Basic Principles on the Use of Force and Firearms by Law Enforcement Officials

Whereas the work of law enforcement officials 131/ is a social service of great importance and there is, therefore, a need to maintain and, whenever necessary, to improve the working conditions and status of these officials,

Whereas a threat to the life and safety of law enforcement officials must be seen as a threat to the stability of society as a whole,

Whereas law enforcement officials have a vital role in the protection of the right to life, liberty and security of the person, as guaranteed in the Universal Declaration of Human Rights 134/ and reaffirmed in the International Covenant on Civil and Political Rights, 135/

Whereas the Standard Minimum Rules for the Treatment of Prisoners 136/ provide for the circumstances in which prison officials may use force in the course of their duties,

Whereas article 3 of the Code of Conduct for Law Enforcement Officials 136/ provides that law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty,

Whereas the preparatory meeting for the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Varenna, Italy, agreed on elements to be considered in the course of further work on restraints on the use of force and firearms by law enforcement officials, 137/

Whereas the Seventh Congress, in its resolution 14, 138/ inter alia, emphasizes that the use of force and firearms by law enforcement officials should be commensurate with due respect for human rights,

131/ In accordance with the commentary to article 1 of the Code of Conduct for Law Enforcement Officials, the term "law enforcement officials" includes all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest or detention. In countries where police powers are exercised by military authorities, whether uniformed or not, or by State security forces, the definition of law enforcement officials shall be regarded as including officers of such services.

134/ General Assembly resolution 217 A (III).

135/ General Assembly resolution 2200 A (XXI), annex.

136/ See Human Rights: A Compilation of International Instruments (United Nations publication, Sales No. E.88.XIV.1), sect. G.

137/ A/CONF.121/IPM.3, para. 34.

138/ See Seventh United Nations Congress..., chap. I, sect. E.

**EIGHTH  
UNITED NATIONS CONGRESS  
ON THE  
PREVENTION OF CRIME  
AND THE  
TREATMENT OF OFFENDERS**

Havana, 27 August-7 September 1990



UNITED NATIONS

Whereas the Economic and Social Council, in its resolution 1986/10, section IX, of 21 May 1986, invited Member States to pay particular attention in the implementation of the Code to the use of force and firearms by law enforcement officials, and the General Assembly, in its resolution 41/149 of 4 December 1986, inter alia, welcomed this recommendation made by the Council,

Whereas it is appropriate that, with due regard to their personal safety, consideration be given to the role of law enforcement officials in relation to the administration of justice, to the protection of the right to life, liberty and security of the person, to their responsibility to maintain public safety and social peace and to the importance of their qualifications, training and conduct,

The basic principles set forth below, which have been formulated to assist Member States in their task of ensuring and promoting the proper role of law enforcement officials, should be taken into account and respected by Governments within the framework of their national legislation and practice, and be brought to the attention of law enforcement officials as well as other persons, such as judges, prosecutors, lawyers, members of the executive branch and the legislature, and the public.

#### General provisions

1. Governments and law enforcement agencies shall adopt and implement rules and regulations on the use of force and firearms against persons by law enforcement officials. In developing such rules and regulations, Governments and law enforcement agencies shall keep the ethical issues associated with the use of force and firearms constantly under review.
2. Governments and law enforcement agencies should develop a range of means as broad as possible and equip law enforcement officials with various types of weapons and ammunition that would allow for a differentiated use of force and firearms. These should include the development of non-lethal incapacitating weapons for use in appropriate situations, with a view to increasingly restraining the application of means capable of causing death or injury to persons. For the same purpose, it should also be possible for law enforcement officials to be equipped with self-defensive equipment such as shields, helmets, bullet-proof vests and bullet-proof means of transportation, in order to decrease the need to use weapons of any kind.
3. The development and deployment of non-lethal incapacitating weapons should be carefully evaluated in order to minimize the risk of endangering uninvolved persons, and the use of such weapons should be carefully controlled.
4. Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.
5. Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall:
  - (a) Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved;

- (b) Minimize damage and injury, and respect and preserve human life;
- (c) Ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment;
- (d) Ensure that relatives or close friends of the injured or affected person are notified at the earliest possible moment.

6. Where injury or death is caused by the use of force and firearms by law enforcement officials, they shall report the incident promptly to their superiors, in accordance with principle 22.

7. Governments shall ensure that arbitrary or abusive use of force and firearms by law enforcement officials is punished as a criminal offence under their law.

8. Exceptional circumstances such as internal political instability or any other public emergency may not be invoked to justify any departure from these basic principles.

#### Special provisions

9. Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.

10. In the circumstances provided for under principle 9, law enforcement officials shall identify themselves as such and give a clear warning of their intent to use firearms, with sufficient time for the warning to be observed, unless to do so would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident.

11. Rules and regulations on the use of firearms by law enforcement officials should include guidelines that:

- (a) Specify the circumstances under which law enforcement officials are authorized to carry firearms and prescribe the types of firearms and ammunition permitted;
- (b) Ensure that firearms are used only in appropriate circumstances and in a manner likely to decrease the risk of unnecessary harm;
- (c) Prohibit the use of those firearms and ammunition that cause unwarranted injury or present an unwarranted risk;

(d) Regulate the control, storage and issuing of firearms, including procedures for ensuring that law enforcement officials are accountable for the firearms and ammunition issued to them;

(e) Provide for warnings to be given, if appropriate, when firearms are to be discharged;

(f) Provide for a system of reporting whenever law enforcement officials use firearms in the performance of their duty.

#### Policing unlawful assemblies

12. As everyone is allowed to participate in lawful and peaceful assemblies, in accordance with the principles embodied in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, Governments and law enforcement agencies and officials shall recognize that force and firearms may be used only in accordance with principles 13 and 14.

13. In the dispersal of assemblies that are unlawful but non-violent, law enforcement officials shall avoid the use of force or, where that is not practicable, shall restrict such force to the minimum extent necessary.

14. In the dispersal of violent assemblies, law enforcement officials may use firearms only when less dangerous means are not practicable and only to the minimum extent necessary. Law enforcement officials shall not use firearms in such cases, except under the conditions stipulated in principle 9.

#### Policing persons in custody or detention

15. Law enforcement officials, in their relations with persons in custody or detention, shall not use force, except when strictly necessary for the maintenance of security and order within the institution, or when personal safety is threatened.

16. Law enforcement officials, in their relations with persons in custody or detention, shall not use firearms, except in self-defence or in the defence of others against the immediate threat of death or serious injury, or when strictly necessary to prevent the escape of a person in custody or detention presenting the danger referred to in principle 9.

17. The preceding principles are without prejudice to the rights, duties and responsibilities of prison officials, as set out in the Standard Minimum Rules for the Treatment of Prisoners, particularly rules 33, 34 and 54.

#### Qualifications, training and counselling

18. Governments and law enforcement agencies shall ensure that all law enforcement officials are selected by proper screening procedures, have appropriate moral, psychological and physical qualities for the effective exercise of their functions and receive continuous and thorough professional training. Their continued fitness to perform these functions should be subject to periodic review.

19. Governments and law enforcement agencies shall ensure that all law enforcement officials are provided with training and are tested in accordance with appropriate proficiency standards in the use of force. Those law enforcement officials who are required to carry firearms should be authorized to do so only upon completion of special training in their use.

20. In the training of law enforcement officials, Governments and law enforcement agencies shall give special attention to issues of police ethics and human rights, especially in the investigative process, to alternatives to the use of force and firearms, including the peaceful settlement of conflicts, the understanding of crowd behaviour, and the methods of persuasion, negotiation and mediation, as well as to technical means, with a view to limiting the use of force and firearms. Law enforcement agencies should review their training programmes and operational procedures in the light of particular incidents.

21. Governments and law enforcement agencies shall make stress counselling available to law enforcement officials who are involved in situations where force and firearms are used.

#### Reporting and review procedures

22. Governments and law enforcement agencies shall establish effective reporting and review procedures for all incidents referred to in principles 6 and 11 (f). For incidents reported pursuant to these principles, Governments and law enforcement agencies shall ensure that an effective review process is available and that independent administrative or prosecutorial authorities are in a position to exercise jurisdiction in appropriate circumstances. In cases of death and serious injury or other grave consequences, a detailed report shall be sent promptly to the competent authorities responsible for administrative review and judicial control.

23. Persons affected by the use of force and firearms or their legal representatives shall have access to an independent process, including a judicial process. In the event of the death of such persons, this provision shall apply to their dependants accordingly.

24. Governments and law enforcement agencies shall ensure that superior officers are held responsible if they know, or should have known, that law enforcement officials under their command are resorting, or have resorted, to the unlawful use of force and firearms, and they did not take all measures in their power to prevent, suppress or report such use.

25. Governments and law enforcement agencies shall ensure that no criminal or disciplinary sanction is imposed on law enforcement officials who, in compliance with the Code of Conduct for Law Enforcement Officials and these basic principles, refuse to carry out an order to use force and firearms, or who report such use by other officials.

26. Obedience to superior orders shall be no defence if law enforcement officials knew that an order to use force and firearms resulting in the death or serious injury of a person was manifestly unlawful and had a reasonable opportunity to refuse to follow it. In any case, responsibility also rests on the superiors who gave the unlawful orders.

**General Comment No. 3 on the nature of  
States parties' obligations (art. 2, para. 1, of  
the Covenant), (adopted by the Committee  
on Economic, Social and Cultural Rights,  
14 December 1990 (E/1991/23))**

The nature of States parties obligations (art. 2, para. 1 of the Covenant)

1. Article 2 is of particular importance to a full understanding of the Covenant and must be seen as having a dynamic relationship with all of the other provisions of the Covenant. It describes the nature of the general legal obligations undertaken by States parties to the Covenant. Those obligations include both what may be termed (following the work of the International Law Commission) obligations of conduct and obligations of result. While great emphasis has sometimes been placed on the difference between the formulations used in this provision and that contained in the equivalent article 2 of the International Covenant on Civil and Political Rights, it is not always recognized that there are also significant similarities. In particular, while the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect. Of these, two are of particular importance in understanding the precise nature of States parties obligations. One of these, which is dealt with in a separate General Comment, and which is to be considered by the Committee at its sixth session, is the "undertaking to guarantee" that relevant rights "will be exercised without discrimination...".
2. The other is the undertaking in article 2 (1) "to take steps", which in itself, is not qualified or limited by other considerations. The full meaning of the phrase can also be gauged by noting some of the different language versions. In English the undertaking is "to take steps", in French it is "to act" ("*s'engage à agir*") and in Spanish it is "to adopt measures" ("*a adoptar medidas*"). Thus while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.
3. The means which should be used in order to satisfy the obligation to take steps are stated in article 2 (1) to be "all appropriate means, including particularly the adoption of legislative measures". The Committee recognizes that in many instances legislation is highly desirable and in some cases may even be indispensable. For example, it may be difficult to combat discrimination effectively in the absence of a sound legislative foundation for the necessary measures. In fields such as health, the protection of children and mothers, and education, as well as in respect of the matters dealt with in articles 6 to 9, legislation may also be an indispensable element for many purposes.

# COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

## REPORT ON THE FIFTH SESSION

(26 November-14 December 1990)

### ECONOMIC AND SOCIAL COUNCIL

OFFICIAL RECORDS, 1991

### SUPPLEMENT No. 3



UNITED NATIONS

New York, 1991

4. The Committee notes that States parties have generally been conscientious in detailing at least some of the legislative measures that they have taken in this regard. It wishes to emphasize, however, that the adoption of legislative measures, as specifically foreseen by the Covenant, is by no means exhaustive of the obligations of States parties. Rather, the phrase "by all appropriate means" must be given its full and natural meaning. While each State party must decide for itself which means are the most appropriate under the circumstances with respect to each of the rights, the "appropriateness" of the means chosen will not always be self-evident. It is therefore desirable that States parties reports should indicate not only the measures that have been taken but also the basis on which they are considered to be the most "appropriate" under the circumstances. However, the ultimate determination as to whether all appropriate measures have been taken remains one for the Committee to make.

5. Among the measures which might be considered appropriate, in addition to legislation, is the provision of judicial remedies with respect to rights which may, in accordance with the national legal system, be considered justiciable. The Committee notes, for example, that the enjoyment of the rights recognized, without discrimination, will often be appropriately promoted, in part, through the provision of judicial or other effective remedies. Indeed, those States parties which are also parties to the International Covenant on Civil and Political Rights are already obligated (by virtue of arts. 2 (paras. 1 and 3) 3 and 26) of that Covenant to ensure that any person whose rights or freedoms (including the right to equality and non-discrimination) recognized in that Covenant are violated, "shall have an effective remedy" (art. 2 (3) (A)). In addition, there are a number of other provisions in the International Covenant on Economic, Social and Cultural Rights, including articles 3, 7 (A) (1), 8, 10 (3), 13 (2) (A), (3) and (4) and 15 (3) which would seem to be capable of immediate application by judicial and other organs in many national legal systems. Any suggestion that the provisions indicated are inherently non-self-executing would seem to be difficult to sustain.

6. Where specific policies aimed directly at the realization of the rights recognized in the Covenant have been adopted in legislative form, the Committee would wish to be informed, *inter alia*, as to whether such laws create any right of action on behalf of individuals or groups who feel that their rights are not being fully realized. In cases where constitutional recognition has been accorded to specific economic, social and cultural rights, or where the provisions of the Covenant have been incorporated directly into national law, the Committee would wish to receive information to the extent to which these rights are considered to be justiciable (i.e. able to be invoked before the courts). The Committee would also wish to receive specific information as to any instances in which existing constitutional provisions relating to economic, social and cultural rights have been weakened or significantly changed.

7. Other measures which may also be considered "appropriate" for the purposes of article 2 (1) include, but are not limited to, administrative, financial, educational and social measures.

8. The Committee notes that the undertaking "to take steps ... by all appropriate means including particularly the adoption of legislative measures" neither requires nor precludes any particular form of government or economic system being used as the vehicle for the steps in question, provided only that it is democratic and that all human rights are thereby respected. Thus, in terms of political and economic systems the Covenant is neutral and its principles cannot accurately be described as being predicated exclusively upon the need for, or the desirability of, a socialist or a capitalist system, or a mixed, centrally planned, or *laissez-faire* economy, or upon any other particular approach. In this regard, the Committee reaffirms that the rights recognized in the Covenant are susceptible of realization within the context of a wide variety of economic and political systems, provided only that the interdependence and indivisibility of the two sets of human rights, as affirmed *inter alia* in the preamble to the Covenant, is recognized and reflected in the system in question. The Committee also notes the relevance in this regard of other human rights and in particular the right to development.

9. The principal obligation of result reflected in article 2 (1) is to take steps "with a view to achieving progressively the full realization of the rights recognized" in the Covenant. The term "progressive realization" is often used to describe the intent of this phrase. The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. In this sense the obligation differs significantly from that contained in article 2 of the International Covenant on Civil and Political Rights which embodies an immediate obligation to respect and ensure all of the relevant rights. Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d'être*, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.

10. On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of

examining States parties reports the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'être. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2 (1) obligates each State party to take the necessary steps "to the maximum of its available resources". In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.

11. The Committee wishes to emphasize, however, that even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances. Moreover, the obligations to monitor the extent of the realization, or more especially of the non-realization, of economic, social and cultural rights, and to devise strategies and programmes for their promotion, are not in any way eliminated as a result of resource constraints. The Committee has already dealt with these issues in its General Comment No. 1 (1989).

12. Similarly, the Committee underlines the fact that even in times of severe resources constraints whether caused by a process of adjustment, of economic recession, or by other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes. In support of this approach the Committee takes note of the analysis prepared by UNICEF entitled Adjustment with a human face: protecting the vulnerable and promoting growth, a/ the analysis by UNDP in its Human Development Report 1990 b/ and the analysis by the World Bank in the World Development Report 1990. c/

13. A final element of article 2 (1), to which attention must be drawn, is that the undertaking given by all States parties is "to take steps, individually and through international assistance and co-operation, especially economic and technical ...". The Committee notes that the phrase "to the maximum of its available resources" was intended by the drafters of the Covenant to refer to both the resources existing within a State and those available from the international community through international co-operation and assistance. Moreover, the essential role of such co-operation in facilitating the full realization of the relevant rights is further underlined by the specific provisions contained in articles 11, 15, 22 and 23. With

respect to article 22 the Committee has already drawn attention, in General Comment No. 2 (1990), to some of the opportunities and responsibilities that exist in relation to international co-operation. Article 23 also specifically identifies "the furnishing of technical assistance" as well as other activities, as being among the means of "international action for the achievement of the rights recognized ...".

14. The Committee wishes to emphasize that in accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant itself, international co-operation for development and thus for the realization of economic, social and cultural rights is an obligation of all States. It is particularly incumbent upon those States which are in a position to assist others in this regard. The Committee notes in particular the importance of the Declaration on the Right to Development adopted by the General Assembly in its resolution 41/128 of 4 December 1986 and the need for States parties to take full account of all of the principles recognized therein. It emphasizes that, in the absence of an active programme of international assistance and co-operation on the part of all those States that are in a position to undertake one, the full realization of economic, social and cultural rights will remain an unfulfilled aspiration in many countries. In this respect, the Committee also recalls the terms of its General Comment No. 2 (1990).

#### NOTES

a/ G.A. Cornia, R. Jolly and F. Stewart, eds., Oxford, Clarendon Press, 1987.

b/ Oxford, Oxford University Press, 1990.

c/ Oxford, Oxford University Press, 1990.

**Vienna Declaration and Programme of Action  
(adopted by the World Conference on Human Rights,  
Vienna, 25 June 1993 (A/CONF.157/23)), paras. 1 and 5**

Distr.  
GENERAL

A/CONF.157/23  
12 July 1993

Original: ENGLISH

WORLD CONFERENCE ON HUMAN RIGHTS  
Vienna, 14-25 June 1993

VIENNA DECLARATION AND PROGRAMME OF ACTION

**Vienna Declaration and Programme of Action  
(adopted by the World Conference on Human Rights,  
Vienna, 25 June 1993 (A/CONF.157/23)), paras. 1 and 5**

Note by the secretariat

Attached is the text of the Vienna Declaration and Programme of Action,  
as adopted by the World Conference on Human Rights on 25 June 1993.

GE.93-14233 (E)

Considering the major changes taking place on the international scene and the aspirations of all the peoples for an international order based on the principles enshrined in the Charter of the United Nations, including promoting and encouraging respect for human rights and fundamental freedoms for all and respect for the principle of equal rights and self-determination of peoples, peace, democracy, justice, equality, rule of law, pluralism, development, better standards of living and solidarity,

Deeply concerned by various forms of discrimination and violence, to which women continue to be exposed all over the world,

Recognizing that the activities of the United Nations in the field of human rights should be rationalized and enhanced in order to strengthen the United Nations machinery in this field and to further the objectives of universal respect for observance of international human rights standards,

Having taken into account the Declarations adopted by the three regional meetings at Tunis, San José and Bangkok and the contributions made by Governments, and bearing in mind the suggestions made by intergovernmental and non-governmental organizations, as well as the studies prepared by independent experts during the preparatory process leading to the World Conference on Human Rights,

Welcoming the International Year of the World's Indigenous People 1993 as a reaffirmation of the commitment of the international community to ensure their enjoyment of all human rights and fundamental freedoms and to respect the value and diversity of their cultures and identities,

Recognizing also that the international community should devise ways and means to remove the current obstacles and meet challenges to the full realization of all human rights and to prevent the continuation of human rights violations resulting thereof throughout the world,

Invoking the spirit of our age and the realities of our time which call upon the peoples of the world and all States Members of the United Nations to rededicate themselves to the global task of promoting and protecting all human rights and fundamental freedoms so as to secure full and universal enjoyment of these rights,

Determined to take new steps forward in the commitment of the international community with a view to achieving substantial progress in human rights endeavours by an increased and sustained effort of international cooperation and solidarity,

#### **Solemnly adopts the Vienna Declaration and Programme of Action.**

##### I

1. The World Conference on Human Rights reaffirms the solemn commitment of all States to fulfil their obligations to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all in accordance with the Charter of the United Nations, other instruments

relating to human rights, and international law. The universal nature of these rights and freedoms is beyond question.

In this framework, enhancement of international cooperation in the field of human rights is essential for the full achievement of the purposes of the United Nations.

Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of Governments.

2. All peoples have the right of self-determination. By virtue of that right they freely determine their political status, and freely pursue their economic, social and cultural development.

Taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, the World Conference on Human Rights recognizes the right of peoples to take any legitimate action, in accordance with the Charter of the United Nations, to realize their inalienable right of self-determination. The World Conference on Human Rights considers the denial of the right of self-determination as a violation of human rights and underlines the importance of the effective realization of this right.

In accordance with the Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations, this shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.

3. Effective international measures to guarantee and monitor the implementation of human rights standards should be taken in respect of people under foreign occupation, and effective legal protection against the violation of their human rights should be provided, in accordance with human rights norms and international law, particularly the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 14 August 1949, and other applicable norms of humanitarian law.

4. The promotion and protection of all human rights and fundamental freedoms must be considered as a priority objective of the United Nations in accordance with its purposes and principles, in particular the purpose of international cooperation. In the framework of these purposes and principles, the promotion and protection of all human rights is a legitimate concern of the international community. The organs and specialized agencies related to human rights should therefore further enhance the coordination of their activities based on the consistent and objective application of international human rights instruments.

5. All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.
6. The efforts of the United Nations system towards the universal respect for, and observance of, human rights and fundamental freedoms for all, contribute to the stability and well-being necessary for peaceful and friendly relations among nations, and to improved conditions for peace and security as well as social and economic development, in conformity with the Charter of the United Nations.
7. The processes of promoting and protecting human rights should be conducted in conformity with the purposes and principles of the Charter of the United Nations, and international law.
8. Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing. Democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives. In the context of the above, the promotion and protection of human rights and fundamental freedoms at the national and international levels should be universal and conducted without conditions attached. The international community should support the strengthening and promoting of democracy, development and respect for human rights and fundamental freedoms in the entire world.
9. The World Conference on Human Rights reaffirms that least developed countries committed to the process of democratization and economic reforms, many of which are in Africa, should be supported by the international community in order to succeed in their transition to democracy and economic development.
10. The World Conference on Human Rights reaffirms the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights.

As stated in the Declaration on the Right to Development, the human person is the central subject of development.

While development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights.

States should cooperate with each other in ensuring development and eliminating obstacles to development. The international community should promote an effective international cooperation for the realization of the right to development and the elimination of obstacles to development.

**General Comment No. 14 on the right to the highest  
attainable standard of health (art. 12 of the Covenant),  
(adopted by the Committee on Economic, Social and  
Cultural Rights, 11 May 2000 (E/C.12/2000/4))**



**Economic and Social  
Council**

Distr.  
GENERAL

E/C.12/2000/4  
11 August 2000

Original: ENGLISH

**COMMITTEE ON ECONOMIC, SOCIAL  
AND CULTURAL RIGHTS**

Twenty-second session  
Geneva, 25 April-12 May 2000  
Agenda item 3

**SUBSTANTIVE ISSUES ARISING IN THE IMPLEMENTATION OF  
THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL  
AND CULTURAL RIGHTS**

General Comment No. 14 (2000)

The right to the highest attainable standard of health (article 12 of the  
International Covenant on Economic, Social and Cultural Rights)

1. Health is a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity. The realization of the right to health may be pursued through numerous, complementary approaches, such as the formulation of health policies, or the implementation of health programmes developed by the World Health Organization (WHO), or the adoption of specific legal instruments. Moreover, the right to health includes certain components which are legally enforceable.<sup>1</sup>
2. The human right to health is recognized in numerous international instruments. Article 25.1 of the Universal Declaration of Human Rights affirms: "Everyone has the right to a standard of living adequate for the health of himself and of his family, including food, clothing, housing and medical care and necessary social services". The International Covenant on Economic, Social and Cultural Rights provides the most comprehensive article on the right to

health in international human rights law. In accordance with article 12.1 of the Covenant, States parties recognize "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health", while article 12.2 enumerates, by way of illustration, a number of "steps to be taken by the States parties ... to achieve the full realization of this right".

Additionally, the right to health is recognized, *inter alia*, in article 5 (e) (iv) of the International Convention on the Elimination of All Forms of Racial Discrimination of 1965, in articles 11.1 (f) and 12 of the Convention on the Elimination of All Forms of Discrimination against Women of 1979 and in article 24 of the Convention on the Rights of the Child of 1989. Several regional human rights instruments also recognize the right to health, such as the European Social Charter of 1961 as revised (art. 11), the African Charter on Human and Peoples' Rights of 1981 (art. 16) and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988 (art. 10). Similarly, the right to health has been proclaimed by the Commission on Human Rights,<sup>2</sup> as well as in the Vienna Declaration and Programme of Action of 1993 and other international instruments.<sup>3</sup>

3. The right to health is closely related to and dependent upon the realization of other human rights, as contained in the International Bill of Rights, including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement. These and other rights and freedoms address integral components of the right to health.
4. In drafting article 12 of the Covenant, the Third Committee of the United Nations General Assembly did not adopt the definition of health contained in the preamble to the Constitution of WHO, which conceptualizes health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity". However, the reference in article 12.1 of the Covenant to "the highest attainable standard of physical and mental health" is not confined to the right to health care. On the contrary, the drafting history and the express wording of article 12.2 acknowledge that the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.
5. The Committee is aware that, for millions of people throughout the world, the full enjoyment of the right to health still remains a distant goal. Moreover, in many cases, especially for those living in poverty, this goal is becoming increasingly remote. The Committee recognizes the formidable structural and other obstacles resulting from international and other factors beyond the control of States that impede the full realization of article 12 in many States parties.
6. With a view to assisting States parties' implementation of the Covenant and the fulfilment of their reporting obligations, this General Comment focuses on the normative content of article 12 (Part I), States parties' obligations (Part II), violations (Part III) and implementation

at the national level (Part IV), while the obligations of actors other than States parties are addressed in Part V. The General Comment is based on the Committee's experience in examining States parties' reports over many years.

#### I. NORMATIVE CONTENT OF ARTICLE 12

7. Article 12.1 provides a definition of the right to health, while article 12.2 enumerates illustrative, non-exhaustive examples of States parties' obligations.

8. The right to health is not to be understood as a right to be *healthy*. The right to health contains both freedoms and entitlements. The freedoms include the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. By contrast, the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.

9. The notion of "the highest attainable standard of health" in article 12.1 takes into account both the individual's biological and socio-economic preconditions and a State's available resources. There are a number of aspects which cannot be addressed solely within the relationship between States and individuals; in particular, good health cannot be ensured by a State, nor can States provide protection against every possible cause of human ill health. Thus, genetic factors, individual susceptibility to ill health and the adoption of unhealthy or risky lifestyles may play an important role with respect to an individual's health. Consequently, the right to health must be understood as a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health.

10. Since the adoption of the two International Covenants in 1966 the world health situation has changed dramatically and the notion of health has undergone substantial changes and has also widened in scope. More determinants of health are being taken into consideration, such as resource distribution and gender differences. A wider definition of health also takes into account such socially-related concerns as violence and armed conflict.<sup>4</sup> Moreover, formerly unknown diseases, such as Human Immunodeficiency Virus and Acquired Immunodeficiency Syndrome (HIV/AIDS), and others that have become more widespread, such as cancer, as well as the rapid growth of the world population, have created new obstacles for the realization of the right to health which need to be taken into account when interpreting article 12.

11. The Committee interprets the right to health, as defined in article 12.1, as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health. A further important aspect is the participation of the population in all health-related decision-making at the community, national and international levels.

12. The right to health in all its forms and at all levels contains the following interrelated and essential elements, the precise application of which will depend on the conditions prevailing in a particular State party:

- (a) *Availability*. Functioning public health and health-care facilities, goods and services, as well as programmes, have to be available in sufficient quantity within the State party. The precise nature of the facilities, goods and services will vary depending on numerous factors, including the State party's developmental level. They will include, however, the underlying determinants of health, such as safe and potable drinking water and adequate sanitation facilities, hospitals, clinics and other health-related buildings, trained medical and professional personnel receiving domestically competitive salaries, and essential drugs, as defined by the WHO Action Programme on Essential Drugs.<sup>5</sup>
- (b) *Accessibility*. Health facilities, goods and services<sup>6</sup> have to be accessible to everyone without discrimination, within the jurisdiction of the State party. Accessibility has four overlapping dimensions:
  - (i) *Non-discrimination*: health facilities, goods and services must be accessible to all, especially the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds.<sup>7</sup>
  - (ii) *Physical accessibility*: health facilities, goods and services must be within safe physical reach for all sections of the population, especially vulnerable or marginalized groups, such as ethnic minorities and indigenous populations, women, children, adolescents, older persons, persons with disabilities and persons with HIV/AIDS. Accessibility also implies that medical services and underlying determinants of health, such as safe and potable water and adequate sanitation facilities, are within safe physical reach, including in rural areas. Accessibility further includes adequate access to buildings for persons with disabilities.
  - (iii) *Economic accessibility (affordability)*: health facilities, goods and services must be affordable for all. Payment for health-care services, as well as services related to the underlying determinants of health, has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with health expenses as compared to richer households.
  - (iv) *Information accessibility*: accessibility includes the right to seek, receive and impart information and ideas<sup>8</sup> concerning health issues. However, accessibility of information should not impair the right to have personal health data treated with confidentiality.

(c) *Acceptability.* All health facilities, goods and services must be respectful of medical ethics and culturally appropriate, i.e. respectful of the culture of individuals, minorities, peoples and communities, sensitive to gender and life-cycle requirements, as well as being designed to respect confidentiality and improve the health status of those concerned.

(d) *Quality.* As well as being culturally acceptable, health facilities, goods and services must also be scientifically and medically appropriate and of good quality. This requires, *inter alia*, skilled medical personnel, scientifically approved and unexpired drugs and hospital equipment, safe and potable water, and adequate sanitation.

13. The non-exhaustive catalogue of examples in article 12.2 provides guidance in defining the action to be taken by States. It gives specific generic examples of measures arising from the broad definition of the right to health contained in article 12.1, thereby illustrating the content of that right, as exemplified in the following paragraphs.<sup>9</sup>

Article 12.2 (a). The right to maternal, child and reproductive health

14. "The provision for the reduction of the stillbirth rate and of infant mortality and for the healthy development of the child" (art. 12.2 (a))<sup>10</sup> may be understood as requiring measures to improve child and maternal health, sexual and reproductive health services, including access to family planning, pre- and post-natal care,<sup>11</sup> emergency obstetric services and access to information, as well as to resources necessary to act on that information.<sup>12</sup>

Article 12.2 (b). The right to healthy natural and workplace environments

15. "The improvement of all aspects of environmental and industrial hygiene" (art. 12.2 (b)) comprises, *inter alia*, preventive measures in respect of occupational accidents and diseases; the requirement to ensure an adequate supply of safe and potable water and basic sanitation; the prevention and reduction of the population's exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health.<sup>13</sup> Furthermore, industrial hygiene refers to the minimization, so far as is reasonably practicable, of the causes of health hazards inherent in the working environment.<sup>14</sup> Article 12.2 (b) also embraces adequate housing and safe and hygienic working conditions, an adequate supply of food and proper nutrition, and discourages the abuse of alcohol, and the use of tobacco, drugs and other harmful substances.

Article 12.2 (c). The right to prevention, treatment and control of diseases

16. "The prevention, treatment and control of epidemic, endemic, occupational and other diseases" (art. 12.2 (c)) requires the establishment of prevention and education programmes for behaviour-related health concerns such as sexually transmitted diseases, in particular HIV/AIDS, and those adversely affecting sexual and reproductive health, and the promotion of social determinants of good health, such as environmental safety, education, economic development and gender equity. The right to treatment includes the creation of a system of urgent medical care in cases of accidents, epidemics and similar health hazards, and the provision of disaster relief and humanitarian assistance in emergency situations. The control of diseases refers to States' individual and joint efforts to, *inter alia*, make available relevant technologies, using and

improving epidemiological surveillance and data collection on a disaggregated basis, the implementation or enhancement of immunization programmes and other strategies of infectious disease control.

Article 12.2 (d). The right to health facilities, goods and services<sup>15</sup>

17. "The creation of conditions which would assure to all medical service and medical attention in the event of sickness" (art. 12.2 (d)), both physical and mental, includes the provision of equal and timely access to basic preventive, curative, rehabilitative health services and health education; regular screening programmes; appropriate treatment of prevalent diseases, illnesses, injuries and disabilities, preferably at community level; the provision of essential drugs; and appropriate mental health treatment and care. A further important aspect is the improvement and furtherance of participation of the population in the provision of preventive and curative health services, such as the organization of the health sector, the insurance system and, in particular, participation in political decisions relating to the right to health taken at both the community and national levels.

Article 12. Special topics of broad application

Non-discrimination and equal treatment

18. By virtue of article 2.2 and article 3, the Covenant proscribes any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health. The Committee stresses that many measures, such as most strategies and programmes designed to eliminate health-related discrimination, can be pursued with minimum resource implications through the adoption, modification or abrogation of legislation or the dissemination of information. The Committee recalls General Comment No. 3, paragraph 12, which states that even in times of severe resource constraints, the vulnerable members of society must be protected by the adoption of relatively low-cost targeted programmes.

19. With respect to the right to health, equality of access to health care and health services has to be emphasized. States have a special obligation to provide those who do not have sufficient means with the necessary health insurance and health-care facilities, and to prevent any discrimination on internationally prohibited grounds in the provision of health care and health services, especially with respect to the core obligations of the right to health.<sup>16</sup> Inappropriate health resource allocation can lead to discrimination that may not be overt. For example, investments should not disproportionately favour expensive curative health services which are often accessible only to a small, privileged fraction of the population, rather than primary and preventive health care benefiting a far larger part of the population.

### Gender perspective

20. The Committee recommends that States integrate a gender perspective in their health-related policies, planning, programmes and research in order to promote better health for both women and men. A gender-based approach recognizes that biological and socio-cultural factors play a significant role in influencing the health of men and women. The disaggregation of health and socio-economic data according to sex is essential for identifying and remedying inequalities in health.

### Women and the right to health

21. To eliminate discrimination against women, there is a need to develop and implement a comprehensive national strategy for promoting women's right to health throughout their life span. Such a strategy should include interventions aimed at the prevention and treatment of diseases affecting women, as well as policies to provide access to a full range of high quality and affordable health care, including sexual and reproductive services. A major goal should be reducing women's health risks, particularly lowering rates of maternal mortality and protecting women from domestic violence. The realization of women's right to health requires the removal of all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health. It is also important to undertake preventive, promotive and remedial action to shield women from the impact of harmful traditional cultural practices and norms that deny them their full reproductive rights.

### Children and adolescents

22. Article 12.2 (a) outlines the need to take measures to reduce infant mortality and promote the healthy development of infants and children. Subsequent international human rights instruments recognize that children and adolescents have the right to the enjoyment of the highest standard of health and access to facilities for the treatment of illness.<sup>17</sup> The Convention on the Rights of the Child directs States to ensure access to essential health services for the child and his or her family, including pre- and post-natal care for mothers. The Convention links these goals with ensuring access to child-friendly information about preventive and health-promoting behaviour and support to families and communities in implementing these practices. Implementation of the principle of non-discrimination requires that girls, as well as boys, have equal access to adequate nutrition, safe environments, and physical as well as mental health services. There is a need to adopt effective and appropriate measures to abolish harmful traditional practices affecting the health of children, particularly girls, including early marriage, female genital mutilation, preferential feeding and care of male children.<sup>18</sup> Children with disabilities should be given the opportunity to enjoy a fulfilling and decent life and to participate within their community.

23. States parties should provide a safe and supportive environment for adolescents, that ensures the opportunity to participate in decisions affecting their health, to build life-skills, to acquire appropriate information, to receive counselling and to negotiate the health-behaviour choices they make. The realization of the right to health of adolescents is dependent on the development of youth-friendly health care, which respects confidentiality and privacy and includes appropriate sexual and reproductive health services.

24. In all policies and programmes aimed at guaranteeing the right to health of children and adolescents their best interests shall be a primary consideration.

### Older persons

25. With regard to the realization of the right to health of older persons, the Committee, in accordance with paragraphs 34 and 35 of General Comment No. 6 (1995), reaffirms the importance of an integrated approach, combining elements of preventive, curative and rehabilitative health treatment. Such measures should be based on periodical check-ups for both sexes; physical as well as psychological rehabilitative measures aimed at maintaining and functionality and autonomy of older persons; and attention and care for chronically and terminally ill persons, sparing them avoidable pain and enabling them to die with dignity.

### Persons with disabilities

26. The Committee reaffirms paragraph 34 of its General Comment No. 5, which addresses the issue of persons with disabilities in the context of the right to physical and mental health. Moreover, the Committee stresses the need to ensure that not only the public health sector but also private providers of health services and facilities comply with the principle of non-discrimination in relation to persons with disabilities.

### Indigenous peoples

27. In the light of emerging international law and practice and the recent measures taken by States in relation to indigenous peoples,<sup>19</sup> the Committee deems it useful to identify elements that would help to define indigenous peoples' right to health in order better to enable States with indigenous peoples to implement the provisions contained in article 12 of the Covenant. The Committee considers that indigenous peoples have the right to specific measures to improve their access to health services and care. These health services should be culturally appropriate, taking into account traditional preventive care, healing practices and medicines. States should provide resources for indigenous peoples to design, deliver and control such services so that they may enjoy the highest attainable standard of physical and mental health. The vital medicinal plants, animals and minerals necessary to the full enjoyment of health of indigenous peoples should also be protected. The Committee notes that, in indigenous communities, the health of the individual is often linked to the health of the society as a whole and has a collective dimension. In this respect, the Committee considers that development-related activities that lead to the displacement of indigenous peoples against their will from their traditional territories and environment, denying them their sources of nutrition and breaking their symbiotic relationship with their lands, has a deleterious effect on their health.

### Limitations

28. Issues of public health are sometimes used by States as grounds for limiting the exercise of other fundamental rights. The Committee wishes to emphasize that the Covenant's limitation clause, article 4, is primarily intended to protect the rights of individuals rather than to permit the imposition of limitations by States. Consequently a State party which, for example, restricts the movement of, or incarcerates, persons with transmissible diseases such as HIV/AIDS, refuses to

allow doctors to treat persons believed to be opposed to a government, or fails to provide immunization against the community's major infectious diseases, on grounds such as national security or the preservation of public order, has the burden of justifying such serious measures in relation to each of the elements identified in article 4. Such restrictions must be in accordance with the law, including international human rights standards, compatible with the nature of the rights protected by the Covenant, in the interest of legitimate aims pursued, and strictly necessary for the promotion of the general welfare in a democratic society.

29. In line with article 5.1, such limitations must be proportional, i.e. the least restrictive alternative must be adopted where several types of limitations are available. Even where such limitations on grounds of protecting public health are basically permitted, they should be of limited duration and subject to review.

## II. STATES PARTIES' OBLIGATIONS

### General legal obligations

30. While the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes on States parties various obligations which are of immediate effect. States parties have immediate obligations in relation to the right to health, such as the guarantee that the right will be exercised without discrimination of any kind (art. 2.2) and the obligation to take steps (art. 2.1) towards the full realization of article 12. Such steps must be deliberate, concrete and targeted towards the full realization of the right to health.<sup>20</sup>

31. The progressive realization of the right to health over a period of time should not be interpreted as depriving States parties' obligations of all meaningful content. Rather, progressive realization means that States parties have a specific and continuing obligation to move as expeditiously and effectively as possible towards the full realization of article 12.<sup>21</sup>

32. As with all other rights in the Covenant, there is a strong presumption that retrogressive measures taken in relation to the right to health are not permissible. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the State party's maximum available resources.<sup>22</sup>

33. The right to health, like all human rights, imposes three types or levels of obligations on States parties: the obligations to *respect*, *protect* and *fulfil*. In turn, the obligation to fulfil contains obligations to facilitate, provide and promote.<sup>23</sup> The obligation to *respect* requires States to refrain from interfering directly or indirectly with the enjoyment of the right to health. The obligation to *protect* requires States to take measures that prevent third parties from interfering with article 12 guarantees. Finally, the obligation to *fulfil* requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right to health.

### Specific legal obligations

34. In particular, States are under the obligation to *respect* the right to health by, *inter alia*, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services; abstaining from enforcing discriminatory practices as a State policy; and abstaining from imposing discriminatory practices relating to women's health status and needs.

Furthermore, obligations to respect include a State's obligation to refrain from prohibiting or impeding traditional preventive care, healing practices and medicines, from marketing unsafe drugs and from applying coercive medical treatments, unless on an exceptional basis for the treatment of mental illness or the prevention and control of communicable diseases. Such exceptional cases should be subject to specific and restrictive conditions, respecting best practices and applicable international standards, including the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care.<sup>24</sup> In addition, States should refrain from limiting access to contraceptives and other means of maintaining sexual and reproductive health, from censoring, withholding or intentionally misrepresenting health-related information, including sexual education and information, as well as from preventing people's participation in health-related matters. States should also refrain from unlawfully polluting air, water and soil, e.g. through industrial waste from State-owned facilities, from using or testing nuclear, biological or chemical weapons if such testing results in the release of substances harmful to human health, and from limiting access to health services as a punitive measure, e.g. during armed conflicts in violation of international humanitarian law.

35. Obligations to *protect* include, *inter alia*, the duties of States to adopt legislation or to take other measures ensuring equal access to health care and health-related services provided by third parties; to ensure that privatization of the health sector does not constitute a threat to the availability, accessibility, acceptability and quality of health facilities, goods and services; to control the marketing of medical equipment and medicines by third parties; and to ensure that medical practitioners and other health professionals meet appropriate standards of education, skill and ethical codes of conduct. States are also obliged to ensure that harmful social or traditional practices do not interfere with access to pre- and post-natal care and family-planning; to prevent third parties from coercing women to undergo traditional practices, e.g. female genital mutilation; and to take measures to protect all vulnerable or marginalized groups of society, in particular women, children, adolescents and older persons, in the light of gender-based expressions of violence. States should also ensure that third parties do not limit people's access to health-related information and services.

36. The obligation to *fulfil* requires States parties, *inter alia*, to give sufficient recognition to the right to health in the national political and legal systems, preferably by way of legislative implementation, and to adopt a national health policy with a detailed plan for realizing the right to health. States must ensure provision of health care, including immunization programmes against the major infectious diseases, and ensure equal access for all to the underlying determinants of health, such as nutritionally safe food and potable drinking water, basic sanitation and adequate housing and living conditions. Public health infrastructures should provide for sexual and reproductive health services, including safe motherhood, particularly in rural areas. States have to ensure the appropriate training of doctors and other medical personnel, the provision of a sufficient number of hospitals, clinics and other health-related facilities, and the

promotion and support of the establishment of institutions providing counselling and mental health services, with due regard to equitable distribution throughout the country. Further obligations include the provision of a public, private or mixed health insurance system which is affordable for all, the promotion of medical research and health education, as well as information campaigns, in particular with respect to HIV/AIDS, sexual and reproductive health, traditional practices, domestic violence, the abuse of alcohol and the use of cigarettes, drugs and other harmful substances. States are also required to adopt measures against environmental and occupational health hazards and against any other threat as demonstrated by epidemiological data. For this purpose they should formulate and implement national policies aimed at reducing and eliminating pollution of air, water and soil, including pollution by heavy metals such as lead from gasoline. Furthermore, States parties are required to formulate, implement and periodically review a coherent national policy to minimize the risk of occupational accidents and diseases, as well as to provide a coherent national policy on occupational safety and health services.<sup>25</sup>

37. The obligation to *fulfil (facilitate)* requires States *inter alia* to take positive measures that enable and assist individuals and communities to enjoy the right to health. States parties are also obliged to *fulfil (provide)* a specific right contained in the Covenant when individuals or a group are unable, for reasons beyond their control, to realize that right themselves by the means at their disposal. The obligation to *fulfil (promote)* the right to health requires States to undertake actions that create, maintain and restore the health of the population. Such obligations include: (i) fostering recognition of factors favouring positive health results, e.g. research and provision of information; (ii) ensuring that health services are culturally appropriate and that health care staff are trained to recognize and respond to the specific needs of vulnerable or marginalized groups; (iii) ensuring that the State meets its obligations in the dissemination of appropriate information relating to healthy lifestyles and nutrition, harmful traditional practices and the availability of services; (iv) supporting people in making informed choices about their health.

#### International obligations

38. In its General Comment No. 3, the Committee drew attention to the obligation of all States parties to take steps, individually and through international assistance and cooperation, especially economic and technical, towards the full realization of the rights recognized in the Covenant, such as the right to health. In the spirit of article 56 of the Charter of the United Nations, the specific provisions of the Covenant (articles 12, 2.1, 22 and 23) and the Alma-Ata Declaration on primary health care, States parties should recognize the essential role of international cooperation and comply with their commitment to take joint and separate action to achieve the full realization of the right to health. In this regard, States parties are referred to the Alma-Ata Declaration which proclaims that the existing gross inequality in the health status of the people, particularly between developed and developing countries, as well as within countries, is politically, socially and economically unacceptable and is, therefore, of common concern to all countries.<sup>26</sup>

39. To comply with their international obligations in relation to article 12, States parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law. Depending on the availability of resources, States should facilitate access to

essential health facilities, goods and services in other countries, wherever possible and provide the necessary aid when required.<sup>27</sup> States parties should ensure that the right to health is given due attention in international agreements and, to that end, should consider the development of further legal instruments. In relation to the conclusion of other international agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to health. Similarly, States parties have an obligation to ensure that their actions as members of international organizations take due account of the right to health. Accordingly, States parties which are members of international financial institutions, notably the International Monetary Fund, the World Bank, and regional development banks, should pay greater attention to the protection of the right to health in influencing the lending policies, credit agreements and international measures of these institutions.

40. States parties have a joint and individual responsibility, in accordance with the Charter of the United Nations and relevant resolutions of the United Nations General Assembly and of the World Health Assembly, to cooperate in providing disaster relief and humanitarian assistance in times of emergency, including assistance to refugees and internally displaced persons. Each State should contribute to this task to the maximum of its capacities. Priority in the provision of international medical aid, distribution and management of resources, such as safe and potable water, food and medical supplies, and financial aid should be given to the most vulnerable or marginalized groups of the population. Moreover, given that some diseases are easily transmissible beyond the frontiers of a State, the international community has a collective responsibility to address this problem. The economically developed States parties have a special responsibility and interest to assist the poorer developing States in this regard.

41. States parties should refrain at all times from imposing embargoes or similar measures restricting the supply of another State with adequate medicines and medical equipment. Restrictions on such goods should never be used as an instrument of political and economic pressure. In this regard, the Committee recalls its position, stated in General Comment No. 8, on the relationship between economic sanctions and respect for economic, social and cultural rights.

42. While only States are parties to the Covenant and thus ultimately accountable for compliance with it, all members of society - individuals, including health professionals, families, local communities, intergovernmental and non-governmental organizations, civil society organizations, as well as the private business sector - have responsibilities regarding the realization of the right to health. State parties should therefore provide an environment which facilitates the discharge of these responsibilities.

#### Core obligations

43. In General Comment No. 3, the Committee confirms that States parties have a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights enunciated in the Covenant, including essential primary health care. Read in conjunction with more contemporary instruments, such as the Programme of Action of the International Conference on Population and Development,<sup>28</sup> the Alma-Ata Declaration provides compelling guidance on the core obligations arising from article 12. Accordingly, in the Committee's view, these core obligations include at least the following obligations:

- (a) To ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups;
  - (b) To ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone;
  - (c) To ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water;
  - (d) To provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs;
  - (e) To ensure equitable distribution of all health facilities, goods and services;
  - (f) To adopt and implement a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population; the strategy and plan of action shall be devised, and periodically reviewed, on the basis of a participatory and transparent process; they shall include methods, such as right to health indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all vulnerable or marginalized groups.
44. The Committee also confirms that the following are obligations of comparable priority:
- (a) To ensure reproductive, maternal (pre-natal as well as post-natal) and child health care;
  - (b) To provide immunization against the major infectious diseases occurring in the community;
  - (c) To take measures to prevent, treat and control epidemic and endemic diseases;
  - (d) To provide education and access to information concerning the main health problems in the community, including methods of preventing and controlling them;
  - (e) To provide appropriate training for health personnel, including education on health and human rights.

45. For the avoidance of any doubt, the Committee wishes to emphasize that it is particularly incumbent on States parties and other actors in a position to assist, to provide "international assistance and cooperation, especially economic and technical"<sup>29</sup> which enable developing countries to fulfil their core and other obligations indicated in paragraphs 43 and 44 above.

### III. VIOLATIONS

46. When the normative content of article 12 (Part I) is applied to the obligations of States parties (Part II), a dynamic process is set in motion which facilitates identification of violations of the right to health. The following paragraphs provide illustrations of violations of article 12.
47. In determining which actions or omissions amount to a violation of the right to health, it is important to distinguish the inability from the unwillingness of a State party to comply with its obligations under article 12. This follows from article 12.1, which speaks of the highest attainable standard of health, as well as from article 2.1 of the Covenant, which obliges each State party to take the necessary steps to the maximum of its available resources. A State which is unwilling to use the maximum of its available resources for the realization of the right to health is in violation of its obligations under article 12. If resource constraints render it impossible for a State to comply fully with its Covenant obligations, it has the burden of justifying that every effort has nevertheless been made to use all available resources at its disposal in order to satisfy, as a matter of priority, the obligations outlined above. It should be stressed, however, that a State party cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations set out in paragraph 43 above, which are non-derogable.
48. Violations of the right to health can occur through the direct action of States or other entities insufficiently regulated by States. The adoption of any retrogressive measures incompatible with the core obligations under the right to health, outlined in paragraph 43 above, constitutes a violation of the right to health. Violations through *acts of omission* include the formal repeal or suspension of legislation necessary for the continued enjoyment of the right to health or the adoption of legislation or policies which are manifestly incompatible with pre-existing domestic or international legal obligations in relation to the right to health.
49. Violations of the right to health can also occur through the omission or failure of States to take necessary measures arising from legal obligations. Violations through *acts of omission* include the failure to take appropriate steps towards the full realization of everyone's right to the enjoyment of the highest attainable standard of physical and mental health, the failure to have a national policy on occupational safety and health as well as occupational health services, and the failure to enforce relevant laws.
- Violations of the obligation to respect
50. Violations of the obligation to respect are those State actions, policies or laws that contravene the standards set out in article 12 of the Covenant and are likely to result in bodily harm, unnecessary morbidity and preventable mortality. Examples include the denial of access to health facilities, goods and services to particular individuals or groups as a result of de jure or de facto discrimination; the deliberate withholding or misrepresentation of information vital to health protection or treatment; the suspension of legislation or the adoption of laws or policies that interfere with the enjoyment of any of the components of the right to health; and the failure of the State to take into account its legal obligations regarding the right to health when entering into bilateral or multilateral agreements with other States, international organizations and other entities, such as multinational corporations.

Violations of the obligation to protect

51. Violations of the obligation to protect follow from the failure of a State to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to health by third parties. This category includes such omissions as the failure to regulate the activities of individuals, groups or corporations so as to prevent them from violating the right to health of others; the failure to protect consumers and workers from practices detrimental to health, e.g. by employers and manufacturers of medicines or food; the failure to discourage production, marketing and consumption of tobacco, narcotics and other harmful substances; the failure to protect women against violence or to prosecute perpetrators; the failure to discourage the continued observance of harmful traditional medical or cultural practices; and the failure to enact or enforce laws to prevent the pollution of water, air and soil by extractive and manufacturing industries.

Violations of the obligation to fulfil

52. Violations of the obligation to fulfil occur through the failure of States parties to take all necessary steps to ensure the realization of the right to health. Examples include the failure to adopt or implement a national health policy designed to ensure the right to health for everyone; insufficient expenditure or misallocation of public resources which results in the non-employment of the right to health by individuals or groups, particularly the vulnerable or marginalized; the failure to monitor the realization of the right to health at the national level, for example by identifying right to health indicators and benchmarks; the failure to take measures to reduce the inequitable distribution of health facilities, goods and services; the failure to adopt a gender-sensitive approach to health; and the failure to reduce infant and maternal mortality rates.

IV. IMPLEMENTATION AT THE NATIONAL LEVEL

Framework legislation

53. The most appropriate feasible measures to implement the right to health will vary significantly from one State to another. Every State has a margin of discretion in assessing which measures are most suitable to meet its specific circumstances. The Covenant, however, clearly imposes a duty on each State to take whatever steps are necessary to ensure that everyone has access to health facilities, goods and services so that they can enjoy, as soon as possible, the highest attainable standard of physical and mental health. This requires the adoption of a national strategy to ensure to all the enjoyment of the right to health, based on human rights principles which define the objectives of that strategy, and the formulation of policies and corresponding right to health indicators and benchmarks. The national health strategy should also identify the resources available to attain defined objectives, as well as the most cost-effective way of using those resources.

54. The formulation and implementation of national health strategies and plans of action should respect, *inter alia*, the principles of non-discrimination and people's participation. In particular, the right of individuals and groups to participate in decision-making processes, which may affect their development, must be an integral component of any policy, programme or strategy developed to discharge governmental obligations under article 12. Promoting health

must involve effective community action in setting priorities, making decisions, planning, implementing and evaluating strategies to achieve better health. Effective provision of health services can only be assured if people's participation is secured by States.

55. The national health strategy and plan of action should also be based on the principles of accountability, transparency and independence of the judiciary, since good governance is essential to the effective implementation of all human rights, including the realization of the right to health. In order to create a favourable climate for the realization of the right, States parties should take appropriate steps to ensure that the private business sector and civil society are aware of, and consider the importance of, the right to health in pursuing their activities.

56. States should consider adopting a framework law to operationalize their right to health national strategy. The framework law should establish national mechanisms for monitoring the implementation of national health strategies and plans of action. It should include provisions on the targets to be achieved and the time-frame for their achievement; the means by which right to health benchmarks could be achieved; the intended collaboration with civil society, including health experts, the private sector and international organizations; institutional responsibility for the implementation of the right to health national strategy and plan of action; and possible recourse procedures. In monitoring progress towards the realization of the right to health, States parties should identify the factors and difficulties affecting implementation of their obligations.

Right to health indicators and benchmarks

57. National health strategies should identify appropriate right to health indicators and benchmarks. The indicators should be designed to monitor, at the national and international levels, the State party's obligations under article 12. States may obtain guidance on appropriate right to health indicators, which should address different aspects of the right to health, from the ongoing work of WHO and the United Nations Children's Fund (UNICEF) in this field. Right to health indicators require disaggregation on the prohibited grounds of discrimination.

58. Having identified appropriate right to health indicators, States parties are invited to set appropriate national benchmarks in relation to each indicator. During the periodic reporting procedure the Committee will engage in a process of scoping with the State party. Scoping involves the joint consideration by the State party and the Committee of the indicators and national benchmarks which will then provide the targets to be achieved during the next reporting period. In the following five years, the State party will use these national benchmarks to help monitor its implementation of article 12. Thereafter, in the subsequent reporting process, the State party and the Committee will consider whether or not the benchmarks have been achieved, and the reasons for any difficulties that may have been encountered.

Remedies and accountability

59. Any person or group victim of a violation of the right to health should have access to effective judicial or other appropriate remedies at both national and international levels.<sup>30</sup> All victims of such violations should be entitled to adequate reparation, which may take the form of

restitution, compensation, satisfaction or guarantees of non-repetition. National ombudsmen, human rights commissions, consumer forums, patients' rights associations or similar institutions should address violations of the right to health.

60. The incorporation in the domestic legal order of international instruments recognizing the right to health can significantly enhance the scope and effectiveness of remedial measures and should be encouraged in all cases.<sup>31</sup> Incorporation enables courts to adjudicate violations of the right to health, or at least its core obligations, by direct reference to the Covenant.

61. Judges and members of the legal profession should be encouraged by States parties to pay greater attention to violations of the right to health in the exercise of their functions.

62. States parties should respect, protect, facilitate and promote the work of human rights advocates and other members of civil society with a view to assisting vulnerable or marginalized groups in the realization of their right to health.

#### V. OBLIGATIONS OF ACTORS OTHER THAN STATES PARTIES

63. The role of the United Nations agencies and programmes, and in particular the key function assigned to WHO in realizing the right to health at the international, regional and country levels, is of particular importance, as is the function of UNICEF in relation to the right to health of children. When formulating and implementing their right to health national strategies, States parties should avail themselves of technical assistance and cooperation of WHO. Further, when preparing their reports, States parties should utilize the extensive information and advisory services of WHO with regard to data collection, disaggregation, and the development of right to health indicators and benchmarks.

64. Moreover, coordinated efforts for the realization of the right to health should be maintained to enhance the interaction among all the actors concerned, including the various components of civil society. In conformity with articles 22 and 23 of the Covenant, WHO, The International Labour Organization, the United Nations Development Programme, UNICEF, the United Nations Population Fund, the World Bank, regional development banks, the International Monetary Fund, the World Trade Organization and other relevant bodies within the United Nations system, should cooperate effectively with States parties, building on their respective expertise, in relation to the implementation of the right to health at the national level, with due respect to their individual mandates. In particular, the international financial institutions, notably the World Bank and the International Monetary Fund, should pay greater attention to the protection of the right to health in their lending policies, credit agreements and structural adjustment programmes. When examining the reports of States parties and their ability to meet the obligations under article 12, the Committee will consider the effects of the assistance provided by all other actors. The adoption of a human rights-based approach by United Nations specialized agencies, programmes and bodies will greatly facilitate implementation of the right to health. In the course of its examination of States parties' reports, the Committee will also consider the role of health professional associations and other non-governmental organizations in relation to the States' obligations under article 12.

65. The role of WHO, the Office of the United Nations High Commissioner for Refugees, the International Committee of the Red Cross/Red Crescent and UNICEF, as well as non governmental organizations and national medical associations, is of particular importance in relation to disaster relief and humanitarian assistance in times of emergencies, including assistance to refugees and internally displaced persons. Priority in the provision of international medical aid, distribution and management of resources, such as safe and potable water, food and medical supplies, and financial aid should be given to the most vulnerable or marginalized groups of the population.

*Adopted on 11 May 2000.*

#### Notes

- 1 For example, the principle of non-discrimination in relation to health facilities, goods and services is legally enforceable in numerous national jurisdictions.
- 2 In its resolution 1989/11.
- 3 The Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care adopted by the United Nations General Assembly in 1991 (resolution 46/119) and the Committee's General Comment No. 5 on persons with disabilities apply to persons with mental illness: the Programme of Action of the International Conference on Population and Development held at Cairo in 1994, as well as the Declaration and Programme for Action of the Fourth World Conference on Women held in Beijing in 1995 contain definitions of reproductive health and women's health, respectively.
- 4 Common article 3 of the Geneva Conventions for the protection of war victims (1949); Additional Protocol I (1977) relating to the Protection of Victims of International Armed Conflicts, art. 75 (2) (a); Additional Protocol II (1977) relating to the Protection of Victims of Non-International Armed Conflicts, art. 4 (a).
- 5 See WHO Model List of Essential Drugs, revised December 1999, WHO Drug Information, vol. 13, No. 4, 1999.
- 6 Unless expressly provided otherwise, any reference in this General Comment to health facilities, goods and services includes the underlying determinants of health outlined in paras. 11 and 12 (a) of this General Comment.
- 7 See paras. 18 and 19 of this General Comment.
- 8 See article 19.2 of the International Covenant on Civil and Political Rights. This General Comment gives particular emphasis to access to information because of the special importance of this issue in relation to health.
- 9 In the literature and practice concerning the right to health, three levels of health care are frequently referred to: *primary health care* typically deals with common and relatively minor

illnesses and is provided by health professionals and/or generally trained doctors working within the community at relatively low cost; *secondary health care* is provided in centres, usually hospitals, and typically deals with relatively common minor or serious illnesses that cannot be managed at community level, using specially-trained health professionals and doctors, special equipment and sometimes in-patient care at comparatively higher cost; *tertiary health care* is provided in relatively few centres, typically deals with small numbers of minor or serious illnesses requiring specially-trained health professionals and doctors and special equipment, and is often relatively expensive. Since forms of primary, secondary and tertiary health care frequently overlap and often interact, the use of this typology does not always provide sufficient distinguishing criteria to be helpful for assessing which levels of health care States parties must provide, and is therefore of limited assistance in relation to the normative understanding of article 12.

<sup>10</sup> According to WHO, the stillbirth rate is no longer commonly used, infant and under-five mortality rates being measured instead.

<sup>11</sup> *Prenatal* denotes existing or occurring before birth; *perinatal* refers to the period shortly before and after birth (in medical statistics the period begins with the completion of 28 weeks of gestation and is variously defined as ending one to four weeks after birth); *neonatal*, by contrast, covers the period pertaining to the first four weeks after birth; while *post-natal* denotes occurrence after birth. In this General Comment, the more generic terms pre- and post-natal are exclusively employed.

<sup>12</sup> Reproductive health means that women and men have the freedom to decide if and when to reproduce and the right to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice as well as the right of access to appropriate health-care services that will, for example, enable women to go safely through pregnancy and childbirth.

<sup>13</sup> The Committee takes note, in this regard, of Principle 1 of the Stockholm Declaration of 1972 which states: "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being", as well as of recent developments in international law, including General Assembly resolution 45/94 on the need to ensure a healthy environment for the well-being of individuals; Principle 1 of the Rio Declaration; and regional human rights instruments such as article 10 of the San Salvador Protocol to the American Convention on Human Rights.

<sup>14</sup> ILO Convention No. 155, art. 4.2.

<sup>15</sup> See para. 12 (b) and note 8 above.

<sup>16</sup> For the core obligations, see paras. 43 and 44 of the present General Comments.

<sup>17</sup> Article 24.1 of the Convention on the Rights of the Child.

<sup>18</sup> See World Health Assembly resolution WHA47.10, 1994, entitled "Maternal and child health and family planning: traditional practices harmful to the health of women and children".

<sup>19</sup> Recent emerging international norms relevant to indigenous peoples include the ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989); articles 29 (c) and (d) and 30 of the Convention on the Rights of the Child (1989); article 8 (j) of the Convention on Biological Diversity (1992), recommending that States respect, preserve and maintain knowledge, innovation and practices of indigenous communities; Agenda 21 of the United Nations Conference on Environment and Development (1992), in particular chapter 26; and Part I, paragraph 20, of the Vienna Declaration and Programme of Action (1993), stating that States should take concerted positive steps to ensure respect for all human rights of indigenous people, on the basis of non-discrimination. See also the preamble and article 3 of the United Nations Framework Convention on Climate Change (1992); and article 10 (2) (e) of the United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (1994). During recent years an increasing number of States have changed their constitutions and introduced legislation recognizing specific rights of indigenous peoples.

<sup>20</sup> See General Comment No. 13, para. 43.

<sup>21</sup> See General Comment No. 3, para. 9; General Comment No. 13, para. 44.

<sup>22</sup> See General Comment No. 3, para. 9; General Comment No. 13, para. 45.

<sup>23</sup> According to General Comments Nos. 12 and 13, the obligation to fulfil incorporates an obligation to *facilitate* and an obligation to *provide*. In the present General Comment, the obligation to fulfil also incorporates an obligation to *promote* because of the critical importance of health promotion in the work of WHO and elsewhere.

<sup>24</sup> General Assembly resolution 46/119 (1991).

<sup>25</sup> Elements of such a policy are the identification, determination, authorization and control of dangerous materials, equipment, substances, agents and work processes; the provision of health information to workers and the provision, if needed, of adequate protective clothing and equipment; the enforcement of laws and regulations through adequate inspection; the requirement of notification of occupational accidents and diseases, the conduct of inquiries into serious accidents and diseases, and the production of annual statistics; the protection of workers and their representatives from disciplinary measures for actions properly taken by them in conformity with such a policy; and the provision of occupational health services with essentially preventive functions. See ILO Occupational Safety and Health Convention, 1981 (No. 155) and Occupational Health Services Convention, 1985 (No. 161).

<sup>26</sup> Article II, Alma-Ata Declaration, Report of the International Conference on Primary Health Care, Alma-Ata, 6-12 September 1978, in: World Health Organization, "Health for All" Series, No. 1, WHO, Geneva, 1978.

<sup>27</sup> See para. 45 of this General Comment.

<sup>28</sup> Report of the International Conference on Population and Development, Cairo, 5-13 September 1994 (United Nations publication, Sales No. E.95.XIII.18), chap. I, resolution 1, annex, chaps. VII and VIII.

<sup>29</sup> Covenant, art. 2.1.

<sup>30</sup> Regardless of whether groups as such can seek remedies as distinct holders of rights, States parties are bound by both the collective and individual dimensions of article 12. Collective rights are critical in the field of health; modern public health policy relies heavily on prevention and promotion which are approaches directed primarily to groups.

<sup>31</sup> See General Comment No. 2, para. 9.

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**General Comment No. 29 on article 4 on derogations  
during a state of emergency (adopted by the Human  
Rights Committee, 24 July 2001  
(CCPR/C/21/Rev.1/Add.11))**



**International covenant  
on civil and  
political rights**

**CCPR**

Distr.  
GENERAL

CCPR/C/21/Rev.1/Add.11  
31 August 2001

Original: ENGLISH

CCPR/C/21/Rev.1/Add.11  
page 2

**GENERAL COMMENT ON ARTICLE 4**

**(adopted at the 1950th meeting, on 24 July 2001)**

1. Article 4 of the Covenant is of paramount importance for the system of protection for human rights under the Covenant. On the one hand, it allows for a State party unilaterally to derogate temporarily from a part of its obligations under the Covenant. On the other hand, article 4 subjects both this very measure of derogation, as well as its material consequences, to a specific regime of safeguards. The restoration of a state of normalcy where full respect for the Covenant can again be secured must be the predominant objective of a State party derogating from the Covenant. In this general comment, replacing its General Comment No 5, adopted at the thirteenth session (1981), the Committee seeks to assist States parties to meet the requirements of article 4.
2. Measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature. Before a State moves to invoke article 4, two fundamental conditions must be met: the situation must amount to a public emergency which threatens the life of the nation, and the State party must have officially proclaimed a state of emergency. The latter requirement is essential for the maintenance of the principles of legality and rule of law at times when they are most needed. When proclaiming a state of emergency with consequences that could entail derogation from any provision of the Covenant, States must act within their constitutional and other provisions of law that govern such proclamation and the exercise of emergency powers; it is the task of the Committee to monitor the laws in question with respect to whether they enable and secure compliance with article 4. In order that the Committee can perform its task, States parties to the Covenant should include in their reports submitted under article 40 sufficient and precise information about their law and practice in the field of emergency powers.
3. Not every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation, as required by article 4, paragraph 1. During armed conflict, whether international or non-international, rules of international humanitarian law become applicable and help, in addition to the provisions in article 4 and article 5, paragraph 1, of the Covenant, to prevent the abuse of a State's emergency powers. The Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation. If States parties consider invoking article 4 in other situations than an armed conflict, they should carefully consider the justification and why such a measure is necessary and legitimate in the circumstances. On a number of occasions the Committee has expressed its concern over States parties that appear to have derogated from rights protected by the Covenant, or whose domestic law appears to allow such derogation in situations not covered by article 4.<sup>1</sup>
4. A fundamental requirement for any measures derogating from the Covenant, as set forth in article 4, paragraph 1, is that such measures are limited to the extent strictly required by the exigencies of the situation. This requirement relates to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency. Derogation from some Covenant obligations in emergency situations is clearly distinct from restrictions or limitations allowed even in normal times under several provisions of the Covenant.<sup>2</sup> Nevertheless, the obligation to limit any derogations to those strictly required by

**GENERAL COMMENT NO. 29**

**STATES OF EMERGENCY (ARTICLE 4)**

GE.01-44470 (E)

the exigencies of the situation reflects the principle of proportionality which is common to derogation and limitation powers. Moreover, the mere fact that a permissible derogation from a specific provision may, of itself, be justified by the exigencies of the situation does not obviate the requirement that specific measures taken pursuant to the derogation must also be shown to be required by the exigencies of the situation. In practice, this will ensure that no provision of the Covenant, however validly derogated from will be entirely inapplicable to the behaviour of a State party. When considering States parties' reports the Committee has expressed its concern over insufficient attention being paid to the principle of proportionality.<sup>3</sup>

5. The issues of when rights can be derogated from, and to what extent, cannot be separated from the provision in article 4, paragraph 1, of the Covenant according to which any measures derogating from a State party's obligations under the Covenant must be limited "to the extent strictly required by the exigencies of the situation". This condition requires that States parties provide careful justification not only for their decision to proclaim a state of emergency but also for any specific measures based on such a proclamation. If States purport to invoke the right to derogate from the Covenant during, for instance, a natural catastrophe, a mass demonstration including instances of violence, or a major industrial accident, they must be able to justify not only that such a situation constitutes a threat to the life of the nation, but also that all their measures derogating from the Covenant are strictly required by the exigencies of the situation. In the opinion of the Committee, the possibility of restricting certain Covenant rights under the terms of, for instance, freedom of movement (article 12) or freedom of assembly (article 21) is generally sufficient during such situations and no derogation from the provisions in question would be justified by the exigencies of the situation.

6. The fact that some of the provisions of the Covenant have been listed in article 4 (paragraph 2), as not being subject to derogation does not mean that other articles in the Covenant may be subjected to derogations at will, even where a threat to the life of the nation exists. The legal obligation to narrow down all derogations to those strictly required by the exigencies of the situation establishes both for States parties and for the Committee a duty to conduct a careful analysis under each article of the Covenant based on an objective assessment of the actual situation.

7. Article 4, paragraph 2, of the Covenant explicitly prescribes that no derogation from the following articles may be made: article 6 (right to life), article 7 (prohibition of torture or cruel, inhuman or degrading punishment, or of medical or scientific experimentation without consent), article 8, paragraphs 1 and 2 (prohibition of slavery, slave-trade and servitude), article 11 (prohibition of imprisonment because of inability to fulfil a contractual obligation), article 15 (the principle of legality in the field of criminal law, i.e. the requirement of both criminal liability and punishment being limited to clear and precise provisions in the law that was in place and applicable at the time the act or omission took place, except in cases where a later law imposes a lighter penalty), article 16 (the recognition of everyone as a person before the law), and article 18 (freedom of thought, conscience and religion). The rights enshrined in these provisions are non-derogable by the very fact that they are listed in article 4, paragraph 2. The same applies, in relation to States that are parties to the Second Optional Protocol to the Covenant, aiming at the abolition of the death penalty, as prescribed in article 6 of that Protocol. Conceptually, the qualification of a Covenant provision as a non-derogable one does not mean that no limitations or restrictions would ever be justified. The reference in article 4, paragraph 2,

to article 18, a provision that includes a specific clause on restrictions in its paragraph 3, demonstrates that the permissibility of restrictions is independent of the issue of derogability. Even in times of most serious public emergencies, States that interfere with the freedom to manifest one's religion or belief must justify their actions by referring to the requirements specified in article 18, paragraph 3. On several occasions the Committee has expressed its concern about rights that are non-derogable according to article 4, paragraph 2, being either derogated from or under a risk of derogation owing to inadequacies in the legal regime of the State party.<sup>4</sup>

8. According to article 4, paragraph 1, one of the conditions for the justifiability of any derogation from the Covenant is that the measures taken do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. Even though article 26 or the other Covenant provisions related to non-discrimination (articles 2, 3, 14, paragraph 1, 23, paragraph 4, 24, paragraph 1, and 25) have not been listed among the non-derogable provisions in article 4, paragraph 2, there are elements or dimensions of the right to non-discrimination that cannot be derogated from in any circumstances. In particular, this provision of article 4, paragraph 1, must be complied with if any distinctions between persons are made when resorting to measures that derogate from the Covenant.

9. Furthermore, article 4, paragraph 1, requires that no measure derogating from the provisions of the Covenant may be inconsistent with the State party's other obligations under international law, particularly the rules of international humanitarian law. Article 4 of the Covenant cannot be read as justification for derogation from the Covenant if such derogation would entail a breach of the State's other international obligations, whether based on treaty or general international law. This is reflected also in article 5, paragraph 2, of the Covenant according to which there shall be no restriction upon or derogation from any fundamental rights recognized in other instruments on the pretext that the Covenant does not recognize such rights or that it recognizes them to a lesser extent.

10. Although it is not the function of the Human Rights Committee to review the conduct of a State party under other treaties, in exercising its functions under the Covenant the Committee has the competence to take a State party's other international obligations into account when it considers whether the Covenant allows the State party to derogate from specific provisions of the Covenant. Therefore, when invoking article 4, paragraph 1, or when reporting under article 40 on the legal framework related to emergencies, States parties should present information on their other international obligations relevant for the protection of the rights in question, in particular those obligations that are applicable in times of emergency.<sup>5</sup> In this respect, States parties should duly take into account the developments within international law as to human rights standards applicable in emergency situations.<sup>6</sup>

11. The enumeration of non-derogable provisions in article 4 is related to, but not identical with, the question whether certain human rights obligations bear the nature of peremptory norms of international law. The proclamation of certain provisions of the Covenant as being of a non-derogable nature, in article 4, paragraph 2, is to be seen partly as recognition of the peremptory nature of some fundamental rights ensured in treaty form in the Covenant (e.g., articles 6 and 7). However, it is apparent that some other provisions of the Covenant were included in the list of non-derogable provisions because it can never become necessary to

derogate from these rights during a state of emergency (e.g., articles 11 and 18). Furthermore, the category of peremptory norms extends beyond the list of non-derogable provisions as given in article 4, paragraph 2. States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence.

12. In assessing the scope of legitimate derogation from the Covenant, one criterion can be found in the definition of certain human rights violations as crimes against humanity. If action conducted under the authority of a State constitutes a basis for individual criminal responsibility for a crime against humanity by the persons involved in that action, article 4 of the Covenant cannot be used as justification that a state of emergency exempted the State in question from its responsibility in relation to the same conduct. Therefore, the recent codification of crimes against humanity, for jurisdictional purposes, in the Rome Statute of the International Criminal Court is of relevance in the interpretation of article 4 of the Covenant.<sup>7</sup>

13. In those provisions of the Covenant that are not listed in article 4, paragraph 2, there are elements that in the Committee's opinion cannot be made subject to lawful derogation under article 4. Some illustrative examples are presented below.

(a) All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Although this right, prescribed in article 10 of the Covenant, is not separately mentioned in the list of non-derogable rights in article 4, paragraph 2, the Committee believes that here the Covenant expresses a norm of general international law not subject to derogation. This is supported by the reference to the inherent dignity of the human person in the preamble to the Covenant and by the close connection between articles 7 and 10.

(b) The prohibitions against taking of hostages, abductions or unacknowledged detention are not subject to derogation. The absolute nature of these prohibitions, even in times of emergency, is justified by their status as norms of general international law.

(c) The Committee is of the opinion that the international protection of the rights of persons belonging to minorities includes elements that must be respected in all circumstances. This is reflected in the prohibition against genocide in international law, in the inclusion of a non-discrimination clause in article 4 itself (paragraph 1), as well as in the non-derogable nature of article 18.

(d) As confirmed by the Rome Statute of the International Criminal Court, deportation or forcible transfer of population without grounds permitted under international law, in the form of forced displacement by expulsion or other coercive means from the area in which the persons concerned are lawfully present, constitutes a crime against humanity.<sup>8</sup> The legitimate right to derogate from article 12 of the Covenant during a state of emergency can never be accepted as justifying such measures.

(e) No declaration of a state of emergency made pursuant to article 4, paragraph 1, may be invoked as justification for a State party to engage itself, contrary to article 20, in propaganda for war, or in advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence.

14. Article 2, paragraph 3, of the Covenant requires a State party to the Covenant to provide remedies for any violation of the provisions of the Covenant. This clause is not mentioned in the list of non-derogable provisions in article 4, paragraph 2, but it constitutes a treaty obligation inherent in the Covenant as a whole. Even if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant to provide a remedy that is effective.

15. It is inherent in the protection of rights explicitly recognized as non-derogable in article 4, paragraph 2, that they must be secured by procedural guarantees, including, often, judicial guarantees. The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights. Article 4 may not be resorted to in a way that would result in derogation from non-derogable rights. Thus, for example, as article 6 of the Covenant is non-derogable in its entirety, any trial leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the Covenant, including all the requirements of articles 14 and 15.

16. Safeguards related to derogation, as embodied in article 4 of the Covenant, are based on the principles of legality and the rule of law inherent in the Covenant as a whole. As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected. In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant.<sup>9</sup>

17. In paragraph 3 of article 4, States parties, when they resort to their power of derogation under article 4, commit themselves to a regime of international notification. A State party availing itself of the right of derogation must immediately inform the other States parties, through the United Nations Secretary-General, of the provisions it has derogated from and of the reasons for such measures. Such notification is essential not only for the discharge of the Committee's functions, in particular in assessing whether the measures taken by the State party were strictly required by the exigencies of the situation, but also to permit other States parties to monitor compliance with the provisions of the Covenant. In view of the summary character of many of the notifications received in the past, the Committee emphasizes that the notification by States parties should include full information about the measures taken and a clear explanation of the reasons for them, with full documentation attached regarding their law. Additional notifications are required if the State party subsequently takes further measures under article 4,

for instance by extending the duration of a state of emergency. The requirement of immediate notification applies equally in relation to the termination of derogation. These obligations have not always been respected: States parties have failed to notify other States parties, through the Secretary-General, of a proclamation of a state of emergency and of the resulting measures of derogation from one or more provisions of the Covenant, and States parties have sometimes neglected to submit a notification of territorial or other changes in the exercise of their emergency powers.<sup>10</sup> Sometimes, the existence of a state of emergency and the question of whether a State party has derogated from provisions of the Covenant have come to the attention of the Committee only incidentally, in the course of the consideration of a State party's report. The Committee emphasizes the obligation of immediate international notification whenever a State party takes measures derogating from its obligations under the Covenant. The duty of the Committee to monitor the law and practice of a State party for compliance with article 4 does not depend on whether that State party has submitted a notification.

#### Notes

<sup>1</sup> See the following comments/concluding observations: United Republic of Tanzania (1992), CCPR/C/79/Add.12, para. 7; Dominican Republic (1993), CCPR/C/79/Add.18, para. 4; United Kingdom of Great Britain and Northern Ireland (1995), CCPR/C/79/Add.55, para. 23; Peru (1996), CCPR/C/79/Add.67, para. 11; Bolivia (1997), CCPR/C/79/Add.74, para. 14; Colombia (1997), CCPR/C/79/Add.76, para. 25; Lebanon (1997), CCPR/C/79/Add.78, para. 10; Uruguay (1998), CCPR/C/79/Add.90, para. 8; Israel (1998), CCPR/C/79/Add.93, para. 11.

<sup>2</sup> See, for instance, articles 12 and 19 of the Covenant.

<sup>3</sup> See, for example, concluding observations on Israel (1998), CCPR/C/79/Add.93, para. 11.

<sup>4</sup> See the following comments/concluding observations: Dominican Republic (1993), CCPR/C/79/Add.18, para. 4; Jordan (1994) CCPR/C/79/Add.35, para. 6; Nepal (1994) CCPR/C/79/Add.42, para. 9; Russian Federation (1995), CCPR/C/79/Add.54, para. 27; Zambia (1996), CCPR/C/79/Add.62, para. 11; Gabon (1996), CCPR/C/79/Add.71, para. 10; Colombia (1997) CCPR/C/79/Add.76, para. 25; Israel (1998), CCPR/C/79/Add.93, para. 11; Iraq (1997), CCPR/C/79/Add.84, para. 9; Uruguay (1998) CCPR/C/79/Add.90, para. 8; Armenia (1998), CCPR/C/79/Add.100, para. 7; Mongolia (2000), CCPR/C/79/Add.120, para. 14; Kyrgyzstan (2000), CCPR/CO/69/KGZ, para. 12.

<sup>5</sup> Reference is made to the Convention on the Rights of the Child which has been ratified by almost all States parties to the Covenant and does not include a derogation clause. As article 38 of the Convention clearly indicates, the Convention is applicable in emergency situations.

<sup>6</sup> Reference is made to reports of the Secretary-General to the Commission on Human Rights submitted pursuant to Commission resolutions 1998/29, 1996/65 and 2000/69 on minimum humanitarian standards (later: fundamental standards of humanity), E/CN.4/1999/92, E/CN.4/2000/94 and E/CN.4/2001/91, and to earlier efforts to identify fundamental rights applicable in all circumstances, for instance the Paris Minimum Standards of Human Rights Norms in a State of Emergency (International Law Association, 1984), the Siracusa Principles

on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, the final report of Mr. Leandro Despouy, Special Rapporteur of the Sub-Commission, on human rights and states of emergency (E/CN.4/Sub.2/1997/19 and Add.1), the Guiding Principles on Internal Displacement (E/CN.4/1998/53/Add.2), the Turku (Abo) Declaration of Minimum Humanitarian Standards (1990), (E/CN.4/1995/116). As a field of ongoing further work reference is made to the decision of the 26th International Conference of the Red Cross and Red Crescent (1995) to assign the International Committee of the Red Cross the task of preparing a report on the customary rules of international humanitarian law applicable in international and non-international armed conflicts.

<sup>7</sup> See articles 6 (genocide) and 7 (crimes against humanity) of the Statute which by 1 July 2001 had been ratified by 35 States. While many of the specific forms of conduct listed in article 7 of the Statute are directly linked to violations against those human rights that are listed as non-derogable provisions in article 4, paragraph 2, of the Covenant, the category of crimes against humanity as defined in that provision covers also violations of some provisions of the Covenant that have not been mentioned in the said provision of the Covenant. For example, certain grave violations of article 27 may at the same time constitute genocide under article 6 of the Rome Statute, and article 7, in turn, covers practices that are related to, besides articles 6, 7 and 8 of the Covenant, also articles 9, 12, 26 and 27.

<sup>8</sup> See article 7 (1) (d) and 7 (2) (d) of the Rome Statute.

<sup>9</sup> See the Committee's concluding observations on Israel (1998) (CCPR/C/79/Add.93), para. 21: "... The Committee considers the present application of administrative detention to be incompatible with articles 7 and 16 of the Covenant, neither of which allows for derogation in times of public emergency ... The Committee stresses, however, that a State party may not depart from the requirement of effective judicial review of detention." See also the recommendation by the Committee to the Sub-Commission on Prevention of Discrimination and Protection of Minorities concerning a draft third optional protocol to the Covenant: "The Committee is satisfied that States parties generally understand that the right to habeas corpus and amparo should not be limited in situations of emergency. Furthermore, the Committee is of the view that the remedies provided in article 9, paragraphs 3 and 4, read in conjunction with article 2 are inherent to the Covenant as a whole." Official Records of the General Assembly, Forty-ninth session, Supplement No. 40 (A/49/40), vol. I, annex XI, para. 2.

<sup>10</sup> See comments/concluding observations on Peru (1992) CCPR/C/79/Add.8, para. 10; Ireland (1993) CCPR/C/79/Add.21, para. 11; Egypt (1993), CCPR/C/79/Add.23, para. 7; Cameroon (1994) CCPR/C/79/Add.33, para. 7; Russian Federation (1995), CCPR/C/79/Add.54, para. 27; Zambia (1996), CCPR/C/79/Add.62, para. 11; Lebanon (1997), CCPR/C/79/Add.78, para. 10; India (1997), CCPR/C/79/Add.81, para. 19; Mexico (1999), CCPR/C/79/Add.109, para. 12.

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**General Comment No. 31[80] on the nature of the  
general legal obligation imposed on States parties  
to the Covenant (adopted by the Human Rights  
Committee, 29 March 2004  
(CCPR/C/21/Rev.1/Add. 13))**



**International covenant  
on civil and  
political rights**

Distr.  
GENERAL

CCPR/C/21/Rev.1/Add. 13  
26 May 2004

Original: ENGLISH

HUMAN RIGHTS COMMITTEE  
Eightieth session

**General Comment No. 31 [80]**

**The Nature of the General Legal Obligation Imposed on States Parties to the Covenant**

Adopted on 29 March 2004 (2187<sup>th</sup> meeting)

1. This General Comment replaces General Comment No 3, reflecting and developing its principles. The general non-discrimination provisions of article 2, paragraph 1, have been addressed in General Comment 18 and General Comment 28, and this General Comment should be read together with them.

2. While article 2 is couched in terms of the obligations of State Parties towards individuals as the right-holders under the Covenant, every State Party has a legal interest in the performance by every other State Party of its obligations. This follows from the fact that the 'rules concerning the basic rights of the human person' are *erga omnes* obligations and that, as indicated in the fourth preambular paragraph of the Covenant, there is a United Nations Charter obligation to promote universal respect for, and observance of, human rights and fundamental freedoms. Furthermore, the contractual dimension of the treaty involves any State Party to a treaty being obligated to every other State Party to comply with its undertakings under the treaty. In this connection, the Committee reminds States Parties of the desirability of making the declaration contemplated in article 41. It further reminds those States Parties already having made the declaration of the potential value of availing themselves of the procedure under that article. However, the mere fact that a formal interstate mechanism for complaints to the Human Rights Committee exists in respect of States Parties that have made the declaration under article

41 does not mean that this procedure is the only method by which States Parties can assert their interest in the performance of other States Parties. On the contrary, the article 41 procedure should be seen as supplementary to, not diminishing of, States Parties' interest in each others' discharge of their obligations. Accordingly, the Committee commends to States Parties the view that violations of Covenant rights by any State Party deserve their attention. To draw attention to possible breaches of Covenant obligations by other States Parties and to call on them to comply with their Covenant obligations should, far from being regarded as an unfriendly act, be considered as a reflection of legitimate community interest.

3. Article 2 defines the scope of the legal obligations undertaken by States Parties to the Covenant. A general obligation is imposed on States Parties to respect the Covenant rights and to ensure them to all individuals in their territory and subject to their jurisdiction (see paragraph 10 below). Pursuant to the principle articulated in article 26 of the Vienna Convention on the Law of Treaties, States Parties are required to give effect to the obligations under the Covenant in good faith.

4. The obligations of the Covenant in general and article 2 in particular are binding on every State Party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local - are in a position to engage the responsibility of the State Party. The executive branch that usually represents the State Party internationally, including before the Committee, may not point to the fact that an action incompatible with the provisions of the Covenant was carried out by another branch of government as a means of seeking to relieve the State Party from responsibility for the action and consequent incompatibility. This understanding flows directly from the principle contained in article 27 of the Vienna Convention on the Law of Treaties, according to which a State Party 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. Although article 2, paragraph 2, allows States Parties to give effect to Covenant rights in accordance with domestic constitutional processes, the same principle operates so as to prevent States parties from invoking provisions of the constitutional law or other aspects of domestic law to justify a failure to perform or give effect to obligations under the treaty. In this respect, the Committee reminds States Parties with a federal structure of the terms of article 50, according to which the Covenant's provisions 'shall extend to all parts of federal states without any limitations or exceptions'.

5. The article 2, paragraph 1, obligation to respect and ensure the rights recognized by in the Covenant has immediate effect for all States parties. Article 2, paragraph 2, provides the overarching framework within which the rights specified in the Covenant are to be promoted and protected. The Committee has as a consequence previously indicated in its General Comment 24 that reservations to article 2, would be incompatible with the Covenant when considered in the light of its objects and purposes.

6. The legal obligation under article 2, paragraph 1, is both negative and positive in nature. States Parties must refrain from violation of the rights recognized by the Covenant, and any restrictions on any of those rights must be permissible under the relevant provisions of the Covenant. Where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuit of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.

7. Article 2 requires that States Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations. The Committee believes that it is important to raise levels of awareness about the Covenant not only among public officials and State agents but also among the population at large.

8. The article 2, paragraph 1, obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities. States are reminded of the interrelationship between the positive obligations imposed under article 2 and the need to provide effective remedies in the event of breach under article 2, paragraph 3. The Covenant

itself envisages in some articles certain areas where there are positive obligations on States Parties to address the activities of private persons or entities. For example, the privacy-related guarantees of article 17 must be protected by law. It is also implicit in article 7 that States Parties have to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power. In fields affecting basic aspects of ordinary life such as work or housing, individuals are to be protected from discrimination within the meaning of article 26.]

9. The beneficiaries of the rights recognized by the Covenant are individuals. Although, with the exception of article 1, the Covenant does not mention the rights of legal persons or similar entities or collectivities, many of the rights recognized by the Covenant, such as the freedom to manifest one's religion or belief (article 18), the freedom of association (article 22) or the rights of members of minorities (article 27), may be enjoyed in community with others. The fact that the competence of the Committee to receive and consider communications is restricted to those submitted by or on behalf of individuals (article 1 of the Optional Protocol) does not prevent such individuals from claiming that actions or omissions that concern legal persons and similar entities amount to a violation of their own rights.

10. States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. As indicated in General Comment 15 adopted at the twenty-seventh session (1986), the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.

11. As implied in General Comment 29<sup>1</sup>, the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.

12. Moreover, the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed. The relevant judicial and administrative authorities should be made aware of the need to ensure compliance with the Covenant obligations in such matters.

13. Article 2, paragraph 2, requires that States Parties take the necessary steps to give effect to the Covenant rights in the domestic order. It follows that, unless Covenant rights are already protected by their domestic laws or practices, States Parties are required on ratification to make such changes to domestic laws and practices as are necessary to ensure their conformity with the Covenant. Where there are inconsistencies between domestic law and the Covenant, article 2 requires that the domestic law or practice be changed to meet the standards imposed by the Covenant's substantive guarantees. Article 2 allows a State Party to pursue this in accordance with its own domestic constitutional structure and accordingly does not require that the Covenant be directly applicable in the courts, by incorporation of the Covenant into national law. The Committee takes the view, however, that Covenant guarantees may receive enhanced protection in those States where the Covenant is automatically or through specific incorporation part of the domestic legal order. The Committee invites those States Parties in which the Covenant does not form part of the domestic legal order to consider incorporation of the

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<sup>1</sup> General Comment No.29 on States of Emergencies, adopted on 24 July 2001, reproduced in Annual Report for 2001, A/56/40, Annex VI, paragraph 3.

Covenant to render it part of domestic law to facilitate full realization of Covenant rights as required by article 2.

14. The requirement under article 2, paragraph 2, to take steps to give effect to the Covenant rights is unqualified and of immediate effect. A failure to comply with this obligation cannot be justified by reference to political, social, cultural or economic considerations within the State.

15. Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights. Such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children. The Committee attaches importance to States Parties' establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law. The Committee notes that the enjoyment of the rights recognized under the Covenant can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law. Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies. National human rights institutions, endowed with appropriate powers, can contribute to this end. A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. Cessation of an ongoing violation is an essential element of the right to an effective remedy.

16. Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.

17. In general, the purposes of the Covenant would be defeated without an obligation integral to article 2 to take measures to prevent a recurrence of a violation of the Covenant. Accordingly, it has been a frequent practice of the Committee in cases under the Optional Protocol to include in its Views the need for measures, beyond a victim-specific remedy, to be taken to avoid recurrence of the type of violation in question. Such measures may require changes in the State Party's laws or practices.

18. Where the investigations referred to in paragraph 15 reveal violations of certain Covenant rights, States Parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (article 7), summary and arbitrary killing (article 6) and enforced disappearance (articles 7 and 9 and, frequently, 6). Indeed, the problem of impunity for these violations, a matter of sustained concern by the Committee, may well be an important contributing element in the recurrence of the violations. When committed as part of a widespread or systematic attack on a civilian population, these violations of the Covenant are crimes against humanity (see Rome Statute of the International Criminal Court, article 7).

Accordingly, where public officials or State agents have committed violations of the Covenant rights referred to in this paragraph, the States Parties concerned may not relieve perpetrators from personal responsibility, as has occurred with certain amnesties (see General Comment 20 (44)) and prior legal immunities and indemnities. Furthermore, no official status justifies persons who may be accused of responsibility for such violations being held immune from legal responsibility. Other impediments to the establishment of legal responsibility should also be removed, such as the defence of obedience to superior orders or unreasonably short periods of statutory limitation in cases where such limitations are applicable. States parties should also assist each other to bring to justice persons suspected of having committed acts in violation of the Covenant that are punishable under domestic or international law.

19. The Committee further takes the view that the right to an effective remedy may in certain circumstances require States Parties to provide for and implement provisional or interim

measures to avoid continuing violations and to endeavour to repair at the earliest possible opportunity any harm that may have been caused by such violations.

20. Even when the legal systems of States parties are formally endowed with the appropriate remedy, violations of Covenant rights still take place. This is presumably attributable to the failure of the remedies to function effectively in practice. Accordingly, States parties are requested to provide information on the obstacles to the effectiveness of existing remedies in their periodic reports.



**United Nations General Assembly resolution 60/251  
of 15 March 2006 (Human Rights Council)**



## General Assembly

Distr.: General  
3 April 2006

Sixtieth session  
Agenda items 46 and 120

### Resolution adopted by the General Assembly

[without reference to a Main Committee (A/60/L.48)]

#### 60/251. Human Rights Council

*The General Assembly,*

*Reaffirming* the purposes and principles contained in the Charter of the United Nations, including developing friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and achieving international cooperation in solving international problems of an economic, social, cultural or humanitarian character and in promoting and encouraging respect for human rights and fundamental freedoms for all,

*Reaffirming also* the Universal Declaration of Human Rights<sup>1</sup> and the Vienna Declaration and Programme of Action,<sup>2</sup> and recalling the International Covenant on Civil and Political Rights,<sup>3</sup> the International Covenant on Economic, Social and Cultural Rights<sup>4</sup> and other human rights instruments,

*Reaffirming further* that all human rights are universal, indivisible, interrelated, interdependent and mutually reinforcing, and that all human rights must be treated in a fair and equal manner, on the same footing and with the same emphasis,

*Reaffirming* that, while the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, all States, regardless of their political, economic and cultural systems, have the duty to promote and protect all human rights and fundamental freedoms,

*Emphasizing* the responsibilities of all States, in conformity with the Charter, to respect human rights and fundamental freedoms for all, without distinction of any kind as to race, colour, sex, language or religion, political or other opinion, national or social origin, property, birth or other status,

*Acknowledging* that peace and security, development and human rights are the pillars of the United Nations system and the foundations for collective security and well-being, and recognizing that development, peace and security and human rights are interlinked and mutually reinforcing,

<sup>1</sup> Resolution 217 A (III).

<sup>2</sup> A/CONF.157/24 (Part I), chap. III.

<sup>3</sup> See resolution 2200 A (XXI), annex.

*Affirming* the need for all States to continue international efforts to enhance dialogue and broaden understanding among civilizations, cultures and religions, and emphasizing that States, regional organizations, non-governmental organizations, religious bodies and the media have an important role to play in promoting tolerance, respect for and freedom of religion and belief,

*Recognizing* the work undertaken by the Commission on Human Rights and the need to preserve and build on its achievements and to redress its shortcomings,

*Recognizing also* the importance of ensuring universality, objectivity and non-selectivity in the consideration of human rights issues, and the elimination of double standards and politicization,

*Recognizing further* that the promotion and protection of human rights should be based on the principles of cooperation and genuine dialogue and aimed at strengthening the capacity of Member States to comply with their human rights obligations for the benefit of all human beings,

*Acknowledging* that non-governmental organizations play an important role at the national, regional and international levels, in the promotion and protection of human rights,

*Reaffirming* the commitment to strengthen the United Nations human rights machinery, with the aim of ensuring effective enjoyment by all of all human rights, civil, political, economic, social and cultural rights, including the right to development, and to that end, the resolve to create a Human Rights Council,

1. *Decides* to establish the Human Rights Council, based in Geneva, in replacement of the Commission on Human Rights, as a subsidiary organ of the General Assembly; the Assembly shall review the status of the Council within five years;

2. *Decides* that the Council shall be responsible for promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner;

3. *Decides also* that the Council should address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon. It should also promote the effective coordination and the mainstreaming of human rights within the United Nations system;

4. *Decides further* that the work of the Council shall be guided by the principles of universality, impartiality, objectivity and non-selectivity, constructive international dialogue and cooperation, with a view to enhancing the promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development;

5. *Decides* that the Council shall, inter alia:

(a) Promote human rights education and learning as well as advisory services, technical assistance and capacity-building, to be provided in consultation with and with the consent of Member States concerned;

(b) Serve as a forum for dialogue on thematic issues on all human rights;

(c) Make recommendations to the General Assembly for the further development of international law in the field of human rights;

(d) Promote the full implementation of human rights obligations undertaken by States and follow-up to the goals and commitments related to the promotion and

protection of human rights emanating from United Nations conferences and summits;

(e) Undertake a universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States; the review shall be a cooperative mechanism, based on an interactive dialogue, with the full involvement of the country concerned and with consideration given to its capacity-building needs; such a mechanism shall complement and not duplicate the work of treaty bodies; the Council shall develop the modalities and necessary time allocation for the universal periodic review mechanism within one year after the holding of its first session;

(f) Contribute, through dialogue and cooperation, towards the prevention of human rights violations and respond promptly to human rights emergencies;

(g) Assume the role and responsibilities of the Commission on Human Rights relating to the work of the Office of the United Nations High Commissioner for Human Rights, as decided by the General Assembly in its resolution 48/141 of 20 December 1993;

(h) Work in close cooperation in the field of human rights with Governments, regional organizations, national human rights institutions and civil society;

(i) Make recommendations with regard to the promotion and protection of human rights;

(j) Submit an annual report to the General Assembly;

6. *Decides also* that the Council shall assume, review and, where necessary, improve and rationalize all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights in order to maintain a system of special procedures, expert advice and a complaint procedure; the Council shall complete this review within one year after the holding of its first session;

7. *Decides further* that the Council shall consist of forty-seven Member States, which shall be elected directly and individually by secret ballot by the majority of the members of the General Assembly; the membership shall be based on equitable geographical distribution, and seats shall be distributed as follows among regional groups: Group of African States, thirteen; Group of Asian States, thirteen; Group of Eastern European States, six; Group of Latin American and Caribbean States, eight; and Group of Western European and other States, seven; the members of the Council shall serve for a period of three years and shall not be eligible for immediate re-election after two consecutive terms;

8. *Decides* that the membership in the Council shall be open to all States Members of the United Nations; when electing members of the Council, Member States shall take into account the contribution of candidates to the promotion and protection of human rights and their voluntary pledges and commitments made thereto; the General Assembly, by a two-thirds majority of the members present and voting, may suspend the rights of membership in the Council of a member of the Council that commits gross and systematic violations of human rights;

9. *Decides also* that members elected to the Council shall uphold the highest standards in the promotion and protection of human rights, shall fully cooperate with the Council and be reviewed under the universal periodic review mechanism during their term of membership;

10. *Decides further* that the Council shall meet regularly throughout the year and schedule no fewer than three sessions per year, including a main session, for a total duration of no less than ten weeks, and shall be able to hold special sessions, when needed, at the request of a member of the Council with the support of one third of the membership of the Council;

11. *Decides* that the Council shall apply the rules of procedure established for committees of the General Assembly, as applicable, unless subsequently otherwise decided by the Assembly or the Council, and also decides that the participation of and consultation with observers, including States that are not members of the Council, the specialized agencies, other intergovernmental organizations and national human rights institutions, as well as non-governmental organizations, shall be based on arrangements, including Economic and Social Council resolution 1996/31 of 25 July 1996 and practices observed by the Commission on Human Rights, while ensuring the most effective contribution of these entities;

12. *Decides also* that the methods of work of the Council shall be transparent, fair and impartial and shall enable genuine dialogue, be results-oriented, allow for subsequent follow-up discussions to recommendations and their implementation and also allow for substantive interaction with special procedures and mechanisms;

13. *Recommends* that the Economic and Social Council request the Commission on Human Rights to conclude its work at its sixty-second session, and that it abolish the Commission on 16 June 2006;

14. *Decides* to elect the new members of the Council; the terms of membership shall be staggered, and such decision shall be taken for the first election by the drawing of lots, taking into consideration equitable geographical distribution;

15. *Decides also* that elections of the first members of the Council shall take place on 9 May 2006, and that the first meeting of the Council shall be convened on 19 June 2006;

16. *Decides further* that the Council shall review its work and functioning five years after its establishment and report to the General Assembly.

72nd plenary meeting  
15 March 2006



**United Nations Human Rights Council resolution 5/1 of  
18 June 2007 (Institution-building of the United Nations  
Human Rights Council)**



## Human Rights Council

### 5/1. Institution-building of the United Nations Human Rights Council

#### *The Human Rights Council,*

*Acting in compliance* with the mandate entrusted to it by the United Nations General Assembly in resolution 60/251 of 15 March 2006,

*Having considered* the draft text on institution-building submitted by the President of the Council,

1. *Adopts* the draft text entitled “United Nations Human Rights Council: Institution-Building”, as contained in the annex to the present resolution, including its appendix(ces);
2. *Decides* to submit the following draft resolution to the General Assembly for its adoption as a matter of priority in order to facilitate the timely implementation of the text contained thereafter:

*“The General Assembly,*

*“Taking note* of Human Rights Council resolution 5/1 of 18 June 2007,

1. *Welcomes* the text entitled “United Nations Human Rights Council: Institution-Building”, as contained in the annex to the present resolution, including its appendix(ces).”

*9th meeting  
18 June 2007*

[Resolution adopted without a vote.]<sup>1</sup>

#### Annex

### UNITED NATIONS HUMAN RIGHTS COUNCIL: INSTITUTION-BUILDING

#### I. UNIVERSAL PERIODIC REVIEW MECHANISM

##### A. Basis of the review

1. The basis of the review is:
  - (a) The Charter of the United Nations;
  - (b) The Universal Declaration of Human Rights;
  - (c) Human rights instruments to which a State is party;

- (d) Voluntary pledges and commitments made by States, including those undertaken when presenting their candidatures for election to the Human Rights Council (hereinafter “the Council”).

2. In addition to the above and given the complementary and mutually interrelated nature of international human rights law and international humanitarian law, the review shall take into account applicable international humanitarian law.

#### B. Principles and objectives

##### 1. Principles

3. The universal periodic review should:
  - (a) Promote the universality, interdependence, indivisibility and interrelatedness of all human rights;
  - (b) Be a cooperative mechanism based on objective and reliable information and on interactive dialogue;
  - (c) Ensure universal coverage and equal treatment of all States;
  - (d) Be an intergovernmental process, United Nations Member-driven and action-oriented;
  - (e) Fully involve the country under review;
  - (f) Complement and not duplicate other human rights mechanisms, thus representing an added value;
  - (g) Be conducted in an objective, transparent, non-selective, constructive, non-confrontational and non-politicized manner;
  - (h) Not be overly burdensome to the concerned State or to the agenda of the Council;
  - (i) Not be overly long; it should be realistic and not absorb a disproportionate amount of time, human and financial resources;
  - (j) Not diminish the Council’s capacity to respond to urgent human rights situations;
  - (k) Fully integrate a gender perspective;
  - (l) Without prejudice to the obligations contained in the elements provided for in the basis of review, take into account the level of development and specificities of countries;
  - (m) Ensure the participation of all relevant stakeholders, including non-governmental organizations and national human rights institutions, in accordance with General Assembly resolution 60/251 of 15 March 2006 and Economic and Social Council resolution 1996/31 of 25 July 1996, as well as any decisions that the Council may take in this regard.
4. The objectives of the review are:
  - (a) The improvement of the human rights situation on the ground;
  - (b) The fulfilment of the State’s human rights obligations and commitments and assessment of positive developments and challenges faced by the State;
  - (c) The enhancement of the State’s capacity and of technical assistance, in consultation with, and with the consent of, the State concerned;

##### 2. Objectives

<sup>1</sup> See A/HRC/5/21, chap. III, paras. 60-62.

- (d) The sharing of best practice among States and other stakeholders;
- (e) Support for cooperation in the promotion and protection of human rights;
- (f) The encouragement of full cooperation and engagement with the Council, other human rights bodies and the Office of the United Nations High Commissioner for Human Rights.

### C. Periodicity and order of the review

5. The review begins after the adoption of the universal periodic review mechanism by the Council.
6. The order of review should reflect the principles of universality and equal treatment.
7. The order of the review should be established as soon as possible in order to allow States to prepare adequately.
8. All member States of the Council shall be reviewed during their term of membership.
9. The initial members of the Council, especially those elected for one or two-year terms, should be reviewed first.
10. A mix of member and observer States of the Council should be reviewed.
11. Equitable geographic distribution should be respected in the selection of countries for review.
12. The first member and observer States to be reviewed will be chosen by the drawing of lots from each Regional Group in such a way as to ensure full respect for equitable geographic distribution. Alphabetical order will then be applied beginning with those countries thus selected, unless other countries volunteer to be reviewed.
13. The period between review cycles should be reasonable so as to take into account the capacity of States to prepare for, and the capacity of other stakeholders to respond to, the requests arising from the review.
14. The periodicity of the review for the first cycle will be of four years. This will imply the consideration of 48 States per year during three sessions of the working group of two weeks each.<sup>a</sup>

### D. Process and modalities of the review

#### 1. Documentation

15. The documents on which the review would be based are:
  - (a) Information prepared by the State concerned, which can take the form of a national report, on the basis of general guidelines to be adopted by the Council at its sixth session (first session of the second cycle), and any other information considered relevant by the State concerned, which could be presented either orally or in writing, provided that the written presentation summarizing the information will not exceed 20 pages, to guarantee equal treatment to all States and not to overburden the mechanism. States are encouraged to prepare the information through a broad consultation process at the national level with all relevant stakeholders;
  - (b) Additionally a compilation prepared by the Office of the High Commissioner for Human Rights of the information contained in the reports of treaty bodies, special procedures, including observations and comments by the State concerned, and other relevant official United Nations documents, which shall not exceed 10 pages;

<sup>a</sup> The universal periodic review is an evolving process; the Council, after the conclusion of the first review cycle, may review the modalities and the periodicity of this mechanism, based on best practices and lessons learned.

(c) Additional, credible and reliable information provided by other relevant stakeholders to the universal periodic review which should also be taken into consideration by the Council in the review. The Office of the High Commissioner for Human Rights will prepare a summary of such information which shall not exceed 10 pages.

16. The documents prepared by the Office of the High Commissioner for Human Rights should be elaborated following the structure of the general guidelines adopted by the Council regarding the information prepared by the State concerned.

17. Both the State's written presentation and the summaries prepared by the Office of the High Commissioner for Human Rights shall be ready six weeks prior to the review by the working group to ensure the distribution of documents simultaneously in the six official languages of the United Nations, in accordance with General Assembly resolution 53/208 of 14 January 1999.

### 2. Modalities

18. The modalities of the review shall be as follows:
  - (a) The review will be conducted in one working group, chaired by the President of the Council and composed of the 47 member States of the Council. Each member State will decide on the composition of its delegation;<sup>b</sup>
  - (b) Observer States may participate in the review, including in the interactive dialogue;
  - (c) Other relevant stakeholders may attend the review in the Working Group;
  - (d) A group of three rapporteurs, selected by the drawing of lots among the members of the Council and from different Regional Groups (*troika*) will be formed to facilitate each review, including the preparation of the report of the working group. The Office of the High Commissioner for Human Rights will provide the necessary assistance and expertise to the rapporteurs.
19. The country concerned may request that one of the rapporteurs be from its own Regional Group and may also request the substitution of a rapporteur on only one occasion.
20. A rapporteur may request to be excused from participation in a specific review process.
21. Interactive dialogue between the country under review and the Council will take place in the working group. The rapporteurs may collate issues or questions to be transmitted to the State under review to facilitate its preparation and focus the interactive dialogue, while guaranteeing fairness and transparency.
22. The duration of the review will be three hours for each country in the working group. Additional time of up to one hour will be allocated for the consideration of the outcome by the plenary of the Council.
23. Half an hour will be allocated for the adoption of the report of each country under review in the working group.
24. A reasonable time frame should be allocated between the review and the adoption of the report of each State in the working group.
25. The final outcome will be adopted by the plenary of the Council.

<sup>b</sup> A Universal Periodic Review Voluntary Trust Fund should be established to facilitate the participation of developing countries, particularly the Least Developed Countries, in the universal periodic review mechanism.

## **E. Outcome of the review**

### **1. Format of the outcome**

26. The format of the outcome of the review will be a report consisting of a summary of the proceedings of the review process; conclusions and/or recommendations, and the voluntary commitments of the State concerned.

### **2. Content of the outcome**

27. The universal periodic review is a cooperative mechanism. Its outcome may include, *inter alia*:

- (a) An assessment undertaken in an objective and transparent manner of the human rights situation in the country under review, including positive developments and the challenges faced by the country;
- (b) Sharing of best practices;
- (c) An emphasis on enhancing cooperation for the promotion and protection of human rights;
- (d) The provision of technical assistance and capacity-building in consultation with, and with the consent of, the country concerned;<sup>c</sup>
- (e) Voluntary commitments and pledges made by the country under review.

### **3. Adoption of the outcome**

28. The country under review should be fully involved in the outcome.

29. Before the adoption of the outcome by the plenary of the Council, the State concerned should be offered the opportunity to present replies to questions or issues that were not sufficiently addressed during the interactive dialogue.

30. The State concerned and the member States of the Council, as well as observer States, will be given the opportunity to express their views on the outcome of the review before the plenary takes action on it.

31. Other relevant stakeholders will have the opportunity to make general comments before the adoption of the outcome by the plenary.

32. Recommendations that enjoy the support of the State concerned will be identified as such. Other recommendations, together with the comments of the State concerned thereon, will be noted. Both will be included in the outcome report to be adopted by the Council.

### **F. Follow-up to the review**

33. The outcome of the universal periodic review, as a cooperative mechanism, should be implemented primarily by the State concerned and, as appropriate, by other relevant stakeholders.

34. The subsequent review should focus, *inter alia*, on the implementation of the preceding outcome.

35. The Council should have a standing item on its agenda devoted to the universal periodic review.

36. The international community will assist in implementing the recommendations and conclusions regarding capacity-building and technical assistance, in consultation with, and with the consent of, the country concerned.

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<sup>c</sup> A decision should be taken by the Council on whether to resort to existing financing mechanisms or to create a new mechanism.

37. In considering the outcome of the universal periodic review, the Council will decide if and when any specific follow-up is necessary.

38. After exhausting all efforts to encourage a State to cooperate with the universal periodic review mechanism, the Council will address, as appropriate, cases of persistent non-cooperation with the mechanism.

## **II. SPECIAL PROCEDURES**

### **A. Selection and appointment of mandate-holders**

39. The following general criteria will be of paramount importance while nominating, selecting and appointing mandate-holders: (a) expertise; (b) experience in the field of the mandate; (c) independence; (d) impartiality; (e) personal integrity; and (f) objectivity.

40. Due consideration should be given to gender balance and equitable geographic representation, as well as to an appropriate representation of different legal systems.

41. Technical and objective requirements for eligible candidates for mandate-holders will be approved by the Council at its sixth session (first session of the second cycle), in order to ensure that eligible candidates are highly qualified individuals who possess established competence, relevant expertise and extensive professional experience in the field of human rights.

42. The following entities may nominate candidates as special procedures mandate-holders: (a) Governments; (b) Regional Groups operating within the United Nations human rights system; (c) international organizations or their offices (e.g. the Office of the High Commissioner for Human Rights); (d) non-governmental organizations; (e) other human rights bodies; (f) individual nominations.

43. The Office of the High Commissioner for Human Rights shall immediately prepare, maintain and periodically update a public list of eligible candidates in a standardized format, which shall include personal data, areas of expertise and professional experience. Upcoming vacancies of mandates shall be publicized.

44. The principle of non-accumulation of human rights functions at a time shall be respected.

45. A mandate-holder's tenure in a given function, whether a thematic or country mandate, will be no longer than six years (two terms of three years for thematic mandate-holders).

46. Individuals holding decision-making positions in Government or in any other organization or entity which may give rise to a conflict of interest with the responsibilities inherent to the mandate shall be excluded. Mandate-holders will act in their personal capacity.

47. A consultative group would be established to propose to the President, at least one month before the beginning of the session in which the Council would consider the selection of mandate-holders, a list of candidates who possess the highest qualifications for the mandates in question and meet the general criteria and particular requirements.

48. The consultative group shall also give due consideration to the exclusion of nominated candidates from the public list of eligible candidates brought to its attention.

49. At the beginning of the annual cycle of the Council, Regional Groups would be invited to appoint a member of the consultative group, who would serve in his/her personal capacity. The Group will be assisted by the Office of the High Commissioner for Human Rights.

50. The consultative group will consider candidates included in the public list; however, under exceptional circumstances and if a particular post justifies it, the Group may consider additional nominations with equal or more suitable qualifications for the post. Recommendations to the President shall be public and substantiated.

51. The consultative group should take into account, as appropriate, the views of stakeholders, including the current or outgoing mandate-holders, in determining the necessary expertise, experience, skills, and other relevant requirements for each mandate.

52. On the basis of the recommendations of the consultative group and following broad consultations, in particular through the regional coordinators, the President of the Council will identify an appropriate candidate for each vacancy. The President will present to member States and observers a list of candidates to be proposed at least two weeks prior to the beginning of the session in which the Council will consider the appointments.

53. If necessary, the President will conduct further consultations to ensure the endorsement of the proposed candidates. The appointment of the special procedures mandate-holders will be completed upon the subsequent approval of the Council. Mandate-holders shall be appointed before the end of the session.

#### **B. Review, rationalization and improvement of mandates**

54. The review, rationalization and improvement of mandates, as well as the creation of new ones, must be guided by the principles of universality, impartiality, objectivity and non-selectivity, constructive international dialogue and cooperation, with a view to enhancing the promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development.

55. The review, rationalization and improvement of each mandate would take place in the context of the negotiations of the relevant resolutions. An assessment of the mandate may take place in a separate segment of the interactive dialogue between the Council and special procedures mandate-holders.

56. The review, rationalization and improvement of mandates would focus on the relevance, scope and contents of the mandates, having as a framework the internationally recognized human rights standards, the system of special procedures and General Assembly resolution 60/251.

57. Any decision to streamline, merge or possibly discontinue mandates should always be guided by the need for improvement of the enjoyment and protection of human rights.

58. The Council should always strive for improvements:

- (a) Mandates should always offer a clear prospect of an increased level of human rights protection and promotion as well as being coherent within the system of human rights;
  - (b) Equal attention should be paid to all human rights. The balance of thematic mandates should broadly reflect the accepted equal importance of civil, political, economic, social and cultural rights, including the right to development;
  - (c) Every effort should be made to avoid unnecessary duplication;
  - (d) Areas which constitute thematic gaps will be identified and addressed, including by means other than the creation of special procedures mandates, such as by expanding an existing mandate, bringing a cross-cutting issue to the attention of mandate-holders or by requesting a joint action to the relevant mandate-holders;
  - (e) Any consideration of merging mandates should have regard to the content and predominant functions of each mandate, as well as to the workload of individual mandate-holders;
  - (f) In creating or reviewing mandates, efforts should be made to identify whether the structure of the mechanism (expert, rapporteur or working group) is the most effective in terms of increasing human rights protection;
  - (g) New mandates should be as clear and specific as possible, so as to avoid ambiguity.
59. It should be considered desirable to have a uniform nomenclature of mandate-holders, titles of mandates as well as a selection and appointment process, to make the whole system more understandable.
60. Thematic mandate periods will be of three years. Country mandate periods will be of one year.

61. Mandates included in Appendix I, where applicable, will be renewed until the date on which they are considered by the Council according to the programme of work.<sup>d</sup>

62. Current mandate-holders may continue serving, provided they have not exceeded the six-year term limit (Appendix II). On an exceptional basis, the term of those mandate-holders who have served more than six years may be extended until the relevant mandate is considered by the Council and the selection and appointment process has concluded.

63. Decisions to create, review or discontinue country mandates should also take into account the principles of cooperation and genuine dialogue aimed at strengthening the capacity of Member States to comply with their human rights obligations.

64. In case of situations of violations of human rights or a lack of cooperation that require the Council's attention, the principles of objectivity, non-selectivity, and the elimination of double standards and politicization should apply.

### **III. HUMAN RIGHTS COUNCIL ADVISORY COMMITTEE**

65. The Human Rights Council Advisory Committee (hereinafter "the Advisory Committee"), composed of 18 experts serving in their personal capacity, will function as a think-tank for the Council and work at its direction. The establishment of this subsidiary body and its functioning will be executed according to the guidelines stipulated below.

#### **A. Nomination**

66. All Member States of the United Nations may propose or endorse candidates from their own region. When selecting their candidates, States should consult their national human rights institutions and civil society organizations and, in this regard, include the names of those supporting their candidates.

67. The aim is to ensure that the best possible expertise is made available to the Council. For this purpose, technical and objective requirements for the submission of candidatures will be established and approved by the Council at its sixth session (first session of the second cycle). These should include:

- (a) Recognized competence and experience in the field of human rights;
- (b) High moral standing;
- (c) Independence and impartiality.

68. Individuals holding decision-making positions in Government or in any other organization or entity which might give rise to a conflict of interest with the responsibilities inherent in the mandate shall be excluded. Elected members of the Committee will act in their personal capacity.

69. The principle of non-accumulation of human rights functions at the same time shall be respected.

#### **B. Election**

70. The Council shall elect the members of the Advisory Committee, in secret ballot, from the list of candidates whose names have been presented in accordance with the agreed requirements.

<sup>d</sup> Country mandates meet the following criteria:

- There is a pending mandate of the Council to be accomplished; or
- There is a pending mandate of the General Assembly to be accomplished; or
- The nature of the mandate is for advisory services and technical assistance.

71. The list of candidates shall be closed two months prior to the election date. The Secretariat will make available the list of candidates and relevant information to member States and to the public at least one month prior to their election.

72. Due consideration should be given to gender balance and appropriate representation of different civilizations and legal systems.

73. The geographic distribution will be as follows:

African States: 5

Asian States: 5

Eastern European States: 2

Latin American and Caribbean States: 3

Western European and other States: 3

74. The members of the Advisory Committee shall serve for a period of three years. They shall be eligible for re-election once. In the first term, one third of the experts will serve for one year and another third for two years. The staggering of terms of membership will be defined by the drawing of lots.

#### C. Functions

75. The function of the Advisory Committee is to provide expertise to the Council in the manner and form requested by the Council, focusing mainly on studies and research-based advice. Further, such expertise shall be rendered only upon the latter's request, in compliance with its resolutions and under its guidance.

76. The Advisory Committee should be implementation-oriented and the scope of its advice should be limited to thematic issues pertaining to the mandate of the Council; namely promotion and protection of all human rights.

77. The Advisory Committee shall not adopt resolutions or decisions. The Advisory Committee may propose within the scope of the work set out by the Council, for the latter's consideration and approval, suggestions for further enhancing its procedural efficiency, as well as further research proposals within the scope of the work set out by the Council.

78. The Council shall issue specific guidelines for the Advisory Committee when it requests a substantive contribution from the latter and shall review all or any portion of those guidelines if it deems necessary in the future.

#### D. Methods of work

79. The Advisory Committee shall convene up to two sessions for a maximum of 10 working days per year. Additional sessions may be scheduled on an ad hoc basis with prior approval of the Council.

80. The Council may request the Advisory Committee to undertake certain tasks that could be performed collectively, through a smaller team or individually. The Advisory Committee will report on such efforts to the Council.

81. Members of the Advisory Committee are encouraged to communicate between sessions, individually or in teams. However, the Advisory Committee shall not establish subsidiary bodies unless the Council authorizes it to do so.

82. In the performance of its mandate, the Advisory Committee is urged to establish interaction with States, national human rights institutions, non-governmental organizations and other civil society entities in accordance with the modalities of the Council.

83. Member States and observers, including States that are not members of the Council, the specialized agencies, other intergovernmental organizations and national human rights institutions, as well as non-governmental organizations shall be entitled to participate in the work of the Advisory Committee based on arrangements, including Economic and Social Council resolution 1996/31 and practices observed by the Commission on Human Rights and the Council, while ensuring the most effective contribution of these entities.

84. The Council will decide at its sixth session (first session of its second cycle) on the most appropriate mechanisms to continue the work of the Working Groups on Indigenous Populations; Contemporary Forms of Slavery; Minorities; and the Social Forum.

#### IV. COMPLAINT PROCEDURE

##### A. Objective and scope

85. A complaint procedure is being established to address consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstances.

86. Economic and Social Council resolution 1503 (XLVIII) of 27 May 1970 as revised by resolution 2000/3 of 19 June 2000 served as a working basis and was improved where necessary, so as to ensure that the complaint procedure is impartial, objective, efficient, victims-oriented and conducted in a timely manner. The procedure will retain its confidential nature, with a view to enhancing cooperation with the State concerned.

##### B. Admissibility criteria for communications

87. A communication related to a violation of human rights and fundamental freedoms, for the purpose of this procedure, shall be admissible, provided that:

- (a) It is not manifestly politically motivated and its object is consistent with the Charter of the United Nations, the Universal Declaration of Human Rights and other applicable instruments in the field of human rights law;
- (b) It gives a factual description of the alleged violations, including the rights which are alleged to be violated;
- (c) Its language is not abusive. However, such a communication may be considered if it meets the other criteria for admissibility after deletion of the abusive language;
- (d) It is submitted by a person or a group of persons claiming to be the victims of violations of human rights and fundamental freedoms, or by any person or group of persons, including non-governmental organizations, acting in good faith in accordance with the principles of human rights, not resorting to politically motivated stands contrary to the provisions of the Charter of the United Nations and claiming to have direct and reliable knowledge of the violations concerned. Nonetheless, reliably attested communications shall not be inadmissible solely because the knowledge of the individual authors is second-hand, provided that they are accompanied by clear evidence;
- (e) It is not exclusively based on reports disseminated by mass media;
- (f) It does not refer to a case that appears to reveal a consistent pattern of gross and reliably attested violations of human rights already being dealt with by a special procedure, a treaty body or other United Nations or similar regional complaints procedure in the field of human rights;
- (g) Domestic remedies have been exhausted, unless it appears that such remedies would be ineffective or unreasonably prolonged.

88. National human rights institutions, established and operating under the Principles Relating to the Status of National Institutions (the Paris Principles), in particular in regard to quasi-judicial competence, may serve as effective means of addressing individual human rights violations.

### C. Working groups

89. Two distinct working groups shall be established with the mandate to examine the communications and to bring to the attention of the Council consistent patterns of gross and reliably attested violations of human rights and fundamental freedoms.

90. Both working groups shall, to the greatest possible extent, work on the basis of consensus. In the absence of consensus, decisions shall be taken by simple majority of the votes. They may establish their own rules of procedure.

#### 1. Working Group on Communications: composition, mandate and powers

91. The Human Rights Council Advisory Committee shall appoint five of its members, one from each Regional Group, with due consideration to gender balance, to constitute the Working Group on Communications.

92. In case of a vacancy, the Advisory Committee shall appoint an independent and highly qualified expert of the same Regional Group from the Advisory Committee.

93. Since there is a need for independent expertise and continuity with regard to the examination and assessment of communications received, the independent and highly qualified experts of the Working Group on Communications shall be appointed for three years. Their mandate is renewable only once.

94. The Chairperson of the Working Group on Communications is requested, together with the secretariat, to undertake an initial screening of communications received, based on the admissibility criteria, before transmitting them to the States concerned. Manifestly ill-founded or anonymous communications shall be screened out by the Chairperson and shall therefore not be transmitted to the State concerned. In a perspective of accountability and transparency, the Chairperson of the Working Group on Communications shall provide all its members with a list of all communications rejected after initial screening. This list should indicate the grounds of all decisions resulting in the rejection of a communication. All other communications, which have not been screened out, shall be transmitted to the State concerned, so as to obtain the views of the latter on the allegations of violations.

95. The members of the Working Group on Communications shall decide on the admissibility of a communication and assess the merits of the allegations of violations, including whether the communication alone or in combination with other communications appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms. The Working Group on Communications shall provide the Working Group on Situations with a file containing all admissible communications as well as recommendations thereon. When the Working Group on Communications requires further consideration or additional information, it may keep a case under review until its next session and request such information from the State concerned. The Working Group on Communications may decide to dismiss a case. All decisions of the Working Group on Communications shall be based on a rigorous application of the admissibility criteria and duly justified.

#### 2. Working Group on Situations: composition, mandate and powers

96. Each Regional Group shall appoint a representative of a member State of the Council, with due consideration to gender balance, to serve on the Working Group on Situations. Members shall be appointed for one year. Their mandate may be renewed once, if the State concerned is a member of the Council.

97. Members of the Working Group on Situations shall serve in their personal capacity. In order to fill a vacancy, the respective Regional Group to which the vacancy belongs, shall appoint a representative from member States of the same Regional Group.

98. The Working Group on Situations is requested, on the basis of the information and recommendations provided by the Working Group on Communications, to present the Council with a report on consistent patterns of gross and reliably attested violations of human rights and fundamental freedoms and to make recommendations to the Council on the course of action to take, normally in the form of a draft resolution or decision with respect to the situations referred to it. When the Working Group on Situations requires further consideration or additional information, its members may keep a case under review until its next session. The Working Group on Situations may also decide to dismiss a case.

99. All decisions of the Working Group on Situations shall be duly justified and indicate why the consideration of a situation has been discontinued or action recommended thereon. Decisions to discontinue should be taken by consensus; if that is not possible, by simple majority of the votes.

#### D. Working modalities and confidentiality

100. Since the complaint procedure is to be, *inter alia*, victims-oriented and conducted in a confidential and timely manner, both Working Groups shall meet at least twice a year for five working days each session, in order to promptly examine the communications received, including replies of States thereon, and the situations of which the Council is already seized under the complaint procedure.

101. The State concerned shall cooperate with the complaint procedure and make every effort to provide substantive replies in one of the United Nations official languages to any of the requests of the Working Groups or the Council. The State concerned shall also make every effort to provide a reply not later than three months after the request has been made. If necessary, this deadline may however be extended at the request of the State concerned.

102. The Secretariat is requested to make the confidential files available to all members of the Council, at least two weeks in advance, so as to allow sufficient time for the consideration of the files.

103. The Council shall consider consistent patterns of gross and reliably attested violations of human rights and fundamental freedoms brought to its attention by the Working Group on Situations as frequently as needed, but at least once a year.

104. The reports of the Working Group on Situations referred to the Council shall be examined in a confidential manner, unless the Council decides otherwise. When the Working Group on Situations recommends to the Council that it consider a situation in a public meeting, in particular in the case of manifest and unequivocal lack of cooperation, the Council shall consider such recommendation on a priority basis at its next session.

105. So as to ensure that the complaint procedure is victims-oriented, efficient and conducted in a timely manner, the period of time between the transmission of the complaint to the State concerned and consideration by the Council shall not, in principle, exceed 24 months.

#### E. Involvement of the complainant and of the State concerned

106. The complaint procedure shall ensure that both the author of a communication and the State concerned are informed of the proceedings at the following key stages:

(a) When a communication is deemed inadmissible by the Working Group on Communications or when it is taken up for consideration by the Working Group on Situations; or when a communication is kept pending by one of the Working Groups or by the Council;

(b) At the final outcome.

107. In addition, the complainant shall be informed when his/her communication is registered by the complaint procedure.

108. Should the complainant request that his/her identity be kept confidential, it will not be transmitted to the State concerned.

## F. Measures

109. In accordance with established practice the action taken in respect of a particular situation should be one of the following options:

- (a) To discontinue considering the situation when further consideration or action is not warranted;
- (b) To keep the situation under review and request the State concerned to provide further information within a reasonable period of time;
- (c) To keep the situation under review and appoint an independent and highly qualified expert to monitor the situation and report back to the Council;
- (d) To discontinue reviewing the matter under the confidential complaint procedure in order to take up public consideration of the same;
- (e) To recommend to OHCHR to provide technical cooperation, capacity-building assistance or advisory services to the State concerned.

## V. AGENDA AND FRAMEWORK FOR THE PROGRAMME OF WORK

### A. Principles

Universality  
Impartiality  
Objectivity  
Non-selectiveness  
Constructive dialogue and cooperation  
Predictability  
Flexibility  
Transparency  
Accountability  
Balance  
Inclusive/comprehensive  
Gender perspective  
Implementation and follow-up of decisions

### B. Agenda

- Item 1. Organizational and procedural matters
- Item 2. Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General
- Item 3. Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

- Item 4. Human rights situations that require the Council's attention
- Item 5. Human rights bodies and mechanisms
- Item 6. Universal Periodic Review
- Item 7. Human rights situation in Palestine and other occupied Arab territories
- Item 8. Follow-up and implementation of the Vienna Declaration and Programme of Action
- Item 9. Racism, racial discrimination, xenophobia and related forms of intolerance, follow-up and implementation of the Durban Declaration and Programme of Action
- Item 10. Technical assistance and capacity-building

### C. Framework for the programme of work

- Item 1. Organizational and procedural matters
  - Election of the Bureau
  - Adoption of the annual programme of work
  - Adoption of the programme of work of the session, including other business
  - Selection and appointment of mandate-holders
  - Election of members of the Human Rights Council Advisory Committee
  - Adoption of the report of the session
  - Adoption of the annual report
- Item 2. Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General
  - Presentation of the annual report and updates
- Item 3. Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development
  - Economic, social and cultural rights
  - Civil and political rights
  - Rights of peoples, and specific groups and individuals
  - Right to development
  - Interrelation of human rights and human rights thematic issues
- Item 4. Human rights situations that require the Council's attention
- Item 5. Human rights bodies and mechanisms
  - Report of the Human Rights Council Advisory Committee
  - Report of the complaint procedure

Item 6. Universal Periodic Review

Item 7. Human rights situation in Palestine and other occupied Arab territories

Human rights violations and implications of the Israeli occupation of Palestine and other occupied Arab territories

Right to self-determination of the Palestinian people

Item 8. Follow-up and implementation of the Vienna Declaration and Programme of Action

Item 9. Racism, racial discrimination, xenophobia and related forms of intolerance, follow-up and implementation of the Durban Declaration and Programme of Action

Item 10. Technical assistance and capacity-building

## VI. METHODS OF WORK

110. The methods of work, pursuant to General Assembly resolution 60/251 should be transparent, impartial, equitable, fair, pragmatic; lead to clarity, predictability, and inclusiveness. They may also be updated and adjusted over time.

### A. Institutional arrangements

#### 1. Briefings on prospective resolutions or decisions

111. The briefings on prospective resolutions or decisions would be informative only, whereby delegations would be apprised of resolutions and/or decisions tabled or intended to be tabled. These briefings will be organized by interested delegations.

#### 2. President's open-ended information meetings on resolutions, decisions and other related business

112. The President's open-ended information meetings on resolutions, decisions and other related business shall provide information on the status of negotiations on draft resolutions and/or decisions so that delegations may gain a bird's eye view of the status of such drafts. The consultations shall have a purely informational function, combined with information on the extranet, and be held in a transparent and inclusive manner. They shall not serve as a negotiating forum.

#### 3. Informal consultations on proposals convened by main sponsors

113. Informal consultations shall be the primary means for the negotiation of draft resolutions and/or decisions, and their convening shall be the responsibility of the sponsor(s). At least one informal open-ended consultation should be held on each draft resolution and/or decision before it is considered for action by the Council. Consultations should, as much as possible, be scheduled in a timely, transparent and inclusive manner that takes into account the constraints faced by delegations, particularly smaller ones.

#### 4. Role of the Bureau

114. The Bureau shall deal with procedural and organizational matters. The Bureau shall regularly communicate the contents of its meetings through a timely summary report.

#### 5. Other work formats may include panel debates, seminars and round tables

115. Utilization of these other work formats, including topics and modalities, would be decided by the Council on a case-by-case basis. They may serve as tools of the Council for enhancing dialogue and mutual understanding on certain issues. They should be utilized in the context of the Council's agenda and annual programme of work, and reinforce and/or complement its intergovernmental nature. They shall not be used to substitute or replace existing human rights mechanisms and established methods of work.

## 6. High-Level Segment

116. The High-Level Segment shall be held once a year during the main session of the Council. It shall be followed by a general segment wherein delegations that did not participate in the High-Level Segment may deliver general statements.

### B. Working culture

117. There is a need for:

(a) Early notification of proposals;

(b) Early submission of draft resolutions and decisions, preferably by the end of the penultimate week of a session;

(c) Early distribution of all reports, particularly those of special procedures, to be transmitted to delegations in a timely fashion, at least 15 days in advance of their consideration by the Council, and in all official United Nations languages;

(d) Proposers of a country resolution to have the responsibility to secure the broadest possible support for their initiatives (preferably 15 members), before action is taken;

(e) Restraint in resorting to resolutions, in order to avoid proliferation of resolutions without prejudice to the right of States to decide on the periodicity of presenting their draft proposals by:

(i) Minimizing unnecessary duplication of initiatives with the General Assembly/Third Committee;

(ii) Clustering of agenda items;

(iii) Staggering the tabling of decisions and/or resolutions and consideration of action on agenda items/issues.

### C. Outcomes other than resolutions and decisions

118. These may include recommendations, conclusions, summaries of discussions and President's Statement. As such outcomes would have different legal implications, they should supplement and not replace resolutions and decisions.

### D. Special sessions of the Council

119. The following provisions shall complement the general framework provided by General Assembly resolution 60/251 and the rules of procedure of the Human Rights Council.

120. The rules of procedure of special sessions shall be in accordance with the rules of procedure applicable for regular sessions of the Council.

121. The request for the holding of a special session, in accordance with the requirement established in paragraph 10 of General Assembly resolution 60/251, shall be submitted to the President and to the secretariat of the Council. The request shall specify the item proposed for consideration and include any other relevant information the sponsors may wish to provide.

122. The special session shall be convened as soon as possible after the formal request is communicated, but, in principle, not earlier than two working days, and not later than five working days after the formal receipt of the request. The duration of the special session shall not exceed three days (six working sessions), unless the Council decides otherwise.

123. The secretariat of the Council shall immediately communicate the request for the holding of a special session and any additional information provided by the sponsors in the request, as well as the date for the convening of the special session, to all United Nations Member States and make the information available to the specialized agencies, other intergovernmental organizations and national human rights institutions, as well as to non-governmental organizations in consultative status by the most expedient and expeditious means of communication. Special session documentation, in particular draft resolutions and decisions, should be made available in all official United Nations languages to all States in an equitable, timely and transparent manner.

124. The President of the Council should hold open-ended informative consultations before the special session on its conduct and organization. In this regard, the secretariat may also be requested to provide additional information, including, on the methods of work of previous special sessions.

125. Members of the Council, concerned States, observer States, specialized agencies, other inter-governmental organizations and national human rights institutions, as well as non-governmental organizations in consultative status may contribute to the special session in accordance with the rules of procedure of the Council.

126. If the requesting or other States intend to present draft resolutions or decisions at the special session, texts should be made available in accordance with the Council's relevant rules of procedure. Nevertheless, sponsors are urged to present such texts as early as possible.

127. The sponsors of a draft resolution or decision should hold open-ended consultations on the text of their draft resolution(s) or decision(s) with a view to achieving the widest participation in their consideration and, if possible, achieving consensus on them.

128. A special session should allow participatory debate, be results-oriented and geared to achieving practical outcomes, the implementation of which can be monitored and reported on at the following regular session of the Council for possible follow-up decision.

## VII. RULES OF PROCEDURE<sup>e</sup>

### SESSIONS

#### *Rules of procedure*

#### **Rule 1**

The Human Rights Council shall apply the rules of procedure established for the Main Committees of the General Assembly, as applicable, unless subsequently otherwise decided by the Assembly or the Council.

### REGULAR SESSIONS

#### *Number of sessions*

#### **Rule 2**

The Human Rights Council shall meet regularly throughout the year and schedule no fewer than three sessions per Council year, including a main session, for a total duration of no less than 10 weeks.

#### *Assumption of membership*

#### **Rule 3**

Newly-elected member States of the Human Rights Council shall assume their membership on the first day of the Council year, replacing member States that have concluded their respective membership terms.

<sup>e</sup> Figures indicated in square brackets refer to identical or corresponding rules of the General Assembly or its Main Committees (A/520/Rev.16).

#### *Place of meeting*

#### **Rule 4**

The Human Rights Council shall be based in Geneva.

### SPECIAL SESSIONS

#### *Convening of special sessions*

#### **Rule 5**

The rules of procedure of special sessions of the Human Rights Council will be the same as the rules of procedure applicable for regular sessions of the Human Rights Council.

#### **Rule 6**

The Human Rights Council shall hold special sessions, when needed, at the request of a member of the Council with the support of one third of the membership of the Council.

### PARTICIPATION OF AND CONSULTATION WITH OBSERVERS OF THE COUNCIL

#### **Rule 7**

(a) The Council shall apply the rules of procedure established for committees of the General Assembly, as applicable, unless subsequently otherwise decided by the Assembly or the Council, and the participation of and consultation with observers, including States that are not members of the Council, the specialized agencies, other intergovernmental organizations and national human rights institutions, as well as non-governmental organizations, shall be based on arrangements, including Economic and Social Council resolution 1996/31 of 25 July 1996, and practices observed by the Commission on Human Rights, while ensuring the most effective contribution of these entities.

(b) Participation of national human rights institutions shall be based on arrangements and practices agreed upon by the Commission on Human Rights, including resolution 2005/74 of 20 April 2005, while ensuring the most effective contribution of these entities.

### ORGANIZATION OF WORK AND AGENDA FOR REGULAR SESSIONS

#### *Organizational meetings*

#### **Rule 8**

(a) At the beginning of each Council year, the Council shall hold an organizational meeting to elect its Bureau and to consider and adopt the agenda, programme of work, and calendar of regular sessions for the Council year indicating, if possible, a target date for the conclusion of its work, the approximate dates of consideration of items and the number of meetings to be allocated to each item.

(b) The President of the Council shall also convene organizational meetings two weeks before the beginning of each session and, if necessary, during the Council sessions to discuss organizational and procedural issues pertinent to that session.

## PRESIDENT AND VICE-PRESIDENTS

### *Elections*

#### **Rule 9**

(a) At the beginning of each Council year, at its organizational meeting, the Council shall elect, from among the representatives of its members, a President and four Vice-Presidents. The President and the Vice-Presidents shall constitute the Bureau. One of the Vice-Presidents shall serve as Rapporteur.

(b) In the election of the President of the Council, regard shall be had for the equitable geographical rotation of this office among the following Regional Groups: African States, Asian States, Eastern European States, Latin American and Caribbean States, and Western European and other States. The four Vice-Presidents of the Council shall be elected on the basis of equitable geographical distribution from the Regional Groups other than the one to which the President belongs. The selection of the Rapporteur shall be based on geographic rotation.

### *Bureau*

#### **Rule 10**

The Bureau shall deal with procedural and organizational matters.

### *Term of office*

#### **Rule 11**

The President and the Vice-Presidents shall, subject to rule 13, hold office for a period of one year. They shall not be eligible for immediate re-election to the same post.

### *Absence of officers*

#### **Rule 12 [105]**

If the President finds it necessary to be absent during a meeting or any part thereof, he/she shall designate one of the Vice-Presidents to take his/her place. A Vice-President acting as President shall have the same powers and duties as the President. If the President ceases to hold office pursuant to rule 13, the remaining members of the Bureau shall designate one of the Vice-Presidents to take his/her place until the election of a new President.

### *Replacement of the President or a Vice-President*

#### **Rule 13**

If the President or any Vice-President ceases to be able to carry out his/her functions or ceases to be a representative of a member of the Council, or if the Member of the United Nations of which he/she is a representative ceases to be a member of the Council, he/she shall cease to hold such office and a new President or Vice-President shall be elected for the unexpired term.

## SECRETARIAT

### *Duties of the secretariat*

#### **Rule 14 [47]**

The Office of the United Nations High Commissioner for Human Rights shall act as secretariat for the Council. In this regard, it shall receive, translate, print and circulate in all official United Nations languages, documents, reports and resolutions of the Council, its committees and its organs; interpret speeches made at the meetings; prepare, print and circulate the records of the session; have the custody and proper preservation of the documents in the archives of the Council; distribute all documents of the Council to the members of the Council and observers and, generally, perform all other support functions which the Council may require.

## RECORDS AND REPORT

### *Report to the General Assembly*

#### **Rule 15**

The Council shall submit an annual report to the General Assembly.

## PUBLIC AND PRIVATE MEETINGS OF THE HUMAN RIGHTS COUNCIL

### *General principles*

#### **Rule 16 [60]**

The meetings of the Council shall be held in public unless the Council decides that exceptional circumstances require the meeting be held in private.

### *Private meetings*

#### **Rule 17 [61]**

All decisions of the Council taken at a private meeting shall be announced at an early public meeting of the Council.

## CONDUCT OF BUSINESS

### *Working groups and other arrangements*

#### **Rule 18**

The Council may set up working groups and other arrangements. Participation in these bodies shall be decided upon by the members, based on rule 7. The rules of procedure of these bodies shall follow those of the Council, as applicable, unless decided otherwise by the Council.

### *Quorum*

#### **Rule 19 [67]**

The President may declare a meeting open and permit the debate to proceed when at least one third of the members of the Council are present. The presence of a majority of the members shall be required for any decision to be taken.

*Majority required*

**Rule 20 [125]**

Decisions of the Council shall be made by a simple majority of the members present and voting, subject to rule 19.

**Appendix I**

**RENEWED MANDATES UNTIL THEY COULD BE CONSIDERED  
BY THE HUMAN RIGHTS COUNCIL ACCORDING TO ITS  
ANNUAL PROGRAMME OF WORK**

- Independent expert appointed by the Secretary-General on the situation of human rights in Haiti
- Independent expert appointed by the Secretary-General on the situation of human rights in Somalia
- Independent expert on the situation of human rights in Burundi
- Independent expert on technical cooperation and advisory services in Liberia
- Independent expert on the situation of human rights in the Democratic Republic of the Congo
- Independent expert on human rights and international solidarity
- Independent expert on minority issues
- Independent expert on the effects of economic reform policies and foreign debt on the full enjoyment of all human rights, particularly economic, social and cultural rights
- Independent expert on the question of human rights and extreme poverty
- Special Rapporteur on the situation of human rights in the Sudan
- Special Rapporteur on the situation of human rights in Myanmar
- Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea
- Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967 (The duration of this mandate has been established until the end of the occupation.)
- Special Rapporteur on adequate housing as a component of the right to an adequate standard of living
- Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance
- Special Rapporteur on extrajudicial, summary or arbitrary executions
- Special Rapporteur on freedom of religion or belief
- Special Rapporteur on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights
- Special Rapporteur on the human rights aspects of the victims of trafficking in persons, especially women and children
- Special Rapporteur on the human rights of migrants
- Special Rapporteur on the independence of judges and lawyers

- Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism
- Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression
- Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health
- Special Rapporteur on the right to education
- Special Rapporteur on the right to food
- Special Rapporteur on the sale of children, child prostitution and child pornography
- Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people
- Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment
- Special Rapporteur on violence against women, its causes and consequences
- Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises
- Special Representative of the Secretary-General for human rights in Cambodia
- Special Representative of the Secretary-General on the situation of human rights defenders
- Representative of the Secretary-General on human rights of internally displaced persons
- Working Group of Experts on People of African Descent
- Working Group on Arbitrary Detention
- Working Group on Enforced or Involuntary Disappearances
- Working Group on the question of the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination

**Appendix II**

**TERMS IN OFFICE OF MANDATE-HOLDERS**

<b>Mandate-holder</b>	<b>Mandate</b>	<b>Terms in office</b>
Charlotte Abaka	Independent Expert on the situation of human rights in Liberia	July 2006 (first term)
Yakin Ertürk	Special Rapporteur on violence against women, its causes and consequences	July 2006 (first term)
Manuela Carmena Castrillo	Working Group on Arbitrary Detention	July 2006 (first term)
Joel Adebayo Adekanye	Working Group on Enforced or Involuntary Disappearances	July 2006 (second term)
Saeed Rajaei Khorasani	Working Group on Enforced or Involuntary Disappearances	July 2006 (first term)

<b>Mandate-holder</b>	<b>Mandate</b>	<b>Terms in office</b>	<b>Mandate-holder</b>	<b>Mandate</b>	<b>Terms in office</b>
Joe Frans	Working Group on people of African descent	July 2006 (first term)	Okechukwu Ibeanu	Special Rapporteur on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights	July 2007 (first term)
Leandro Despouy	Special Rapporteur on the independence of judges and lawyers	August 2006 (first term)	Vernor Muñoz Villalobos	Special Rapporteur on the right to education	July 2007 (first term)
Hina Jilani	Special Representative of the Secretary-General on the situation of human rights defenders	August 2006 (second term)	Juan Miguel Petit	Special Rapporteur on the sale of children, child prostitution and child pornography	July 2007 (second term)
Soledad Villagra de Biedermann	Working Group on Arbitrary Detention	August 2006 (second term)	Vitit Muntarbhorn	Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea	July 2007 (first term)
Miloon Kothari	Special Rapporteur on adequate housing as a component of the right to an adequate standard of living	September 2006 (second term)	Leila Zerrougui	Working Group on Arbitrary Detention	August 2007 (second term)
Jean Ziegler	Special Rapporteur on the right to food	September 2006 (second term)	Santiago Corcuera Cabezut	Working Group on Enforced or Involuntary Disappearances	August 2007 (first term)
Paulo Sérgio Pinheiro	Special Rapporteur on the situation of human rights in Myanmar	December 2006 (second term)	Walter Kälin	Representative of the Secretary-General on the human rights of internally displaced persons	September 2007 (first term)
Darko Göttinger	Working Group on Enforced or Involuntary Disappearances	January 2007 (first term)	Sigma Huda	Special Rapporteur on trafficking in persons, especially in women and children	October 2007 (first term)
Tamás Bán	Working Group on Arbitrary Detention	April 2007 (second term)	Bernards Andrew Nyamwaya Mudho	Independent Expert on the effects of economic reform policies and foreign debt on the full enjoyment of human rights, particularly economic, social and cultural rights	November 2007 (second term)
Ghanim AlInajjar	Independent Expert appointed by the Secretary-General on the situation of human rights in Somalia	May 2007 (second term)	Manfred Nowak	Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment	November 2007 (first term)
John Dugard	Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967	June 2007 (second term)	Louis Joinet	Independent Expert appointed by the Secretary-General on the situation of human rights in Haiti	February 2008 (second term)
Rodolfo Stavenhagen	Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people	June 2007 (second term)	Rudi Muhammad Rizki	Independent Expert on human rights and international solidarity	July 2008 (first term)
Arjun Sengupta	Independent Expert on the question of human rights and extreme poverty	July 2007 (first term)	Gay McDougall	Independent Expert on minority issues	July 2008 (first term)
Akich Okola	Independent Expert on the situation of human rights in Burundi	July 2007 (first term)	Doudou Diène	Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance	July 2008 (second term)
Tiinga Frédéric Pacéré	Independent Expert on the situation of human rights in the Democratic Republic of the Congo	July 2007 (first term)	Jorge A. Bustamante	Special Rapporteur on the human rights of migrants	July 2008 (first term)
Philip Alston	Special Rapporteur on extrajudicial, summary or arbitrary executions	July 2007 (first term)			
Asma Jahangir	Special Rapporteur on freedom of religion or belief	July 2007 (first term)			

<b>Mandate-holder</b>	<b>Mandate</b>	<b>Terms in office</b>	<b>Mandate-holder</b>	<b>Mandate</b>	<b>Terms in office</b>
Martin Scheinin	Special Rapporteur on the promotion and protection of human rights while countering terrorism	July 2008 (first term)	Yash Ghai	Special Representative of the Secretary-General for human rights in Cambodia	November 2008 (first term)
Sima Samar	Special Rapporteur on the situation of human rights in the Sudan	July 2008 (first term)			
John Ruggie	Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises	July 2008 (first term)			
Seyyed Mohammad Hashemi	Working Group on Arbitrary Detention	July 2008 (second term)			
Nejat Al-Hajjaji	Working Group on the use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination	July 2008 (first term)			
Amada Benavides de Pérez	Working Group on the use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination	July 2008 (first term)			
Alexander Ivanovich Nikitin	Working Group on the use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination	July 2008 (first term)			
Shaista Shameem	Working Group on the use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination	July 2007 (first term)			
Ambeyi Ligabo	Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression	August 2008 (second term)			
Paul Hunt	Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health	August 2008 (second term)			
Peter Lesa Kasanda	Working Group on people of African descent	August 2008 (second term)			
Stephen J. Toope	Working Group on Enforced or Involuntary Disappearances	September 2008 (second term)			
George N. Jabbour	Working Group on people of African descent	September 2008 (second term)			
Irina Zlatescu	Working Group on people of African descent	October 2008 (second term)			
José Gómez del Prado	Working Group on the use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination	October 2008 (first term)			

**United Nations General Assembly resolution 68/268  
of 9 April 2014 (Strengthening and enhancing the  
effective functioning of the human rights treaty  
body system)**



## General Assembly

Distr.: General  
21 April 2014

Sixty-eighth session  
Agenda item 125

### Resolution adopted by the General Assembly on 9 April 2014

[without reference to a Main Committee (A/68/L.37)]

#### 68/268. Strengthening and enhancing the effective functioning of the human rights treaty body system

*The General Assembly,*

*Reaffirming* the purposes and principles of the Charter of the United Nations, and recalling the Universal Declaration of Human Rights<sup>1</sup> and relevant international human rights instruments,

*Underlining* the obligation that States have to promote and protect human rights and to carry out the responsibilities that they have undertaken under international law, especially the Charter, as well as various international instruments in the field of human rights, including under international human rights treaties,

*Recalling* Economic and Social Council resolution 1985/17 of 28 May 1985,

*Recognizing also* its resolution 66/254 of 23 February 2012, by which it launched the intergovernmental process of the General Assembly on strengthening and enhancing the effective functioning of the human rights treaty body system, and its resolutions 66/295 of 17 September 2012 and 68/2 of 20 September 2013, by which it extended the intergovernmental process,

*Recalling further* its relevant resolutions on the human rights treaty bodies,

*Reaffirming* that the full and effective implementation of international human rights instruments by States parties is of major importance for the efforts of the United Nations to promote universal respect for and observance of human rights and fundamental freedoms and that the effective functioning of the human rights treaty body system is indispensable for the full and effective implementation of such instruments,

*Recognizing* the important, valuable and unique role and contribution of each of the human rights treaty bodies in the promotion and protection of human rights and fundamental freedoms, including through their examination of the progress made by States parties to the respective human rights treaties in fulfilling their

<sup>1</sup> Resolution 217 A (III).



relevant obligations and their provision of recommendations to States parties on the implementation of such treaties,

*Reaffirming* the importance of the independence of the human rights treaty bodies,

*Reaffirming also* that the independence and impartiality of members of the human rights treaty bodies is essential for the performance of their duties and responsibilities in line with the respective treaties, and recalling the requirement that they be individuals of high moral standing serving in their personal capacity,

*Recognizing* that States have a legal obligation under the international human rights treaties to which they are party to periodically submit to the relevant human rights treaty bodies reports on the measures they have taken to give effect to the provisions of the relevant treaties, and noting the need to increase the level of compliance in this regard,

*Recognizing also* that the promotion and protection of human rights should be based on the principle of cooperation and genuine dialogue and be aimed at strengthening the capacity of Member States to comply with their human rights obligations for the benefit of all human beings,

*Emphasizing* the importance of multilingualism in the activities of the United Nations, including those linked to the promotion and protection of human rights, and reaffirming the paramount importance of the equality of the six official languages of the United Nations for the effective functioning of the human rights treaty bodies,

*Recognizing* that the current allocation of resources has not allowed the human rights treaty body system to work in a sustainable and effective manner, and in this regard also recognizing the importance of providing, under the existing procedures of the General Assembly, adequate funding to the human rights treaty body system from the regular budget of the United Nations,

*Recognizing also* the importance of continued efforts to improve the efficiency of the working methods of the human rights treaty body system,

*Recognizing further* the importance and added value of capacity-building and technical assistance provided in consultation with and with the consent of the States parties concerned to ensure the full and effective implementation of and compliance with the international human rights treaties,

*Recalling* that certain international human rights instruments include provisions regarding the venue of the meetings of the committees, and mindful of the importance of the full engagement of all States parties in the interactive dialogue with the human rights treaty bodies,

*Taking note* of the reports of the Secretary-General on measures to improve further the effectiveness, harmonization and reform of the human rights treaty body system,<sup>2</sup>

*Noting with appreciation* the initiative and efforts of the United Nations High Commissioner for Human Rights, in the form of a multi-stakeholder consultation approach for reflecting on how to streamline and strengthen the human rights treaty body system,

<sup>2</sup> A/66/344 and A/HRC/19/28.

Noting that the multi-stakeholder approach consisted of a number of meetings involving representatives of Member States, human rights treaty bodies, national human rights institutions, non-governmental organizations and academia, including events hosted by a number of Member States,

*Taking note* of the report of the High Commissioner on strengthening the United Nations human rights treaty body system,<sup>3</sup> which includes recommendations addressed to different stakeholders,

*Taking note also* of the report of the co-facilitators on the open-ended intergovernmental process on how to strengthen and enhance the effective functioning of the human rights treaty body system,<sup>4</sup>

*Expressing its appreciation* for the efforts of the President of the General Assembly and the co-facilitators in the framework of the intergovernmental process,

*Noting* the participation and contributions of Member States in the intergovernmental process, as well as experts of the human rights treaty bodies, national human rights institutions, the Office of the United Nations High Commissioner for Human Rights and non-governmental organizations,

*Emphasizing* that strengthening and enhancing the effective functioning of the human rights treaty body system is a common goal shared by stakeholders who have different legal competencies in accordance with the Charter and the international human rights instruments establishing treaty bodies, and recognizing in this regard the ongoing efforts of different treaty bodies towards strengthening and enhancing their effective functioning,

1. *Encourages* the human rights treaty bodies to offer to States parties for their consideration the simplified reporting procedure and to set a limit on the number of the questions included;

2. *Encourages* States parties to consider the possibility of using the simplified reporting procedure, when offered, to facilitate the preparation of their reports and the interactive dialogue on the implementation of their treaty obligations;

3. *Also encourages* States parties to consider submitting a common core document and updating it as appropriate, as a comprehensive document or in the form of an addendum to the original document, bearing in mind the most recent developments in the particular State party, and in this regard encourages the human rights treaty bodies to further elaborate their existing guidelines on the common core document in a clear and consistent manner;

4. *Decides*, without prejudice to the formulation of the annual report of each human rights treaty body as laid out in the respective treaty, that the annual reports of treaty bodies are not to contain documents published separately and referenced therein;

5. *Encourages* the human rights treaty bodies to collaborate towards the elaboration of an aligned methodology for their constructive dialogue with the States parties, bearing in mind the views of States parties as well as the specificity of the respective committees and of their mandates, with the aim of making the

<sup>3</sup> A/66/860.

<sup>4</sup> A/68/832.

dialogue more effective, maximizing the use of the time available and allowing for a more interactive and productive dialogue with States parties;

6. *Also encourages* the human rights treaty bodies to adopt short, focused and concrete concluding observations, including the recommendations therein, that reflect the dialogue with the relevant State party, and to this end further encourages them to develop common guidelines for the elaboration of such concluding observations, bearing in mind the specificity of the respective committees and of their mandates, as well as the views of States parties;

7. *Recommends* the more efficient and effective use of the meetings of States parties, *inter alia*, by proposing and organizing discussions on matters related to the implementation of each treaty;

8. *Strongly condemns* all acts of intimidation and reprisals against individuals and groups for their contribution to the work of the human rights treaty bodies, and urges States to take all appropriate action, consistent with the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms<sup>5</sup> and all other relevant human rights instruments, to prevent and eliminate such human rights violations;

9. *Encourages* the human rights treaty bodies to continue to enhance their efforts towards achieving greater efficiency, transparency, effectiveness and harmonization through their working methods, within their respective mandates, and in this regard encourages the treaty bodies to continue to review good practices regarding the application of rules of procedure and working methods in their ongoing efforts towards strengthening and enhancing their effective functioning, bearing in mind that these activities should fall under the provisions of the respective treaties, thus not creating new obligations for States parties;

10. *Encourages* States parties to continue their efforts to nominate experts of high moral standing and recognized competence and experience in the field of human rights, in particular in the field covered by the relevant treaty, and, as appropriate, to consider adopting national policies or processes with respect to the nomination of experts as candidates for human rights treaty bodies;

11. *Recommends* that the Economic and Social Council consider replacing the existing procedure for the election of experts to the Committee on Economic, Social and Cultural Rights with a meeting of States parties to the International Covenant on Economic, Social and Cultural Rights,<sup>6</sup> while preserving the current structure, organization and administrative arrangement of the Committee as set forth in Council resolution 1985/17;

12. *Requests* the Office of the United Nations High Commissioner for Human Rights to include in the documentation prepared for elections of members of human rights treaty bodies at meetings of States parties an information note on the current situation with respect to the composition of the treaty body, reflecting the balance in terms of geographical distribution and gender representation, professional background and different legal systems, as well as the tenure of current members;

<sup>5</sup> Resolution 53/144, annex.

<sup>6</sup> See resolution 2200 A (XXI), annex.

13. *Encourages* States parties, in the election of treaty body experts, to give due consideration, as stipulated in the relevant human rights instruments, to equitable geographical distribution, the representation of the different forms of civilization and the principal legal systems, balanced gender representation and the participation of experts with disabilities in the membership of the human rights treaty bodies;
14. *Encourages* the human rights treaty bodies to develop an aligned consultation process for the elaboration of general comments that provides for consultation with States parties in particular and bears in mind the views of other stakeholders during the elaboration of new general comments;
15. *Decides*, in line with established practice with respect to other United Nations documentation, to establish a limit of 10,700 words for each document produced by the human rights treaty bodies, and further recommends that word limits also be applied for relevant stakeholders;
16. *Also decides* to establish word limits for all State party documentation submitted to the human rights treaty body system, including State party reports, of 31,800 words for initial reports, 21,200 words for subsequent periodic reports and 42,400 words for common core documents, as endorsed by the human rights treaty bodies,<sup>7</sup> and calls upon the treaty bodies to set a limit on the number of questions posed, focusing on areas seen as priority issues to ensure the ability of States parties to meet the aforementioned word limits;
17. *Requests* the Secretary-General, through the Office of the High Commissioner, to support States parties in building the capacity to implement their treaty obligations and to provide in this regard advisory services, technical assistance and capacity-building, in line with the mandate of the Office, in consultation with and with the consent of the State concerned, by:
- Deploying a dedicated human rights capacity-building officer in every regional office of the Office of the High Commissioner, as required;
  - Strengthening cooperation with relevant regional human rights mechanisms within regional organizations to provide technical assistance to States in reporting to human rights treaty bodies, including through the training of trainers;
  - Developing a roster of experts on treaty body reporting, reflecting geographical distribution and gender representation, professional background and different legal systems;
  - Providing direct assistance to States parties at the national level by building and developing institutional capacity for reporting and strengthening technical knowledge through ad hoc training on reporting guidelines at the national level;
  - Facilitating the sharing of best practices among States parties;
18. *Underlines* the need to provide further support to States parties through, inter alia, the United Nations Voluntary Fund for Technical Cooperation in the Field of Human Rights and in conjunction with the provision of technical assistance, with a focus on measures to build sustainable capacity in their activities to fulfil their treaty obligations, and encourages all Member States to contribute to the Fund;

<sup>7</sup> See HR/MC/2006/3 and Corr.1.

19. *Encourages* the Office of the High Commissioner to work with the agencies, funds and programmes of the United Nations system and United Nations country teams, in line with their respective mandates and at the request of States parties, to assist States parties in fulfilling their obligations under international human rights treaties through:

- The provision of advisory services, technical assistance and capacity-building to States parties for the preparation of reports to human rights treaty bodies;
- The development of programmatic responses, in close coordination with the relevant States parties, to support their compliance with treaty obligations;

20. *Recognizes* that some States parties consider that they would benefit from improved coordination of reporting at the national level, and requests the Office of the High Commissioner to include among its technical assistance activities relevant assistance in this regard, at the request of a State party, based on best practices;

21. *Encourages* Member States to provide voluntary funds to facilitate the engagement of States parties, in particular those without representation in Geneva, with the human rights treaty bodies;

22. *Decides* in principle, with the aim of enhancing the accessibility and visibility of the human rights treaty bodies and in line with the report of the Committee on Information on its thirty-fifth session,<sup>8</sup> to webcast, as soon as feasible, the public meetings of the treaty bodies, and requests the Department of Public Information of the Secretariat to report on the feasibility of providing, in all of the official languages used in the respective committees, live webcasts and video archives that are available, accessible, searchable and secure, including from cyberattacks, of relevant meetings of the treaty bodies;

23. *Requests* the Office of the High Commissioner, with the assistance of United Nations country teams through their existing videoconferencing facilities, as appropriate, to provide, at the request of a State party, the opportunity for members of its official delegation not present at the meeting to participate in the consideration of the report of that State party by means of videoconference in order to facilitate wider participation in the dialogue;

24. *Underlines* the need for summary records of the dialogue of human rights treaty bodies with States parties, and in this regard decides to issue summary records in one of the working languages of the United Nations and not to translate the pending backlog of summary records, taking into account that these measures will not constitute a precedent, given the special nature of the treaty bodies, and bearing in mind the aim of providing, through alternative methods, verbatim records of the meetings of the treaty bodies in all of the official languages of the United Nations;

25. *Decides* that a summary record of a meeting of a State party with a treaty body, at the request of any State party, shall be translated into the official language of the United Nations used by that State party;

<sup>8</sup> Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 21 (A/68/21).

26. *Also decides* that the allocation of meeting time to the treaty bodies will be identified in the following manner, and requests the Secretary-General to provide the corresponding financial and human resources:

- (a) An allocation of the number of weeks that each treaty body requires to review the reports of States parties it can expect annually, using the average number of reports received per committee during the period from 2009 to 2012,<sup>9</sup> on the basis of an assumed attainable rate of review of at least 2.5 reports per week and where relevant at least 5 reports under the Optional Protocols to the human rights treaties per week;
- (b) A further allocation of two weeks of meeting time per committee to allow for mandated activities, plus an allocation of additional meeting time to those committees dealing with individual communications, on the basis of each such communication requiring 1.3 hours of meeting time for review and the average number of such communications received per year by those committees;
- (c) An additional margin to prevent the recurrence of backlogs is established as a target 5 per cent increase in reporting compliance allocated among the committees to address their expected workload, at the beginning of each biennium, with a temporary target increase of 15 per cent for the period from 2015 to 2017;
- (d) An adequate allocation of financial and human resources to those treaty bodies whose main mandated role is to carry out field visits;

27. *Further decides* that the amount of meeting time allocated will be reviewed biennially on the basis of actual reporting during the previous four years and will be amended on this basis at the request of the Secretary-General in line with established budgetary procedures, and decides that the number of weeks allocated to a committee on a permanent basis prior to the adoption of the present resolution will not be reduced;

28. *Requests* the Secretary-General accordingly to take into account the meeting time needed in relation to the increased capacity of States parties to submit reports under the respective human rights instruments and the situation in terms of ratifications and the number of individual communications considered, based on paragraphs 26 and 27 above, in his future biennial programme budget for the human rights treaty body system, including the specific requirements for field visits by treaty bodies mandated to conduct such visits;

29. *Also requests* the Secretary-General to ensure the progressive implementation of relevant accessibility standards with regard to the human rights treaty body system, as appropriate, particularly in connection with the strategic heritage plan being developed for the United Nations Office at Geneva, and to provide reasonable accommodation for treaty body experts with disabilities to ensure their full and effective participation;

30. *Decides* to allocate a maximum of three official working languages for the work of the human rights treaty bodies, with the inclusion, on an exceptional basis, of a fourth official language, when necessary to facilitate communication among the members, as determined by the committee concerned, taking into account

that these measures will not constitute a precedent, given the special nature of the treaty bodies, and without prejudice to the right of each State party to interact with the treaty bodies in any of the six official languages of the United Nations;

31. *Requests* the Secretary-General to improve the efficiency of the current arrangement with regard to the travel of treaty body experts in line with section VI of resolution 67/254-A of 12 April 2013;<sup>10</sup>

32. *Invites* States parties, as applicable and as an exceptional measure, with a view to achieving greater compliance with reporting obligations by States parties and eliminating the backlog of reports and in agreement with the relevant treaty body, to submit one combined report to satisfy its reporting obligations to the treaty body for the entire period for which reports to that treaty body are outstanding at the time of the adoption of the present resolution;

33. *Invites* the human rights treaty bodies, as an exceptional measure, and with a view to eliminating the current backlog of reports, without prejudice to the existing practices of the human rights treaty bodies or to the right of a State party to provide, or a treaty body to request, a short addendum for the purpose of reflecting significant and relevant recent national developments, to consider all State party reports which at the date of the present resolution have been submitted and are awaiting consideration to satisfy the reporting obligation of the State party concerned to the relevant treaty body until the completion of a reporting cycle starting from the time of the consideration of the report of the State party concerned;

34. *Invites* the human rights treaty bodies and the Office of the High Commissioner, within their respective mandates, to continue to work to increase coordination and predictability in the reporting process, including through cooperation with States parties, with the aim of achieving a clear and regularized schedule for reporting by States parties;

35. *Reaffirms* the importance of the independence and impartiality of members of the human rights treaty bodies, and underlines the importance of all stakeholders of the treaty body system, as well as the Secretariat,<sup>11</sup> respecting fully the independence of treaty body members and the importance of avoiding any act that would interfere with the exercise of their functions;

36. *Notes* the adoption, at the twenty-fourth annual meeting of the Chairs of the human rights treaty bodies, held in Addis Ababa from 25 to 29 June 2012, of the guidelines on the independence and impartiality of members of the human rights treaty bodies (the Addis Ababa guidelines),<sup>12</sup> which are aimed at ensuring objectivity, impartiality and accountability within the treaty body system, in full respect for the independence of the treaty bodies, and in this regard encourages the treaty bodies to implement the guidelines in accordance with their mandates;

37. *Encourages* the human rights treaty bodies to continue to consider and review the Addis Ababa guidelines, inter alia, by seeking the views of States parties and other stakeholders on their development, and in this regard invites the Chairs of the treaty bodies to keep States parties updated on their implementation;

<sup>10</sup> See also ST/SGB/107/Rev.6 and A/67/995.

<sup>11</sup> See ST/SGB/2009/6.

<sup>12</sup> A/67/222 and Corr.1, annex I.

<sup>9</sup> Thereafter on the basis of the four preceding years for which data are available and, for treaties for which the data on the incoming reports from the previous four years are not yet available owing to the more recent entry into force, the average will be calculated on the basis of the years for which the data are available.

38. *Also encourages* the human rights treaty bodies, with a view to accelerating the harmonization of the treaty body system, to continue to enhance the role of their Chairs in relation to procedural matters, including with respect to formulating conclusions on issues related to working methods and procedural matters, promptly generalizing good practices and methodologies among all treaty bodies, ensuring coherence across the treaty bodies and standardizing working methods;
39. *Further encourages* the human rights treaty bodies to strengthen the possibilities for interaction during the annual meetings of the Chairs of the treaty bodies with States parties to all human rights treaties, held in Geneva and New York, with a view to ensuring a forum for an open and formal interactive dialogue in which all issues, including those related to the independence and impartiality of treaty body members, may be raised by States parties in a constructive manner;
40. *Requests* the Secretary-General to submit to the General Assembly, on a biennial basis, a comprehensive report on the status of the human rights treaty body system and the progress achieved by the human rights treaty bodies in realizing greater efficiency and effectiveness in their work, including the number of reports submitted and reviewed by the committees, the visits undertaken and the individual communications received and reviewed, where applicable, the state of the backlog, capacity-building efforts and the results achieved, as well as the situation in terms of ratifications, increased reporting and the allocation of meeting time and proposals on measures, including on the basis of information and observations from Member States, to enhance the engagement of all States parties in the dialogue with the treaty bodies;
41. *Decides* to consider the state of the human rights treaty body system no later than six years from the date of adoption of the present resolution, to review the effectiveness of the measures taken in order to ensure their sustainability, and, if appropriate, to decide on further action to strengthen and enhance the effective functioning of the human rights treaty body system.

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*81st plenary meeting  
9 April 2014*

**General Comment No. 35 on article 9 on liberty and  
security of person (adopted by the Human Rights  
Committee, 28 October 2014 (CCPR/C/GC/35))**



## International Covenant on Civil and Political Rights

Distr.: General  
16 December 2014  
Original: English

### Human Rights Committee

#### General comment No. 35

#### Article 9 (Liberty and security of person)\*

##### I. General remarks

1. The present general comment replaces general comment No. 8 (sixteenth session), adopted in 1982.
2. Article 9 recognizes and protects both liberty of person and security of person. In the Universal Declaration of Human Rights, article 3 proclaims that everyone has the right to life, liberty and security of person. That is the first substantive right protected by the Universal Declaration, which indicates the profound importance of article 9 of the Covenant both for individuals and for society as a whole. Liberty and security of person are precious for their own sake, and also because the deprivation of liberty and security of person have historically been principal means for impairing the enjoyment of other rights.
3. Liberty of person concerns freedom from confinement of the body, not a general freedom of action.<sup>1</sup> Security of person concerns freedom from injury to the body and the mind, or bodily and mental integrity, as further discussed in paragraph 9 below. Article 9 guarantees those rights to everyone. "Everyone" includes, among others, girls and boys, soldiers, persons with disabilities, lesbian, gay, bisexual and transgender persons, aliens, refugees and asylum seekers, stateless persons, migrant workers, persons convicted of crime, and persons who have engaged in terrorist activity.
4. Paragraphs 2 to 5 of article 9 set out specific safeguards for the protection of liberty and security of person. Some of the provisions of article 9 (part of paragraph 2 and the whole of paragraph 3) apply only in connection with criminal charges. But the rest, in particular the important guarantee laid down in paragraph 4, i.e. the right to review by a court of the legality of detention, applies to all persons deprived of liberty.
5. Deprivation of liberty involves more severe restriction of motion within a narrower space than mere interference with liberty of movement under article 12.<sup>2</sup> Examples of

\* Adopted by the Committee at its 112th session (7–31 October 2014).

<sup>1</sup> 854/1999, *Wackenheim v. France*, para. 6.3.

<sup>2</sup> 263/1987, *González del Río v. Peru*, para. 5.1; 833/1998, *Karkner v. France*, para. 8.5.

deprivation of liberty include police custody, *arraigo*,<sup>3</sup> remand detention, imprisonment after conviction, house arrest,<sup>4</sup> administrative detention, involuntary hospitalization,<sup>5</sup> institutional custody of children and confinement to a restricted area of an airport,<sup>6</sup> as well as being involuntarily transported.<sup>7</sup> They also include certain further restrictions on a person who is already detained, for example, solitary confinement or the use of physical restraining devices.<sup>8</sup> During a period of military service, restrictions that would amount to deprivation of liberty for a civilian may not amount to deprivation of liberty if they do not exceed the exigencies of normal military service or deviate from the normal conditions of life within the armed forces of the State party concerned.<sup>9</sup>

6. Deprivation of personal liberty is without free consent. Individuals who go voluntarily to a police station to participate in an investigation, and who know that they are free to leave at any time, are not being deprived of their liberty.<sup>10</sup>
7. States parties have the duty to take appropriate measures to protect the right to liberty of person against deprivation by third parties.<sup>11</sup> States parties must protect individuals against abduction or detention by individual criminals or irregular groups, including armed or terrorist groups, operating within their territory. They must also protect individuals against wrongful deprivation of liberty by lawful organizations, such as employers, schools and hospitals. States parties should do their utmost to take appropriate measures to protect individuals against deprivation of liberty by the action of other States within their territory.<sup>12</sup>
8. When private individuals or entities are empowered or authorized by a State party to exercise powers of arrest or detention, the State party remains responsible for adherence and ensuring adherence to article 9. It must rigorously limit those powers and must provide strict and effective control to ensure that those powers are not misused, and do not lead to arbitrary or unlawful arrest or detention. It must also provide effective remedies for victims if arbitrary or unlawful arrest or detention does occur.<sup>13</sup>
9. The right to security of person protects individuals against intentional infliction of bodily or mental injury, regardless of whether the victim is detained or non-detained. For example, officials of States parties violate the right to personal security when they unjustifiably inflict bodily injury.<sup>14</sup> The right to personal security also obliges States parties to take appropriate measures in response to death threats against persons in the public sphere, and more generally to protect individuals from foreseeable threats to life or bodily pending expulsion).<sup>3</sup>

<sup>3</sup> See concluding observations: Mexico (CCPR/C/MEX/CO/5, 2010), para. 15.

<sup>4</sup> 1134/2002, *Gorji-Dinka v. Cameroon*, para. 5.4; see also concluding observations: United Kingdom (CCPR/C/GBR/CO/6, 2008), para. 17 (control orders including curfews of up to 16 hours).

<sup>5</sup> 754/1997, *A. v. New Zealand*, para. 7.2 (mental health); see concluding observations: Republic of Moldova (CCPR/C/MDA/CO/2, 2009), para. 13 (contagious disease).

<sup>6</sup> See concluding observations: Belgium (CCPR/CO/81/BEL, 2004), para. 17 (detention of migrants pending expulsion).

<sup>7</sup> R.12/52, *Saldías de López v. Uruguay*, para. 13.

<sup>8</sup> See concluding observations: Czech Republic (CCPR/C/CZE/CO/2, 2007), para. 13; and Republic of Korea (CCPR/C/KOR/CO/3, 2006), para. 13.

<sup>9</sup> 265/1987, *Vuolanne v. Finland*, para. 9.4.

<sup>10</sup> 1758/2008, *Jessop v. New Zealand*, para. 7.9–7.10.

<sup>11</sup> See concluding observations: Yemen (CCPR/C/YEM/CO/5, 2012), para. 24.

<sup>12</sup> 319/1988, *Cañón García v. Ecuador*, paras. 5.1–5.2.

<sup>13</sup> See concluding observations: Guatemala (CCPR/C/GTM/CO/3, 2012), para. 16.

<sup>14</sup> 613/1995, *Lezhong v. Jamaica*, para. 9.3.



integrity proceeding from any governmental or private actors.<sup>15</sup> States parties must take both measures to prevent future injury and retrospective measures, such as enforcement of criminal laws, in response to past injury. For example, States parties must respond appropriately to patterns of violence against categories of victims such as intimidation of human rights defenders and journalists, retaliation against witnesses, violence against women, including domestic violence, the hazing of conscripts in the armed forces, violence against children, violence against persons on the basis of their sexual orientation or gender identity,<sup>16</sup> and violence against persons with disabilities.<sup>17</sup> They should also prevent and redress unjustifiable use of force in law enforcement,<sup>18</sup> and protect their populations against abuses by private security forces, and against the risks posed by excessive availability of firearms.<sup>19</sup> The right to security of person does not address all risks to physical or mental health and is not implicated in the indirect health impact of being the target of civil or criminal proceedings.<sup>20</sup>

## II. Arbitrary detention and unlawful detention

10. The right to liberty of person is not absolute. Article 9 recognizes that sometimes deprivation of liberty is justified, for example, in the enforcement of criminal laws. Paragraph 1 requires that deprivation of liberty must not be arbitrary, and must be carried out with respect for the rule of law.

11. The second sentence of paragraph 1 prohibits arbitrary arrest and detention, while the third sentence prohibits unlawful deprivation of liberty, i.e., deprivation of liberty that is not imposed on such grounds and in accordance with such procedure as are established by law. The two prohibitions overlap, in that arrests or detentions may be in violation of the applicable law but not arbitrary, or legally permitted but arbitrary, or both arbitrary and unlawful. Arrest or detention that lacks any legal basis is also arbitrary.<sup>21</sup> Unauthorized confinement of prisoners beyond the length of their sentences is arbitrary as well as unlawful;<sup>22</sup> the same is true for unauthorized extension of other forms of detention. Continued confinement of detainees in defiance of a judicial order for their release is arbitrary as well as unlawful.<sup>23</sup>

12. An arrest or detention may be authorized by domestic law and nonetheless be arbitrary. The notion of “arbitrariness” is not to be equated with “against the law”, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law,<sup>24</sup> as well as elements of reasonableness, necessity and proportionality. For example, remand in custody on criminal charges must be reasonable

and necessary in all the circumstances.<sup>25</sup> Aside from judicially imposed sentences for a fixed period of time, the decision to keep a person in any form of detention is arbitrary if it is not subject to periodic re-evaluation of the justification for continuing the detention.<sup>26</sup>

13. The term “arrest” refers to any apprehension of a person that commences a deprivation of liberty, and the term “detention” refers to the deprivation of liberty that begins with the arrest and continues in time from apprehension until release.<sup>27</sup> Arrest within the meaning of article 9 need not involve a formal arrest as defined under domestic law.<sup>28</sup> When an additional deprivation of liberty is imposed on a person already in custody, such as detention on unrelated criminal charges, the commencement of that deprivation of liberty also amounts to an arrest.<sup>29</sup>

14. The Covenant does not provide an enumeration of the permissible reasons for depriving a person of liberty. Article 9 expressly recognizes that individuals may be detained on criminal charges, and article 11 expressly prohibits imprisonment on ground of inability to fulfil a contractual obligation.<sup>30</sup> Other regimes involving deprivation of liberty must also be established by law and must be accompanied by procedures that prevent arbitrary detention. The grounds and procedures prescribed by law must not be destructive of the right to liberty of person.<sup>31</sup> The regime must not amount to an evasion of the limits on the criminal justice system by providing the equivalent of criminal punishment without the applicable protections.<sup>32</sup> Although conditions of detention are addressed primarily by articles 7 and 10, detention may be arbitrary if the manner in which the detainees are treated does not relate to the purpose for which they are ostensibly being detained.<sup>33</sup> The imposition of a draconian penalty of imprisonment for contempt of court without adequate explanation and without independent procedural safeguards is arbitrary.<sup>34</sup>

15. To the extent that States parties impose security detention (sometimes known as administrative detention or interment) not in contemplation of prosecution on a criminal charge,<sup>35</sup> the Committee considers that such detention presents severe risks of arbitrary deprivation of liberty.<sup>36</sup> Such detention would normally amount to arbitrary detention as other effective measures addressing the threat, including the criminal justice system, would be available. If, under the most exceptional circumstances, a present, direct and imperative

<sup>25</sup> 1369/2005, *Kulov v. Kyrgyzstan*, para. 8.3. Pretrial detention in criminal cases is further discussed in section IV below.

<sup>26</sup> 1324/2004, *Shafiq v. Australia*, para. 7.2.

<sup>27</sup> 631/1995, *Spakmo v. Norway*, para. 6.3.

<sup>28</sup> 1460/2006, *Ykymova v. Turkmenistan*, paras. 7.2–7.3 (de facto house arrest); 1096/2002, *Kurbanova v. Tajikistan*, para. 7.2 (detention prior to arrest warrant).

<sup>29</sup> 635/1995, *Morrison v. Jamaica*, paras. 22.2–22.3; 1397/2005, *Engo v. Cameroon*, para. 7.3.

<sup>30</sup> Detention for criminal offences such as fraud that are related to civil law debts does not violate article 11, and does not amount to arbitrary detention. 1342/2005, *Gavrilin v. Belarus*, para. 7.3.

<sup>31</sup> 1629/2007, *Fardon v. Australia*, para. 7.3.

<sup>32</sup> *Ibid.*, para. 7.4 (a)–7.4 (c); see concluding observations: United States of America (CCPR/C/USA/CO/3/Rev.1, 2006), para. 19; general comment No. 32, paras. 15 and 18.

<sup>33</sup> 1629/2007, *Fardon v. Australia*, para. 7.4 (a) (nominally civil detention under same prison regime as prior sentence); see concluding observations: Belgium (CCPR/CO/81/BEL, 2004), para. 18 (placement in prison psychiatric annexes), and United Kingdom (CCPR/CO/73/UK, 2001), para. 16 (detention of asylum seekers in prisons).

<sup>34</sup> 1189/2003, *Fernando v. Sri Lanka*, para. 9.2; 1373/2005, *Dissanayake v. Sri Lanka*, para. 8.3.

<sup>35</sup> The present paragraph concerns security detention and not the forms of post-conviction preventative detention addressed in paragraph 21 below or detention for purposes of extradition or immigration control, see paragraph 18 below.

<sup>36</sup> See concluding observations: Colombia (CCPR/C/COL/CO/6, 2010), para. 20, and Jordan (CCPR/C/JOR/CO/4, 2010), para. 11.

<sup>15</sup> 1560/2007, *Marcellana and Guanayoy v. Philippines*, para. 7.7. States parties also violate the right to security of person if they purport to exercise jurisdiction over a person outside their territory by issuing a *latwa* or similar death sentence authorizing the killing of the victim. See concluding observations: Islamic Republic of Iran (CCPR/C/79/Add.25, 1993), para. 9; paragraph 63 below (discussing extraterritorial application).

<sup>16</sup> See concluding observations: El Salvador (CCPR/CO/78/SLV, 2003), para. 16.

<sup>17</sup> See concluding observations: Norway (CCPR/C/NOR/CO/6, 2011), para. 10.

<sup>18</sup> 613/1995, *Leehong v. Jamaica*, paras. 9.3; see Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990).

<sup>19</sup> See concluding observations: Philippines (CCPR/C/PHL/CO/4, 2012), para. 14.

<sup>20</sup> 1124/2002, *Obodzinsky v. Canada*, para. 8.5.

<sup>21</sup> 414/1990, *Mika Miha v. Equatorial Guinea*, para. 6.5.

<sup>22</sup> See concluding observations: Brazil (CCPR/C/BRA/CO/2, 2005), para. 16.

<sup>23</sup> 856/1999, *Chambala v. Zambia*, para. 7.3.

<sup>24</sup> 1134/2002, *Gorji-Dinka v. Cameroon*, para. 5.1; 305/1988, *Van Alphen v. Netherlands*, para. 5.8.

threat is invoked to justify the detention of persons considered to present such a threat, the burden of proof lies on States parties to show that the individual poses such a threat and that it cannot be addressed by alternative measures, and that burden increases with the length of the detention. States parties also need to show that detention does not last longer than absolutely necessary, that the overall length of possible detention is limited and that they fully respect the guarantees provided for by article 9 in all cases. Prompt and regular review by a court or other tribunal possessing the same attributes of independence and impartiality as the judiciary is a necessary guarantee for those conditions, as is access to independent legal advice, preferably selected by the detainee, and disclosure to the detainee of, at least, the essence of the evidence on which the decision is taken.<sup>37</sup>

16. Egregious examples of arbitrary detention include detaining family members of an alleged criminal who are not themselves accused of any wrongdoing, the holding of hostages and arrests for the purpose of extorting bribes or other similar criminal purposes.

17. Arrest or detention as punishment for the legitimate exercise of the rights as guaranteed by the Covenant is arbitrary, including freedom of opinion and expression (art. 19),<sup>38</sup> freedom of assembly (art. 21), freedom of association (art. 22), freedom of religion (art. 18) and the right to privacy (art. 17). Arrest or detention on discriminatory grounds in violation of article 2, paragraph 1, article 3 or article 26 is also in principle arbitrary.<sup>39</sup> Retroactive criminal punishment by detention in violation of article 15 amounts to arbitrary detention.<sup>40</sup> Enforced disappearances violate numerous substantive and procedural provisions of the Covenant and constitute a particularly aggravated form of arbitrary detention. Imprisonment after a manifestly unfair trial is arbitrary, but not every violation of the specific procedural guarantees for criminal defendants in article 14 results in arbitrary detention.<sup>41</sup>

18. Detention in the course of proceedings for the control of immigration is not per se arbitrary, but the detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time.<sup>42</sup> Asylum seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt.<sup>43</sup> To detain them further while their claims are being resolved would be arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security.<sup>44</sup> The decision must consider relevant factors case by case and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and

must be subject to periodic re-evaluation and judicial review.<sup>45</sup> Decisions regarding the detention of migrants must also take into account the effect of the detention on their physical or mental health.<sup>46</sup> Any necessary detention should take place in appropriate, sanitary, non-punitive facilities and should not take place in prisons. The inability of a State party to carry out the expulsion of an individual because of statelessness or other obstacles does not justify indefinite detention.<sup>47</sup> Children should not be deprived of liberty, except as a measure of last resort and for the shortest appropriate period of time, taking into account their best interests as a primary consideration with regard to the duration and conditions of detention, and also taking into account the extreme vulnerability and need for care of unaccompanied minors.<sup>48</sup>

19. States parties should revise outdated laws and practices in the field of mental health in order to avoid arbitrary detention. The Committee emphasizes the harm inherent in any deprivation of liberty and also the particular harms that may result in situations of involuntary hospitalization. States parties should make available adequate community-based or alternative social-care services for persons with psychosocial disabilities, in order to provide less restrictive alternatives to confinement.<sup>49</sup> The existence of a disability shall not in itself justify a deprivation of liberty but rather any deprivation of liberty must be necessary and proportionate, for the purpose of protecting the individual in question from serious harm or preventing injury to others.<sup>50</sup> It must be applied only as a measure of last resort and for the shortest appropriate period of time, and must be accompanied by adequate procedural and substantive safeguards established by law.<sup>51</sup> The procedures should ensure respect for the views of the individual and ensure that any representative genuinely represents and defends the wishes and interests of the individual.<sup>52</sup> States parties must offer to institutionalized persons programmes of treatment and rehabilitation that serve the purposes that are asserted to justify the detention.<sup>53</sup> Deprivation of liberty must be re-evaluated at appropriate intervals with regard to its continuing necessity.<sup>54</sup> The individuals must be assisted in obtaining access to effective remedies for the vindication of their rights, including initial and periodic judicial review of the lawfulness of the detention, and to prevent conditions of detention incompatible with the Covenant.<sup>55</sup>

20. The Covenant is consistent with a variety of schemes for sentencing in criminal cases. Convicted prisoners are entitled to have the duration of their sentences administered

<sup>45</sup> 1014/2001, *Baban v. Australia*, para. 7.2; 1069/2002, *Bakhtiyari v. Australia*, paras. 9.2–9.3; see UNHCR, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention (2012), guideline 4.3 and annex A (describing alternatives to detention).

<sup>46</sup> 1324/2004, *Shafiq v. Australia*, para. 7.3; 900/1999, *C. v. Australia*, paras. 8.2 and 8.4.

<sup>47</sup> 2094/2011, *F.K.A.G. v. Australia*, para. 9.3.

<sup>48</sup> 1050/2002, *D. and E. v. Australia*, para. 7.2; 794/1998, *Jalloh v. Netherlands*, paras. 8.2–8.3; see also Convention on the Rights of the Child, arts. 3, para. 1, and 37 (b).

<sup>49</sup> See concluding observations: Latvia (CCPR/C/LVA/CO/3, 2014), para. 16.

<sup>50</sup> 1061/2002, *Fijalkowska v. Poland*, para. 8.3; 1629/2007, *Fardon v. Australia*, para. 7.3; see

concluding observations: Russian Federation (CCPR/C/RUS/CO/6, 2009), para. 19; Convention on the Rights of Persons with Disabilities, art. 14, para. 1 (b).

<sup>51</sup> 1061/2002, *Fijalkowska v. Poland*, para. 8.3.

<sup>52</sup> See concluding observations: Czech Republic (CCPR/C/CZE/CO/2, 2007), para. 14; see also Committee on the Rights of the Child, general comment No. 9, para. 48.

<sup>53</sup> See concluding observations: Bulgaria (CCPR/C/BGR/CO/3, 2011), para. 10.

<sup>54</sup> 754/1997, *A. v. New Zealand*, para. 7.2; see Committee on the Rights of the Child, general comment No. 9, para. 50.

<sup>55</sup> 1061/2002, *Fijalkowska v. Poland*, paras. 8.3–8.4; 754/1997, *A. v. New Zealand*, para. 7.3; general comment No. 31, para. 15.

<sup>37</sup> On the relationship of article 9 to article 4 of the Covenant and international humanitarian law, see paragraphs 64 to 67 below.

<sup>38</sup> 328/1988, *Zelaya Blanes v. Nicaragua*, para. 10.3.

<sup>39</sup> 1314/2004, *O'Neill and Quinn v. Ireland*, para. 8.5 (finding no violation); see concluding observations: Honduras (CCPR/C/HND/CO/1, 2006), para. 13 (detention on the basis of sexual orientation), and Cameroon (CCPR/C/CMR/CO/4, 2010), para. 12 (imprisonment for consensual same-sex activities of adults).

<sup>40</sup> 1007/2001, *Sineiro Fernández v. Spain*, para. 7.4 (b).

<sup>41</sup> 1007/2001, *Sineiro Fernández v. Spain*, paras. 6.3 (absence of review of conviction by higher court violated paragraph 5 of article 14, but not paragraph 1 of article 9).

<sup>42</sup> 560/1993, *A. v. Australia*, paras. 9.3–9.4; 794/1998, *Jalloh v. Netherlands*, para. 8.2; 1557/2007, *Nystrom v. Australia*, paras. 7.2–7.3.

<sup>43</sup> 1069/2002, *Bakhtiyari v. Australia*, paras. 9.2–9.3.

<sup>44</sup> 1551/2007, *Tartlue v. Canada*, paras. 3.3 and 7.6; 1051/2002, *Ahani v. Canada*, para. 10.2.

in accordance with domestic law. Consideration for parole or other forms of early release must be in accordance with the law<sup>56</sup> and such release must not be denied on grounds that are arbitrary within the meaning of article 9. If such release is granted upon conditions and later the release is revoked because of an alleged breach of the conditions, then the revocation must also be carried out in accordance with law and must not be arbitrary and, in particular, not disproportionate to the seriousness of the breach. A prediction of the prisoner's future behaviour may be a relevant factor in deciding whether to grant early release.<sup>57</sup>

21. When a criminal sentence includes a punitive period followed by a non-punitive period intended to protect the safety of other individuals,<sup>58</sup> then once the punitive term of imprisonment has been served, to avoid arbitrariness, the additional detention must be justified by compelling reasons arising from the gravity of the crimes committed and the likelihood of the detainee's committing similar crimes in the future. States should only use such detention as a last resort and regular periodic reviews by an independent body must be assured to decide whether continued detention is justified.<sup>59</sup> State parties must exercise caution and provide appropriate guarantees in evaluating future dangers.<sup>60</sup> The conditions in such detention must be distinct from the conditions for convicted prisoners serving a punitive sentence and must be aimed at the detainee's rehabilitation and reintegration into society.<sup>61</sup> If a prisoner has fully served the sentence imposed at the time of conviction, articles 9 and 15 prohibit a retroactive increase in sentence and a State party may not circumvent that prohibition by imposing a detention that is equivalent to penal imprisonment under the label of civil detention.<sup>62</sup>

22. The third sentence of paragraph 1 of article 9 provides that no one shall be deprived of liberty except on such grounds and in accordance with such procedure as are established by law. Any substantive grounds for arrest or detention must be prescribed by law and should be defined with sufficient precision to avoid overly broad or arbitrary interpretation or application.<sup>63</sup> Deprivation of liberty without such legal authorization is unlawful<sup>64</sup> Continued detention despite an operative (*exécutoire*) judicial order of release or a valid amnesty is also unlawful.<sup>65</sup>

23. Article 9 requires that procedures for carrying out legally authorized deprivation of liberty should also be established by law and States parties should ensure compliance with their legally prescribed procedures. Article 9 further requires compliance with domestic rules that define the procedure for arrest by identifying the officials authorized to arrest<sup>66</sup> or

specifying when a warrant is required.<sup>67</sup> It also requires compliance with domestic rules that define when authorization to continue detention must be obtained from a judge or other officer,<sup>68</sup> where individuals may be detained,<sup>69</sup> when the detained person must be brought to court<sup>70</sup> and legal limits on the duration of detention.<sup>71</sup> It also requires compliance with domestic rules providing important safeguards for detained persons, such as making a record of an arrest<sup>72</sup> and permitting access to counsel.<sup>73</sup> Violations of domestic procedural rules not related to such issues may not necessarily raise an issue under article 9.<sup>74</sup>

### III. Notice of reasons for arrest and any criminal charges

24. Paragraph 2 of article 9 imposes two requirements for the benefit of persons who are deprived of liberty. First, they shall be informed, at the time of arrest, of the reasons for the arrest. Second, they shall be promptly informed of any charges against them. The first requirement applies broadly to the reasons for any deprivation of liberty. Because "arrest" means the commencement of a deprivation of liberty, that requirement applies regardless of the formality or informality with which the arrest is conducted and regardless of the legitimate or improper reason on which it is based.<sup>75</sup> The second, additional requirement applies only to information regarding criminal charges.<sup>76</sup> If a person already detained on one criminal charge is also ordered detained to face an unrelated criminal charge, prompt information must be provided regarding the unrelated charge.<sup>77</sup>

25. One major purpose of requiring that all arrested persons be informed of the reasons for the arrest is to enable them to seek release if they believe that the reasons given are invalid or unfounded.<sup>78</sup> The reasons must include not only the general legal basis of the arrest, but also enough factual specifics to indicate the substance of the complaint, such as the wrongful act and the identity of an alleged victim.<sup>79</sup> The "reasons" concern the official basis for the arrest, not the subjective motivations of the arresting officer.<sup>80</sup>

26. Oral notification of reasons for arrest satisfies the requirement. The reasons must be given in a language that the arrested person understands.<sup>81</sup>

27. That information must be provided immediately upon arrest. However, in exceptional circumstances, such immediate communication may not be possible. For example, a delay may be required before an interpreter can be present, but any such delay must be kept to the absolute minimum necessary.<sup>82</sup>

<sup>67</sup> 1110/2002, *Rolando v. the Philippines*, para. 5.5.

<sup>68</sup> 770/1997, *Griđin v. Russian Federation*, para. 8.1.

<sup>69</sup> 1449/2006, *Unarov v. Uzbekistan*, para. 8.4.

<sup>70</sup> 981/2001, *Gómez Casafra v. Peru*, para. 7.2.

<sup>71</sup> 2024/2011, *Israel v. Kazakhstan*, para. 9.2.

<sup>72</sup> 1208/2003, *Kurbonov v. Tajikistan*, para. 6.5.

<sup>73</sup> 1412/2005, *Butovenko v. Ukraine*, para. 7.6.

<sup>74</sup> 1425/2005, *Marz v. Russian Federation*, para. 5.3.

<sup>75</sup> 1460/2006, *Ykymova v. Turkmenistan*, para. 7.2 (de facto house arrest), 414/1990, *Mike Miha v. Equatorial Guinea*, para. 6.5 (presidential fiat).

<sup>76</sup> See, e.g., *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, I.C.J. Reports 2010, p. 639, para. 77 (citing the Committee's general comment No. 8).

<sup>77</sup> 635/1995, *Morrison v. Jamaica*, paras. 22.2–22.3; 1397/2005, *Engo v. Cameroon*, para. 7.3.

<sup>78</sup> 248/1987, *Campbell v. Jamaica*, para. 6.3.

<sup>79</sup> 1177/2003, *Ilonbe and Shandwe v. Democratic Republic of the Congo*, para. 6.2.

<sup>80</sup> 1812/2008, *Levinov v. Belarus*, para. 7.5.

<sup>81</sup> 868/1999, *Wilson v. Philippines*, paras. 3.3 and 7.5.

<sup>82</sup> 526/1993, *Hill and Hill v. Spain*, para. 12.2.

<sup>56</sup> 1388/2005, *De León Castro v. Spain*, para. 9.3.

<sup>57</sup> 1492/2006, *Van der Plaai v. New Zealand*, para. 6.3.

<sup>58</sup> In different legal systems, such detention may be known as "rétention de sûreté", "Sicherungsverwahrung" or, in English, "preventive detention"; see 1090/2002, *Rameka v. New Zealand*.

<sup>59</sup> *Ibid.*, para. 7.3.

<sup>60</sup> See concluding observations: Germany (CCPR/C/DEU/CO/6, 2012), para. 14.

<sup>61</sup> 1512/2006, *Dean v. New Zealand*, para. 7.5.

<sup>62</sup> 1629/2007, *Fardon v. Australia*, para. 7.4.

<sup>63</sup> See concluding observations: Philippines (CCPR/CO/79/PHL, 2003), para. 14 (vagrancy law vague), Mauritius (CCPR/CO/83/MUS, 2005), para. 12 (terrorism law), Russian Federation (CCPR/CO/83/RUS/CO/6, 2009), para. 24 ("extremist activity"), and Honduras (CCPR/C/HND/CO/1, 2006), para. 13 ("unlawful association").

<sup>64</sup> 702/1996, *McLawrence v. Jamaica*, para. 5.5: "the principle of legality is violated if an individual is arrested or detained on grounds which are not clearly established in domestic legislation".

<sup>65</sup> 856/1999, *Chambala v. Zambia*, para. 7.3; 138/1981, *Mpanjanjila et al. v. Zaïre*, para. 10.

<sup>66</sup> 1461/2006, 1462/2006, 1476/2006, 1477/2006, *Maksudov et al. v. Kyrgyzstan*, para. 12.2.

28. For some categories of vulnerable persons, directly informing the person arrested is required but not sufficient. When children are arrested, notice of the arrest and the reasons for it should also be provided directly to their parents, guardians, or legal representatives.<sup>83</sup> For certain persons with mental disabilities, notice of the arrest and the reasons should also be provided directly to persons they have designated or appropriate family members. Additional time may be required to identify and contact the relevant third persons, but notice should be given as soon as possible.

29. The second requirement of paragraph 2 concerns notice of criminal charges. Persons arrested for the purpose of investigating crimes that they may have committed or for the purpose of holding them for criminal trial must be promptly informed of the crimes of which they are suspected or accused. That right applies in connection with ordinary criminal prosecutions and also in connection with military prosecutions or other special regimes directed at criminal punishment.<sup>84</sup>

30. Paragraph 2 requires that the arrested person be informed “promptly” of any charges, not necessarily “at the time of arrest”. If particular charges are already contemplated, the arresting officer may inform the person of both the reasons for the arrest and the charges, or the authorities may explain the legal basis of the detention some hours later. The reasons must be given in a language that the arrested person understands.<sup>85</sup> The requirement to give notice of charges under paragraph 2 serves to facilitate the determination of whether the provisional detention is appropriate or not, and therefore paragraph 2 does not require that the arrested person is given as much detail regarding the charges as would be needed later to prepare for trial.<sup>86</sup> If the authorities have already informed an individual of the charges being investigated prior to making the arrest, then paragraph 2 does not require prompt repetition of the formal charges so long as they communicate the reasons for the arrest.<sup>87</sup> The same considerations as mentioned in paragraph 28 above apply to prompt information concerning any criminal charges when minors or other vulnerable persons are arrested.

#### IV. Judicial control of detention in connection with criminal charges

31. The first sentence of paragraph 3 applies to persons “arrested or detained on a criminal charge”, while the second sentence concerns persons “awaiting trial” on a criminal charge. Paragraph 3 applies in connection with ordinary criminal prosecutions, military prosecutions and other special regimes directed at criminal punishment.<sup>88</sup>

<sup>83</sup> 1402/2005, *Krasnov v. Kyrgyzstan*, para. 8.5; general comment No. 32, para. 42; see Committee on the Rights of the Child, general comment No. 10, para. 48.

<sup>84</sup> 1782/2008, *Aboifuaid v. Libya*, para. 7.6. The requirement of being informed about any charges applies to detention for possible military prosecution, regardless of whether the trial of the detainee by a military court would be prohibited by article 14 of the Covenant. 1813/2008, *Akwanga v. Cameroon*, paras. 7.4–7.5. In international armed conflict, detailed rules of international humanitarian law regarding the conduct of military prosecutions are also relevant to the interpretation of article 9, paragraph 3, which continues to apply. See paragraph 64 below.

<sup>85</sup> 493/1992, *Griffin v. Spain*, para. 9.2.

<sup>86</sup> General comment No. 32, para. 31; 702/1996, *McLawrence v. Jamaica*, para. 5.9.

<sup>87</sup> 712/1996, *Smirnova v. Russian Federation*, para. 10.3.

<sup>88</sup> 1782/2008, *Aboifuaid v. Libya*, para. 7.6. Paragraph 3 applies to detention for possible military prosecution, regardless of whether the trial of the detainee by a military court would be prohibited by article 14 of the Covenant. 1813/2008, *Akwanga v. Cameroon*, paras. 7.4–7.5. In international armed conflict, detailed rules of international humanitarian law regarding the conduct of military prosecutions are also relevant to the interpretation of article 9, paragraph 3, which continues to apply. See paragraph 64 below.

32. Paragraph 3 requires, firstly, that any person arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power. That requirement applies in all cases without exception and does not depend on the choice or ability of the detainee to assert it.<sup>89</sup> The requirement applies even before formal charges have been asserted, so long as the person is arrested or detained on suspicion of criminal activity.<sup>90</sup> The right is intended to bring the detention of a person in a criminal investigation or prosecution under judicial control.<sup>91</sup> If a person already detained on one criminal charge is also ordered to be detained to face an unrelated criminal charge, the person must be promptly brought before a judge for control of the second detention.<sup>92</sup> It is inherent to the proper exercise of judicial power that it be exercised by an authority which is independent, objective and impartial in relation to the issues dealt with.<sup>93</sup> Accordingly, a public prosecutor cannot be considered as an officer exercising judicial power under paragraph 3.<sup>94</sup>

33. While the exact meaning of “promptly” may vary depending on objective circumstances,<sup>95</sup> delays should not exceed a few days from the time of arrest.<sup>96</sup> In the view of the Committee, 48 hours is ordinarily sufficient to transport the individual and to prepare for the judicial hearing;<sup>97</sup> any delay longer than 48 hours must remain absolutely exceptional and be justified under the circumstances.<sup>98</sup> Longer detention in the custody of law enforcement officials without judicial control unnecessarily increases the risk of ill-treatment.<sup>99</sup> Laws in most States parties fix precise time limits, sometimes shorter than 48 hours, and those limits should also not be exceeded. An especially strict standard of promptness, such as 24 hours, should apply in the case of juveniles.<sup>100</sup>

34. The individual must be brought to appear physically before the judge or other officer authorized by law to exercise judicial power.<sup>101</sup> The physical presence of detainees at the hearing gives the opportunity for inquiry into the treatment that they received in custody<sup>102</sup> and facilitates immediate transfer to a remand detention centre if continued detention is ordered. It thus serves as a safeguard for the right to security of person and the prohibition against torture and cruel, inhuman or degrading treatment. In the hearing that ensues, and in subsequent hearings at which the judge assesses the legality or necessity of the detention,

<sup>89</sup> 1787/2008, *Kovsh v. Belarus*, paras. 7.3–7.5.

<sup>90</sup> 1128/2002, *Marques de Moraes v. Angola*, paras. 6.3–6.4; 1096/2002, *Kurbanova v. Tajikistan*, para. 7.2.

<sup>91</sup> 1914–1916/2009, *Musaeov v. Uzbekistan*, para. 9.3.

<sup>92</sup> 635/1995, *Morrison v. Jamaica*, paras. 22.2–22.3; 762/1997, *Jensen v. Australia*, para. 6.3.

<sup>93</sup> 521/1992, *Kulomin v. Hungary*, para. 11.3.

<sup>94</sup> See *ibid.*; 1547/2007, *Torobekov v. Kyrgyzstan*, para. 6.2; 1278/2004, *Reshtenikov v. Russian Federation*, para. 8.2; concluding observations: Tajikistan (CCPR/CO/84/TJK, 2005), para. 12.

<sup>95</sup> 702/1996, *McLawrence v. Jamaica*, para. 5.6; 2120/2011, *Kovalev v. Belarus*, para. 11.3.

<sup>96</sup> 1128/2002, *Marques de Moraes v. Angola*, para. 6.3; 2771/1988, *Terán Jijón v. Ecuador*, para. 5.3 (five days not prompt); 625/1995, *Freemanle v. Jamaica*, para. 7.4 (four days not prompt).

<sup>97</sup> 1787/2008, *Kovsh v. Belarus*, paras. 7.3–7.5.

<sup>98</sup> *Ibid.*; see also 336/1988, *Fillastre and Bizouan v. Bolivia*, para. 6.4 (budgetary constraints did not justify 10-day delay).

<sup>99</sup> See concluding observations: Hungary (CCPR/CO/74/HUN, 2002), para. 8.

<sup>100</sup> Committee on the Rights of the Child, general comment No. 10, para. 83.

<sup>101</sup> 289/1988, *Wolf v. Panama*, para. 6.2; 613/1995, *Leehong v. Jamaica*, para. 9.5. Regarding the phrase

“other officer authorized by law to exercise judicial power”, see paragraph 32 above.

<sup>102</sup> See Body of Principles for the Protection of All Persons under Any Form of Detention or

Imprisonment, approved by the General Assembly in its resolution 43/173, principle 37.

the individual is entitled to legal assistance, which should in principle be by counsel of choice.<sup>103</sup>

35. Incommunicado detention that prevents prompt presentation before a judge inherently violates paragraph 3.<sup>104</sup> Depending on its duration and other facts, incommunicado detention may also violate other rights under the Covenant, including articles 6, 7, 10 and 14.<sup>105</sup> States parties should permit and facilitate access to counsel for detainees in criminal cases from the outset of their detention.<sup>106</sup>

36. Once the individual has been brought before the judge, the judge must decide whether the individual should be released or remanded in custody for additional investigation or to await trial. If there is no lawful basis for continuing the detention, the judge must order release.<sup>107</sup> If additional investigation or trial is justified, the judge must decide whether the individual should be released (with or without conditions) pending further proceedings because detention is not necessary, an issue addressed more fully by the second sentence of paragraph 3. In the view of the Committee, detention on remand should not involve a return to police custody, but rather to a separate facility under different authority, where risks to the rights of the detainee can be more easily mitigated.

37. The second requirement expressed in the first sentence of paragraph 3 is that the person detained is entitled to trial within a reasonable time or to release. That requirement applies specifically to periods of pretrial detention, that is, detention between the time of arrest and the time of judgment at first instance.<sup>108</sup> Extremely prolonged pretrial detention may also jeopardize the presumption of innocence under article 14, paragraph 2.<sup>109</sup> Persons who are not released pending trial must be tried as expeditiously as possible, to the extent consistent with their rights of defence.<sup>110</sup> The reasonableness of any delay in bringing the case to trial has to be assessed in the circumstances of each case, taking into account the complexity of the case, the conduct of the accused during the proceeding and the manner in which the matter was dealt with by the executive and judicial authorities.<sup>111</sup> Impediments to the completion of the investigation may justify additional time,<sup>112</sup> but general conditions of understaffing or budgetary constraint do not.<sup>113</sup> When delays become necessary, the judge must reconsider alternatives to pretrial detention.<sup>114</sup> Pretrial detention of juveniles should be

<sup>103</sup> See concluding observations: Kenya (CCPR/C/KEN/CO/3, 2012), para. 19; see also article 14, paragraph 3 (d); Body of Principles (note 102 above), principle 11.

<sup>104</sup> 1297/2004, *Medjounne v. Algeria*, para. 8.7.

<sup>105</sup> 1781/2008, *Berzig v. Algeria*, paras. 8.4, 8.5 and 8.8; 176/1984, *Lafuente Peñarrieta v. Bolivia*, para. 16.

<sup>106</sup> General comment No. 32, paras. 32, 34 and 38; concluding observations: Togo (CCPR/C/TGO/CO/4, 2011), para. 19; paragraph 38 below.

<sup>107</sup> See concluding observations: Tajikistan (CCPR/CO/84/TJK, 2005), para. 12; 647/1995, *Pennant v. Jamaica*, para. 8.2.

<sup>108</sup> 1397/2005, *Enjo v. Cameroon*, para. 7.2. On the relationship between article 9, paragraph 3, and article 14, paragraph 3 (c), in that respect, see general comment No. 32, para. 61.

<sup>109</sup> 788/1997, *Cagas v. Philippines*, para. 7.3.

<sup>110</sup> General comment No. 32, para. 35; 818/1998, *Sextus v. Trinidad and Tobago*, para. 7.2.

<sup>111</sup> 1085/2002, *Tarright v. Algeria*, paras. 8.2–8.4; 386/1989, *Komé v. Senegal*, para. 8.6; see also

677/1996, *Teesdale v. Trinidad and Tobago*, para. 9.3 (delay of seventeen months violated paragraph 3); 614/1995, *Thomas v. Jamaica*, para. 9.6 (delay of nearly fourteen months did not violate paragraph 3); general comment No. 32, para. 35 (discussing factors relevant to reasonableness of delay in criminal proceedings).

<sup>112</sup> 721/1997, *Boodoo v. Trinidad and Tobago*, para. 6.2.

<sup>113</sup> 336/1988, *Fillaire and Bizouan v. Bolivia*, para. 6.5; 818/1998, *Sextus v. Trinidad and Tobago*, para. 4.2 and 7.2.

<sup>114</sup> 1085/2002, *Tarright v. Algeria*, para. 8.3.

avoided, but when it occurs they are entitled to be brought to trial in especially speedy fashion under article 10, paragraph 2 (b).<sup>115</sup>

38. The second sentence of paragraph 3 of article 9 requires that detention in custody of persons awaiting trial shall be the exception rather than the rule. It also specifies that release from such custody may be subject to guarantees of appearance, including appearance for trial, appearance at any other stage of the judicial proceedings and (should occasion arise) appearance for execution of the judgment. That sentence applies to persons awaiting trial on criminal charges, that is, after the defendant has been charged, but a similar requirement prior to charging results from the prohibition of arbitrary detention in paragraph 1.<sup>116</sup> It should not be the general practice to subject defendants to pretrial detention. Detention pending trial must be based on an individualized determination that it is reasonable and necessary taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime.<sup>117</sup> The relevant factors should be specified in law and should not include vague and expansive standards such as “public security”.<sup>118</sup> Pretrial detention should not be mandatory for all defendants charged with a particular crime, without regard to individual circumstances.<sup>119</sup> Neither should pretrial detention be ordered for a period based on the potential sentence for the crime charged, rather than on a determination of necessity. Courts must examine whether alternatives to pretrial detention, such as bail, electronic bracelets or other conditions, would render detention unnecessary in the particular case.<sup>120</sup> If the defendant is a foreigner, that fact must not be treated as sufficient to establish that the defendant may flee the jurisdiction.<sup>121</sup> After an initial determination has been made that pretrial detention is necessary, there should be periodic re-examination of whether it continues to be reasonable and necessary in the light of possible alternatives.<sup>122</sup> If the length of time that the defendant has been detained reaches the length of the longest sentence that could be imposed for the crimes charged, the defendant should be released. Pretrial detention of juveniles should be avoided to the fullest extent possible.<sup>123</sup>

## V. The right to take proceedings for release from unlawful or arbitrary detention

39. Paragraph 4 of article 9 entitles anyone who is deprived of liberty by arrest or detention to take proceedings before a court, in order that the court may decide without delay on the lawfulness of the detention and order release if the detention is not lawful. It enshrines the principle of habeas corpus.<sup>124</sup> Review of the factual basis of the detention

<sup>115</sup> General comment No. 21, para. 13; see also general comment No. 32, para. 42; Committee on the Rights of the Child, general comment No. 10, para. 83.

<sup>116</sup> 1128/2002, *Marques de Moraes v. Angola*, paras. 6.1 and 6.4.

<sup>117</sup> 1502/2006, *Marinich v. Belarus*, para. 10.4; 1940/2010, *Cedeño v. Bolivarian Republic of Venezuela*, para. 7.10; 1547/2007, *Torobekov v. Kyrgyzstan*, para. 6.3.

<sup>118</sup> See concluding observations: Bosnia and Herzegovina (CCPR/C/BIH/CO/1, 2006), para. 18.

<sup>119</sup> See concluding observations: Argentina (CCPR/CO/70/ARG, 2000), para. 10; Sri Lanka (CCPR/CO/79/LKA, 2003), para. 13.

<sup>120</sup> 1178/2003, *Shaniser v. Belarus*, para. 10.3.

<sup>121</sup> 526/1993, *Hill and Hill v. Spain*, para. 12.3.

<sup>122</sup> 1085/2002, *Tarright v. Algeria*, paras. 8.3–8.4.

<sup>123</sup> General comment No. 32, para. 42; see Committee on the Rights of the Child, general comment No. 10, para. 80.

<sup>124</sup> 1342/2005, *Gavrilin v. Belarus*, para. 7.4.

may, in appropriate circumstances, be limited to review of the reasonableness of a prior determination.<sup>125</sup>

40. The right applies to all detention by official action or pursuant to official authorization, including detention in connection with criminal proceedings, military detention, security detention, counter-terrorism detention, involuntary hospitalization, immigration detention, detention for extradition and wholly groundless arrests.<sup>126</sup> It also applies to detention for vagrancy or drug addiction, detention for educational purposes of children in conflict with the law<sup>127</sup> and other forms of administrative detention.<sup>128</sup> Detention within the meaning of paragraph 4 also includes house arrest and solitary confinement.<sup>129</sup> When a prisoner is serving the minimum duration of a prison sentence as decided by a court of law after a conviction, either as a sentence for a fixed period of time or as the fixed portion of a potentially longer sentence, paragraph 4 does not require subsequent review of the detention.<sup>130</sup>

41. The object of the right is release (either unconditional or conditional)<sup>131</sup> from ongoing unlawful detention; compensation for unlawful detention that has already ended is addressed in paragraph 5. Paragraph 4 requires that the reviewing court must have the power to order release from the unlawful detention.<sup>132</sup> When a judicial order of release under paragraph 4 becomes operative (*exécutoire*), it must be complied with immediately, and continued detention would be arbitrary in violation of article 9, paragraph 1.<sup>133</sup>

42. The right to bring proceedings applies in principle from the moment of arrest and any substantial waiting period before a detainee can bring a first challenge to detention is impermissible.<sup>134</sup> In general, the detainee has the right to appear in person before the court, especially where such presence would serve the inquiry into the lawfulness of detention or where questions regarding ill-treatment of the detainee arise.<sup>135</sup> The court must have the power to order the detainee brought before it, regardless of whether the detainee has asked to appear.

43. Unlawful detention includes detention that was lawful at its inception but has become unlawful because the individual has completed serving a sentence of imprisonment or the circumstances that justify the detention have changed.<sup>136</sup> After a court has held that the circumstances justify the detention, an appropriate period of time may pass, depending

on the nature of the relevant circumstances, before the individual is entitled to take proceedings again on similar grounds.<sup>137</sup>

44. “Unlawful” detention includes both detention that violates domestic law and detention that is incompatible with the requirements of article 9, paragraph 1, or with any other relevant provision of the Covenant.<sup>138</sup> While domestic legal systems may establish differing methods for ensuring court review of detention, paragraph 4 requires that there be a judicial remedy for any detention that is unlawful on one of those grounds.<sup>139</sup> For example, the power of a family court to order release of a child from detention that is not in the child’s best interests may satisfy the requirements of paragraph 4 in relevant cases.<sup>140</sup>

45. Paragraph 4 entitles the individual to take proceedings before “a court,” which should ordinarily be a court within the judiciary. Exceptionally, for some forms of detention, legislation may provide for proceedings before a specialized tribunal, which must be established by law and must either be independent of the executive and legislative branches or enjoy judicial independence in deciding legal matters in proceedings that are judicial in nature.<sup>141</sup>

46. Paragraph 4 leaves the option of taking proceedings to the persons being detained or those acting on their behalf; unlike paragraph 3, it does not require automatic initiation of review by the authorities detaining an individual.<sup>142</sup> Laws that exclude a particular category of detainees from the review required by paragraph 4 violate the Covenant.<sup>143</sup> Practices that render such review effectively unavailable to an individual, including incommunicado detention, also amount to a violation.<sup>144</sup> To facilitate effective review, detainees should be afforded prompt and regular access to counsel. Detainees should be informed, in a language they understand, of their right to take proceedings for a decision on the lawfulness of their detention.<sup>145</sup>

47. Persons deprived of liberty are entitled not merely to take proceedings, but to receive a decision, and without delay. The refusal by a competent court to take a decision on a petition for the release of a detained person violates paragraph 4.<sup>146</sup> The adjudication of the case should take place as expeditiously as possible.<sup>147</sup> Delays attributable to the petitioner do not count as judicial delay.<sup>148</sup>

48. The Covenant does not require that a court decision upholding the lawfulness of detention be subject to appeal. If a State party does provide for appeal or further instances,

<sup>137</sup> *Ibid.* (annual review of post-conviction preventive detention); 754/1997, A. v. *New Zealand*, para. 7.3 (regular review of hospitalization); 291/1988, *Torres v. Finland*, para. 7.4 (review every two weeks of detention for extradition).

<sup>138</sup> 1255,1256,1259,1260,1266,1268,1270,1288/2004, *Shams et al. v. Australia*, para. 7.3.

<sup>139</sup> *Ibid.*

<sup>140</sup> 1069/2002, *Bakhtiyari v. Australia*, para. 9.5.

<sup>141</sup> 1090/2002, *Rameka v. New Zealand*, para. 7.4 (discussing ability of Parole Board to act in judicial fashion as a court); 291/1988, *Torres v. Finland*, para. 7.2 (finding review by the Minister of the Interior insufficient); 265/1987, *Vuolanne v. Finland*, para. 9.6 (finding review by a superior military officer insufficient); general comment No. 32, paras. 18–22.

<sup>142</sup> 375/1989, *Stephens v. Jamaica*, para. 9.7.

<sup>143</sup> R.1/4, *Torres Ramirez v. Uruguay*, para. 18; 1449/2006, *Umarov v. Uzbekistan*, para. 8.6.

<sup>144</sup> R.1/5, *Hernández Valentini de Bazzano et al. v. Uruguay*, para. 10; 1751/2008, *Aboussedra v. Libyan Arab Jamahiriya*, para. 7.6; 1061/2002, *Fijalkowska v. Poland*, para. 8.4 (State’s failures frustrated the ability of a patient to challenge involuntary commitment).

<sup>145</sup> See Body of Principles (note 102 above), principles 13–14.

<sup>146</sup> 1128/2002, *Marques de Morais v. Angola*, para. 6.5.

<sup>147</sup> 291/1988, *Torres v. Finland*, para. 7.3.

<sup>148</sup> 1051/2002, *Ahani v. Canada*, para. 10.3.

<sup>125</sup> 1051/2002, *Ahani v. Canada*, para. 10.2; 754/1997, A. v. *New Zealand*, para. 7.3.

<sup>126</sup> 248/1987, *Campbell v. Jamaica*, para. 6.4; 962/2001, *Milezi v. Democratic Republic of the Congo*, para. 5.2; 1051/2002, *Ahani v. Canada*, para. 10.2; 1061/2002, *Fijalkowska v. Poland*, para. 8.4;

291/1988, *Torres v. Finland*, para. 7.4; 414/1990, *Mika Miha v. Equatorial Guinea*, para. 6.5.

<sup>127</sup> 265/1987, *Vuolanne v. Finland*, para. 9.5; see concluding observations: Rwanda (CCPR/C/RWA/CO/3, 2009), para. 16 (recommending abolition of detention for vagrancy).

<sup>128</sup> See concluding observations: Republic of Moldova (CCPR/CO/75/MDA, 2002), para. 11.

<sup>129</sup> 1172/2003, *Madani v. Algeria*, para. 8.5; 265/1987, *Vuolanne v. Finland*, para. 9.5.

<sup>130</sup> 954/2000, *Minoque v. Australia*, para. 6.4; 1342/2005, *Gavrilin v. Belarus*, para. 7.4. Article 14,

paragraph 5, however, guarantees criminal defendants the right to a single appeal from an initial conviction to a higher court (general comment No. 32, para. 45).

<sup>131</sup> 473/1991, *Barroso v. Panama*, paras. 2.4 and 8.2 (habeas corpus for bail).

<sup>132</sup> 1324/2004, *Shafiq v. Australia*, para. 7.4.

<sup>133</sup> 856/1999, *Chambula v. Zambia*, para. 7.2.

<sup>134</sup> 291/1988, *Torres v. Finland*, para. 7.2 (seven days).

<sup>135</sup> See Body of Principles (note 102 above), principle 32, para. 2; general comment No. 29, para. 16.

<sup>136</sup> 1090/2002, *Rameka v. New Zealand*, paras. 7.3–7.4.

the delay may reflect the changing nature of the proceeding and in any event must not be excessive.<sup>149</sup>

## VI. The right to compensation for unlawful or arbitrary arrest or detention

49. Paragraph 5 of article 9 of the Covenant provides that anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation. Like paragraph 4, paragraph 5 articulates a specific example of an effective remedy for human rights violations, which States parties are required to afford. Those specific remedies do not replace, but are included alongside, the other remedies that may be required in a particular situation for a victim of unlawful or arbitrary arrest or detention by article 2, paragraph 3, of the Covenant.<sup>150</sup> Whereas paragraph 4 provides a swift remedy for release from ongoing unlawful detention, paragraph 5 clarifies that victims of unlawful arrest or detention are also entitled to financial compensation.

50. Paragraph 5 obliges States parties to establish the legal framework within which compensation can be afforded to victims, as a matter of enforceable right and not as a matter of grace or discretion. The remedy must not exist merely in theory, but must operate effectively and payment must be made within a reasonable period of time. Paragraph 5 does not specify the precise form of procedure, which may include remedies against the State itself or against individual State officials responsible for the violation, so long as they are effective.<sup>151</sup> Paragraph 5 does not require that a single procedure be established providing compensation for all forms of unlawful arrest, but only that an effective system of procedures exist that provides compensation in all the cases covered by paragraph 5. Paragraph 5 does not oblige States parties to compensate victims *sua sponte*, but rather permits them to leave commencement of proceedings for compensation to the initiative of the victim.<sup>152</sup>

51. Unlawful arrest and detention within the meaning of paragraph 5 include such arrest and detention arising within either criminal or non-criminal proceedings, or in the absence of any proceedings at all.<sup>153</sup> The “unlawful” character of the arrest or detention may result from violation of domestic law or violation of the Covenant itself, such as substantively arbitrary detention and detention that violates procedural requirements of other paragraphs of article 9.<sup>154</sup> However, the fact that a criminal defendant was ultimately acquitted, at first

<sup>149</sup> 1752/2008, *J.S. v. New Zealand*, paras. 6.3–6.4 (finding periods of eight days at first instance, three weeks at second instance, and two months at third instance satisfactory in context).

<sup>150</sup> General comment No. 31, paras. 16 and 18; 238/1987, *Bolaños v. Ecuador*, para. 10; 962/2001, *Mulezi v. Democratic Republic of the Congo*, para. 7.

<sup>151</sup> See concluding observations: Cameroon (CCPR/C/CMR/CO/4, 2010), para. 19; Guyana (CCPR/C/79/Add.121, 2000), para. 15; United States of America (A/50/40, 1995), para. 299; Argentina (A/50/40, 1995), para. 153; 1885/2009, *Horvath v. Australia*, para. 8.7 (discussing effectiveness of remedy); 1432/2005, *Gunaratna v. Sri Lanka*, para. 7.4; general comment No. 32,

para. 52 (requirement of compensation for wrongful convictions).  
<sup>152</sup> 414/1990, *Mika Miha v. Equatorial Guinea*, para. 6.5; 962/2001, *Mulezi v. Democratic Republic of the Congo*, para. 5.2.

<sup>153</sup> 754/1997, *A. v. New Zealand*, paras. 6.7 and 7.4; 188/1984, *Martinez Portorreal v. Dominican Republic*, para. 11; 962/2001, *Mulezi v. Democratic Republic of the Congo*, para. 5.2.  
<sup>154</sup> 1128/2002, *Marques de Morais v. Angola*, para. 6.6; see also 328/1988, *Zelaya Blanco v. Nicaragua*, para. 10.3 (arbitrary detention); 728/1996, *Schadeo v. Guyana*, para. 11 (violation of article 9, para. 3); R-2/9, *Santillo Valcada v. Uruguay*, para. 12 (violation of art. 9, para. 4).

instance or on appeal, does not in and of itself render any preceding detention “unlawful”.<sup>155</sup>

52. The financial compensation required by paragraph 5 relates specifically to the pecuniary and non-pecuniary harm resulting from the unlawful arrest or detention.<sup>156</sup> When the unlawfulness of the arrest arises from the violation of other human rights, such as freedom of expression, the State party may have further obligations to provide compensation or other reparation in relation to those other violations, as required by article 2, paragraph 3, of the Covenant.<sup>157</sup>

## VII. Relationship of article 9 with other articles of the Covenant

53. The procedural and substantive guarantees of article 9 both overlap and interact with other guarantees of the Covenant. Some forms of conduct amount independently to a violation of article 9 and another article, such as delays in bringing a detained criminal defendant to trial, which may violate both paragraph 3 of article 9 and paragraph 3 (c) of article 14. At times the content of article 9, paragraph 1, is informed by the content of other articles; for example, detention may be arbitrary by virtue of the fact that it represents punishment for freedom of expression, in violation of article 19.<sup>158</sup>

54. Article 9 also reinforces the obligations of States parties under the Covenant and the Optional Protocol to protect individuals against reprisals for having cooperated or communicated with the Committee, such as physical intimidation or threats to personal liberty.<sup>159</sup>

55. The right to life guaranteed by article 6 of the Covenant, including the right to protection of life under article 6, paragraph 1, may overlap with the right to security of person guaranteed by article 9, paragraph 1. The right to personal security may be considered broader to the extent that it also addresses injuries that are not life-threatening. Extreme forms of arbitrary detention that are themselves life-threatening violate the rights to personal liberty and personal security as well as the right to protection of life, in particular enforced disappearances.<sup>160</sup>

56. Arbitrary detention creates risks of torture and ill-treatment, and several of the procedural guarantees in article 9 serve to reduce the likelihood of such risks. Prolonged incommunicado detention violates article 9 and would generally be regarded as a violation of article 7.<sup>161</sup> The right to personal security protects interests in bodily and mental integrity that are also protected by article 7.<sup>162</sup>

57. Returning an individual to a country where there are substantial grounds for believing that the individual faces a real risk of a severe violation of liberty or security of

<sup>155</sup> 432/1990, *W.B.E. v. Netherlands*, para. 6.5; 963/2001, *Uebergang v. Australia*, para. 4.4.

<sup>156</sup> 1157/2003, *Coleman v. Australia*, para. 6.3.

<sup>157</sup> *Ibid.*, para. 9; 1128/2002, *Marques de Morais v. Angola*, para. 8; general comment No. 31, para. 16.

<sup>158</sup> See also paragraph 17 above.

<sup>159</sup> General comment No. 33, para. 4; 241 and 242/1987, *Birindwa ci Birhashwirwa and Tshisekedi wa Mulumba v. Zaïre*, para. 12.5; see concluding observations: Maldives (CCPR/C/MDV/CO/1, 2012), para. 26.

<sup>160</sup> 449/1991, *Mojica v. Dominican Republic*, para. 5.4; 1753/2008, *Guezout et al. v. Algeria*, paras. 8.4 and 8.7.

<sup>161</sup> 1782/2008, *Aboufaïed v. Libya*, paras. 7.4 and 7.6; 440/1990, *El-Megreisi v. Libyan Arab Jamahiriya*, para. 5.4.

<sup>162</sup> General comment No. 20, para. 2.

person such as prolonged arbitrary detention may amount to inhuman treatment prohibited by article 7 of the Covenant.<sup>163</sup>

58. Several safeguards that are essential for the prevention of torture are also necessary for the protection of persons in any form of detention against arbitrary detention and infringement of personal security.<sup>164</sup> The following examples are non-exhaustive. Detainees should be held only in facilities officially acknowledged as places of detention. A centralized official register should be kept of the names and places of detention, and times of arrival and departure, as well as of the names of persons responsible for their detention, and made readily available and accessible to those concerned, including relatives.<sup>165</sup> Prompt and regular access should be given to independent medical personnel and lawyers and, under appropriate supervision when the legitimate purpose of the detention so requires, to family members.<sup>166</sup> Detainees should be promptly informed of their rights, in a language they understand;<sup>167</sup> providing information leaflets in the appropriate language, including in Braille, may often assist the detainee in retaining the information. Detained foreign nationals should be informed of their right to communicate with their consular authorities, or, in the case of asylum seekers, with the Office of the United Nations High Commissioner for Refugees.<sup>168</sup> Independent and impartial mechanisms should be established for visiting and inspecting all places of detention, including mental-health institutions.

59. Article 10 of the Covenant, which addresses conditions of detention for persons deprived of liberty, complements article 9, which primarily addresses the fact of detention. At the same time, the right to personal security in article 9, paragraph 1, is relevant to the treatment of both detained and non-detained persons. The appropriateness of the conditions prevailing in detention to the purpose of detention is sometimes a factor in determining whether detention is arbitrary within the meaning of article 9.<sup>169</sup> Certain conditions of detention (such as denial of access to counsel and family) may result in procedural violations of paragraphs 3 and 4 of article 9. Article 10, paragraph 2 (b), reinforces for juveniles the requirement in article 9, paragraph 3, that pretrial detainees be brought to trial expeditiously.

60. The liberty of movement protected by article 12 of the Covenant and the liberty of person protected by article 9 complement each other. Detention is a particularly severe form of restriction of liberty of movement, but in some circumstances both articles may come into play together.<sup>170</sup> Detention in the course of transporting a migrant involuntarily, is often used as a means of enforcing restrictions on freedom of movement. Article 9 addresses such uses of detention in the implementation of expulsion, deportation or extradition.

61. The relationship between article 9 and article 14 of the Covenant, regarding civil and criminal trials, has already been illustrated.<sup>171</sup> Article 9 addresses deprivation of liberty,

<sup>163</sup> General comment No. 31, para. 12.

<sup>164</sup> General comment No. 20, para. 11; Committee against Torture, general comment No. 2, para. 13.

<sup>165</sup> See concluding observations: Algeria (CCPR/C/DZA/CO/3, 2007), para. 11.

<sup>166</sup> See Body of Principles (note 102 above), principles 17–19 and 24; Committee on the Rights of the Child, general comment No. 10, para. 87.

<sup>167</sup> See Body of Principles (note 102 above), principles 13–14; United Nations Rules for the Protection of Juveniles Deprived of their Liberty, paras. 24–25, adopted by the General Assembly in its resolution 45/113 (regarding explanation of rights to detained juveniles).

<sup>168</sup> See Body of Principles (note 102 above), principle 16, para. 2.

<sup>169</sup> See paragraphs 14, 18 and 21 above.

<sup>170</sup> General comment No. 27, para. 7; 1134/2002, *Gorji-Dinka v. Cameroon*, para. 5.4–5.5 (house arrest); 138/1983, *Mpandanjila et al. v. Zaïre*, paras. 8 and 10.

<sup>171</sup> See paragraphs 38 and 53 above.

only some instances of which take place in connection with civil or criminal proceedings within the scope of article 14. The procedural requirements of paragraphs 2 to 5 of article 9 apply in connection with proceedings falling within the scope of article 14 only when actual arrest or detention occurs.<sup>172</sup>

62. Article 24, paragraph 1, of the Covenant entitles every child “to such measures of protection as are required by his status as a minor, on the part of his family, society and the State”. That article entails the adoption of special measures to protect the personal liberty and security of every child, in addition to the measures generally required by article 9 for and security.<sup>173</sup> A child may be deprived of liberty only as a last resort and for the shortest appropriate period of time.<sup>174</sup> In addition to the other requirements applicable to each category of deprivation of liberty, the best interests of the child must be a primary consideration in every decision to initiate or continue the deprivation.<sup>175</sup> The Committee acknowledges that sometimes a particular deprivation of liberty would itself be in the best interests of the child. Placement of a child in institutional care amounts to a deprivation of liberty within the meaning of article 9.<sup>176</sup> A decision to deprive a child of liberty must be subject to periodic review of its continuing necessity and appropriateness.<sup>177</sup> The child has a right to be heard, directly or through legal or other appropriate assistance, in relation to any decision regarding a deprivation of liberty, and the procedures employed should be child-appropriate.<sup>178</sup> The right to release from unlawful detention may result in return to the child’s family or placement in an alternative form of care that accords with the child’s best interests, rather than simple release into the child’s own custody.<sup>179</sup>

63. In the light of article 2, paragraph 1, of the Covenant, States parties have an obligation to respect and to ensure the rights under article 9 to all persons who may be within their territory and to all persons subject to their jurisdiction.<sup>180</sup> Given that arrest and detention bring a person within a State’s effective control, States parties must not arbitrarily or unlawfully arrest or detain individuals outside their territory.<sup>181</sup> States parties must not subject persons outside their territory to, *inter alia*, prolonged incommunicado detention or

<sup>172</sup> 263/1987, *González del Rito v. Peru*, para. 5.1; 1758/2008, *Jessop v. New Zealand*, paras. 7.9–7.10.

<sup>173</sup> See general comments No. 17, para. 1, and No. 32, paras. 42–44.

<sup>174</sup> See concluding observations: Czech Republic (CCPR/C/CZE/CO/3, 2013), para. 17; Convention on the Rights of the Child, art. 37 (b).

<sup>175</sup> 1069/2002, *Bakhtiyari v. Australia*, para. 9.7; see Convention on the Rights of the Child, art. 3, para. 1.

<sup>176</sup> See Committee on the Rights of the Child, general comment No. 10, para. 11; United Nations Rules for the Protection of Juveniles Deprived of their Liberty, para. 11 (b). In contrast, normal supervision of children by parents or family may involve a degree of control over movement, especially of younger children, that would be inappropriate for adults, but that does not constitute a deprivation of liberty; neither do the ordinary requirements of daily school attendance constitute a deprivation of liberty.

<sup>177</sup> See paragraph 12 above; Convention on the Rights of the Child, arts. 37 (d) and 25.

<sup>178</sup> General comment No. 32, paras. 42–44; Committee on the Rights of the Child, general comment No. 12, paras. 32–37.

<sup>179</sup> UNHCR, Detention Guidelines (note 45 above), para. 54 (“Where possible [unaccompanied or separated children] should be released into the care of family members who already have residency within the asylum country. Where this is not possible, alternative care arrangements, such as foster placement or residential homes, should be made by the competent child care authorities, ensuring that the child receives appropriate supervision”).

<sup>180</sup> General comment No. 31, para. 10.

<sup>181</sup> See *ibid.*; 52/1979, *Saldías de López v. Uruguay*, paras. 12.1–13; R.13/56, *Celiberti de Casariego v. Uruguay*, para. 10.1–11; 623.624.626.627/1995, *Domukovsky et al. v. Georgia*, para. 18.2.

deprive them of review of the lawfulness of their detention.<sup>182</sup> The extraterritorial location of an arrest may be a circumstance relevant to an evaluation of promptness under paragraph 3.

64. With regard to article 4 of the Covenant, the Committee first observes that, like the rest of the Covenant, article 9 applies also in situations of armed conflict to which the rules of international humanitarian law are applicable.<sup>183</sup> While rules of international humanitarian law may be relevant for the purposes of the interpretation of article 9, both spheres of law are complementary, not mutually exclusive.<sup>184</sup> Security detention authorized and regulated by and complying with international humanitarian law in principle is not arbitrary. In conflict situations, access by the International Committee of the Red Cross to all places of detention becomes an essential additional safeguard for the rights to liberty and security of person.

65. Article 9 is not included in the list of non-derogable rights of article 4, paragraph 2, of the Covenant, but there are limits on States parties' power to derogate. States parties derogating from normal procedures required under article 9 in circumstances of armed conflict or other public emergency must ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation.<sup>185</sup> Derogating measures must also be consistent with a State party's other obligations under international law, including provisions of international humanitarian law relating to deprivation of liberty, and non-discriminatory.<sup>186</sup> The prohibitions against taking of hostages, abductions or unacknowledged detention are therefore not subject to derogation.<sup>187</sup>

66. There are other elements in article 9 that in the Committee's opinion cannot be made subject to lawful derogation under article 4. The fundamental guarantee against arbitrary detention is non-derogable, insofar as even situations covered by article 4 cannot justify a deprivation of liberty that is unreasonable or unnecessary under the circumstances.<sup>188</sup> The existence and nature of a public emergency which threatens the life of the nation may, however, be relevant to a determination of whether a particular arrest or detention is arbitrary. Valid derogations from other derogable rights may also be relevant when a deprivation of liberty is characterized as arbitrary because of its interference with another right protected by the Covenant. During international armed conflict, substantive and procedural rules of international humanitarian law remain applicable and limit the ability to derogate, thereby helping to mitigate the risk of arbitrary detention.<sup>189</sup> Outside that context, the requirements of strict necessity and proportionality constrain any derogating measures involving security detention, which must be limited in duration and accompanied by procedures to prevent arbitrary application, as explained in paragraph 15 above,<sup>190</sup> including review by a court within the meaning of paragraph 45 above.<sup>191</sup>

<sup>182</sup> See concluding observations: United States of America (CCPR/C/USA/CO/3, 2006), paras. 12 and 18.

<sup>183</sup> General comments No. 31, para. 11, and No. 29, para. 3.

<sup>184</sup> General comments No. 31, para. 11, and No. 29, paras. 3, 12 and 16.

<sup>185</sup> General comment No. 29, paras. 4–5. When the emergency justifying measures of derogation arises from the participation of State party's armed forces in a peacekeeping mission abroad, the geographic and material scope of the derogating measures must be limited to the exigencies of the peacekeeping mission.

<sup>186</sup> General comment No. 29, paras. 8–9.

<sup>187</sup> *Ibid.*, para. 13 (b).

<sup>188</sup> *Ibid.*, paras. 4 and 11.

<sup>189</sup> *Ibid.*, para. 3.

<sup>190</sup> *Ibid.*, paras. 4, 11 and 15.

<sup>191</sup> *Ibid.*, para. 16; paragraph 67 below.

67. The procedural guarantees protecting liberty of person may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights.<sup>192</sup> In order to protect non-derogable rights, including those in articles 6 and 7, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention must not be diminished by measures of derogation.<sup>193</sup>

68. While reservations to certain clauses of article 9 may be acceptable, it would be incompatible with the object and purpose of the Covenant for a State party to reserve the right to engage in arbitrary arrest and detention of persons.<sup>194</sup>

<sup>192</sup>

General comment No. 32, para. 6.

<sup>193</sup>

General comment No. 29, para. 16.

<sup>194</sup>

General comment No. 24, para. 8.



**International Court of Justice**

**Barcelona Traction, Light and Power  
Company, Limited (Belgium *v.* Spain)  
Judgment**

***I.C.J. Report 1970, paras. 33-34***

32. In these circumstances it is logical that the Court should first address itself to what was originally presented as the subject-matter of the third preliminary objection: namely the question of the right of Belgium to exercise diplomatic protection of Belgian shareholders in a company which is a juristic entity incorporated in Canada, the measures complained of having been taken in relation not to any Belgian national but to the company itself.

33. When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

34. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23); others are conferred by international instruments of a universal or quasi-universal character.

35. Obligations the performance of which is the subject of diplomatic protection are not of the same category. It cannot be held, when one such obligation in particular is in question, in a specific case, that all States have a legal interest in its observance. In order to bring a claim in respect of the breach of such an obligation, a State must first establish its right to do so, for the rules on the subject rest on two suppositions:

“The first is that the defendant State has broken an obligation towards the national State in respect of its nationals. The second is that only the party to whom an international obligation is due can bring a claim in respect of its breach.” (*Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, pp. 181-182.)

In the present case it is therefore essential to establish whether the losses allegedly suffered by Belgian shareholders in Barcelona Traction were the consequence of the violation of obligations of which they were the beneficiaries. In other words: has a right of Belgium been violated on account

**International Court of Justice**

**United States Diplomatic and Consular Staff in Tehran  
(United States of America v. Iran)  
Judgment**

***I.C.J. Reports 1980, paras. 85-86, 91***

tinuation of that situation over a long period has, in the circumstances, amounted to detention in the Ministry.

79. The Court moreover cannot conclude its observations on the series of acts which it has found to be imputable to the Iranian State and to be patently inconsistent with its international obligations under the Vienna Conventions of 1961 and 1963 without mention also of another fact. This is that judicial authorities of the Islamic Republic of Iran and the Minister for Foreign Affairs have frequently voiced or associated themselves with, a threat first announced by the militants, of having some of the hostages submitted to trial before a court or some other body. These threats may at present merely be acts in contemplation. But the Court considers it necessary here and now to stress that, if the intention to submit the hostages to any form of criminal trial or investigation were to be put into effect, that would constitute a grave breach by Iran of its obligations under Article 31, paragraph 1, of the 1961 Vienna Convention. This paragraph states in the most express terms: "A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State." Again, if there were an attempt to compel the hostages to bear witness, a suggestion renewed at the time of the visit to Iran of the Secretary-General's Commission, Iran would without question be violating paragraph 2 of that same Article of the 1961 Vienna Convention which provides that: "A diplomatic agent is not obliged to give evidence as a witness."

\* \*

80. The facts of the present case, viewed in the light of the applicable rules of law, thus speak loudly and clearly of successive and still continuing breaches by Iran of its obligations to the United States under the Vienna Conventions of 1961 and 1963, as well as under the Treaty of 1955. Before drawing from this finding the conclusions which flow from it, in terms of the international responsibility of the Iranian State vis-à-vis the United States of America, the Court considers that it should examine one further point. The Court cannot overlook the fact that on the Iranian side, in often imprecise terms, the idea has been put forward that the conduct of the Iranian Government, at the time of the events of 4 November 1979 and subsequently, might be justified by the existence of special circumstances.

81. In his letters of 9 December 1979 and 16 March 1980, as previously recalled, Iran's Minister for Foreign Affairs referred to the present case as only "a marginal and secondary aspect of an overall problem". This problem, he maintained, "involves, *inter alia*, more than 25 years of continual interference by the United States in the internal affairs of Iran, the shameless exploitation of our country, and numerous crimes perpetrated against the Iranian people, contrary to and in conflict with all international and humanitarian norms". In the first of the two letters he indeed singled out amongst the "crimes" which he attributed to the United States an alleged complicity on the part of the Central Intelligence Agency in the coup d'état of 1953 and in the restoration of the Shah to the throne of Iran.

Invoking these alleged crimes of the United States, the Iranian Foreign Minister took the position that the United States' Application could not be examined by the Court divorced from its proper context, which he insisted was "the whole political dossier of the relations between Iran and the United States over the last 25 years".

82. The Court must however observe, first of all, that the matters alleged in the Iranian Foreign Minister's letters of 9 December 1979 and 16 March 1980 are of a kind which, if invoked in legal proceedings, must clearly be established to the satisfaction of the tribunal with all the requisite proof. The Court, in its Order of 15 December 1979, pointed out that if the Iranian Government considered the alleged activities of the United States in Iran legally to have a close connection with the subject-matter of the Application it was open to Iran to present its own case regarding those activities to the Court by way of defence to the United States' claims. The Iranian Government, however, did not appear before the Court. Moreover, even in his letter of 16 March 1980, transmitted to the Court some three months after the issue of that Order, the Iranian Foreign Minister did not furnish the Court with any further information regarding the alleged criminal activities of the United States in Iran, or explain on what legal basis he considered these allegations to constitute a relevant answer to the United States' claims. The large body of information submitted by the United States itself to the Court includes, it is true, some statements emanating from Iranian authorities or from the militants in which reference is made to alleged espionage and interference in Iran by the United States centred upon its Embassy in Tehran. These statements are, however, of the same general character as the assertions of alleged criminal activities of the United States contained in the Foreign Minister's letters, and are unsupported by evidence furnished by Iran before the Court. Hence they do not provide a basis on which the Court could form a judicial opinion on the truth or otherwise of the matters there alleged.

83. In any case, even if the alleged criminal activities of the United States in Iran could be considered as having been established, the question would remain whether they could be regarded by the Court as constituting a justification of Iran's conduct and thus a defence to the United States' claims in the present case. The Court, however, is unable to accept that they can be so regarded. This is because diplomatic law itself provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic or consular missions.

84. The Vienna Conventions of 1961 and 1963 contain express provisions to meet the case when members of an embassy staff, under the cover of diplomatic privileges and immunities, engage in such abuses of their functions as espionage or interference in the internal affairs of the receiving State. It is precisely with the possibility of such abuses in contemplation that Article 41, paragraph 1, of the Vienna Convention on Diplomatic

Relations, and Article 55, paragraph 1, of the Vienna Convention on Consular Relations, provide

“Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State.”

Paragraph 3 of Article 41 of the 1961 Convention further states : “The premises of the mission must not be used in any manner incompatible with the functions of the missions . . .”; an analogous provision, with respect to consular premises is to be found in Article 55, paragraph 2, of the 1963 Convention.

85. Thus, it is for the very purpose of providing a remedy for such possible abuses of diplomatic functions that Article 9 of the 1961 Convention on Diplomatic Relations stipulates :

“1. The receiving State may at any time and without having to explain its decision, notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is *persona non grata* or that any other member of the staff of the mission is not acceptable. In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A person may be declared *non grata* or not acceptable before arriving in the territory of the receiving State.

2. If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this Article, the receiving State may refuse to recognize the person concerned as a member of the mission.”

The 1963 Convention contains, in Article 23, paragraphs 1 and 4, analogous provisions in respect of consular officers and consular staff. Paragraph 1 of Article 9 of the 1961 Convention, and paragraph 4 of Article 23 of the 1963 Convention, take account of the difficulty that may be experienced in practice of proving such abuses in every case or, indeed, of determining exactly when exercise of the diplomatic function, expressly recognized in Article 3 (1) (d) of the 1961 Convention, of “ascertaining by all lawful means conditions and developments in the receiving State” may be considered as involving such acts as “espionage” or “interference in internal affairs”. The way in which Article 9, paragraph 1, takes account of any such difficulty is by providing expressly in its opening sentence that the receiving State may “at any time and without having to explain its decision” notify the sending State that any particular member of its diplomatic mission is “*persona non grata*” or “not acceptable” (and similarly Article 23, paragraph 4, of the 1963 Convention provides that “the receiving State is not obliged to give to the sending State reasons for its de-

cision”). Beyond that remedy for dealing with abuses of the diplomatic function by individual members of a mission, a receiving State has in its hands a more radical remedy if abuses of their functions by members of a mission reach serious proportions. This is the power which every receiving State has, at its own discretion, to break off diplomatic relations with a sending State and to call for the immediate closure of the offending mission.

86. The rules of diplomatic law, in short, constitute a self-contained régime which, on the one hand, lays down the receiving State’s obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse. These means are, by their nature, entirely efficacious, for unless the sending State recalls the member of the mission objected to forthwith, the prospect of the almost immediate loss of his privileges and immunities, because of the withdrawal by the receiving State of his recognition as a member of the mission, will in practice compel that person, in his own interest, to depart at once. But the principle of the inviolability of the persons of diplomatic agents and the premises of diplomatic missions is one of the very foundations of this long-established régime, to the evolution of which the traditions of Islam made a substantial contribution. The fundamental character of the principle of inviolability is, moreover, strongly underlined by the provisions of Articles 44 and 45 of the Convention of 1961 (cf. also Articles 26 and 27 of the Convention of 1963). Even in the case of armed conflict or in the case of a breach in diplomatic relations those provisions require that both the inviolability of the members of a diplomatic mission and of the premises, property and archives of the mission must be respected by the receiving State. Naturally, the observance of this principle does not mean – and this the Applicant Government expressly acknowledges – that a diplomatic agent caught in the act of committing an assault or other offence may not, on occasion, be briefly arrested by the police of the receiving State in order to prevent the commission of the particular crime. But such eventualities bear no relation at all to what occurred in the present case.

87. In the present case, the Iranian Government did not break off diplomatic relations with the United States ; and in response to a question put to him by a Member of the Court, the United States Agent informed the Court that at no time before the events of 4 November 1979 had the Iranian Government declared, or indicated any intention to declare, any member of the United States diplomatic or consular staff in Tehran *persona non grata*. The Iranian Government did not, therefore, employ the remedies placed at its disposal by diplomatic law specifically for dealing with activities of the kind of which it now complains. Instead, it allowed a group of militants to attack and occupy the United States Embassy by force, and to seize the diplomatic and consular staff as hostages ; instead, it has endorsed that action of those militants and has deliberately maintained their occupation of the Embassy and detention of its staff as a

means of coercing the sending State. It has, at the same time, refused altogether to discuss this situation with representatives of the United States. The Court, therefore, can only conclude that Iran did not have recourse to the normal and efficacious means at its disposal, but resorted to coercive action against the United States Embassy and its staff.

88. In an address given on 5 November 1979, the Ayatollah Khomeini traced the origin of the operation carried out by the Islamic militants on the previous day to the news of the arrival of the former Shah of Iran in the United States. That fact may no doubt have been the ultimate catalyst of the resentment felt in certain circles in Iran and among the Iranian population against the former Shah for his alleged misdeeds, and also against the United States Government which was being publicly accused of having restored him to the throne, of having supported him for many years and of planning to go on doing so. But whatever be the truth in regard to those matters, they could hardly be considered as having provided a justification for the attack on the United States Embassy and its diplomatic mission. Whatever extenuation of the responsibility to be attached to the conduct of the Iranian authorities may be found in the offence felt by them because of the admission of the Shah to the United States, that feeling of offence could not affect the imperative character of the legal obligations incumbent upon the Iranian Government which is not altered by a state of diplomatic tension between the two countries. Still less could a mere refusal or failure on the part of the United States to extradite the Shah to Iran be considered to modify the obligations of the Iranian authorities, quite apart from any legal difficulties, in internal or international law, there might be in acceding to such a request for extradition.

89. Accordingly, the Court finds that no circumstances exist in the present case which are capable of negating the fundamentally unlawful character of the conduct pursued by the Iranian State on 4 November 1979 and thereafter. This finding does not however exclude the possibility that some of the circumstances alleged, if duly established, may later be found to have some relevance in determining the consequences of the responsibility incurred by the Iranian State with respect to that conduct, although they could not be considered to alter its unlawful character.

\* \* \*

90. On the basis of the foregoing detailed examination of the merits of the case, the Court finds that Iran, by committing successive and continuing breaches of the obligations laid upon it by the Vienna Conventions of 1961 and 1963 on Diplomatic and Consular Relations, the Treaty of Amity, Economic Relations, and Consular Rights of 1955, and the applicable rules of general international law, has incurred responsibility towards the United States. As to the consequences of this finding, it clearly

entails an obligation on the part of the Iranian State to make reparation for the injury thereby caused to the United States. Since however Iran's breaches of its obligations are still continuing, the form and amount of such reparation cannot be determined at the present date.

91. At the same time the Court finds itself obliged to stress the cumulative effect of Iran's breaches of its obligations when taken together. A marked escalation of these breaches can be seen to have occurred in the transition from the failure on the part of the Iranian authorities to oppose the armed attack by the militants on 4 November 1979 and their seizure of the Embassy premises and staff, to the almost immediate endorsement by those authorities of the situation thus created, and then to their maintaining deliberately for many months the occupation of the Embassy and detention of its staff by a group of armed militants acting on behalf of the State for the purpose of forcing the United States to bow to certain demands. Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights. But what has above all to be emphasized is the extent and seriousness of the conflict between the conduct of the Iranian State and its obligations under the whole corpus of the international rules of which diplomatic and consular law is comprised, the fundamental character of which the Court must here again strongly affirm. In its Order of 15 December 1979, the Court made a point of stressing that the obligations laid on States by the two Vienna Conventions are of cardinal importance for the maintenance of good relations between States in the interdependent world of today. "There is no more fundamental prerequisite for the conduct of relations between States", the Court there said, "than the inviolability of diplomatic envoys and embassies, so that throughout history nations of all creeds and cultures have observed reciprocal obligations for that purpose." The institution of diplomacy, the Court continued, has proved to be "an instrument essential for effective co-operation in the international community, and for enabling States, irrespective of their differing constitutional and social systems, to achieve mutual understanding and to resolve their differences by peaceful means" (*J.C.J. Reports 1979*, p. 19).

92. It is a matter of deep regret that the situation which occasioned those observations has not been rectified since they were made. Having regard to their importance the Court considers it essential to reiterate them in the present Judgment. The frequency with which at the present time the principles of international law governing diplomatic and consular relations are set at naught by individuals or groups of individuals is already deplorable. But this case is unique and of very particular gravity because here it is not only private individuals or groups of individuals that have disregarded and set at naught the inviolability of a foreign embassy, but the government of the receiving State itself. Therefore in recalling yet again the extreme importance of the principles of law which it is called upon to apply

**Inter-American Court of Human Rights**

**Case of Velásquez-Rodríguez v. Honduras**

**Judgment of August 17, 1990 (*Interpretation of the Judgment  
of Reparations and Costs*)**

## Inter-American Court of Human Rights

### Case of Velásquez-Rodríguez v. Honduras

#### Judgment of August 17, 1990 (Interpretation of the Judgment of Reparations and Costs)

In the Velásquez Rodríguez case,

the Inter-American Court of Human Rights composed, in accordance with Article 54(3) of the American Convention on Human rights, of the following judges:

Héctor Fix-Zamudio, President  
Rodolfo E. Piza E., Judge  
Pedro Nikken, Judge  
Rafael Nieto-Navia, Judge  
Rigoberto Espinal-Irias, Judge ad hoc

Also present:

Manuel E. Ventura-Robles, Secretary

pursuant to Articles 67 of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") and 48 of its Rules of Procedure delivers the following judgment on the request of the Inter-American Commission on Human Rights (hereinafter "the Commission") for an interpretation of this Court's judgment of July 21, 1989, assessing compensatory damages against the State of Honduras (hereinafter "Honduras" or "the Government").

#### I

1. By note of September 29, 1989, received at the Inter-American Court of Human Rights (hereinafter "the Court") on October 2, the Commission asked for a clarification of the compensatory damages judgment delivered on July 21, 1989, in the Velásquez Rodríguez case.

2. The Commission invoked Articles 67 of the Convention and 48 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure").

3. In its request, the Commission asks the Court, in order to protect the purchasing power of the amounts of principal and interest that will accrue in the trust to be established in favor of HECTOR RICARDO, NADIA WALESKA and HERLING LIZZETT VELASQUEZ GUZMAN, to direct that said portion of the damages be indexed in such a way as to ensure the stability of its purchasing power.

4. On October 25, 1989, the Secretariat, acting pursuant to Article 48(2) of the Rules of Procedure, communicated the Commission's request to the Government and invited it to submit its written observations within a period of thirty days.

5. In a communication dated November 21, 1989, the Government deemed the Commission's request inadmissible, expressing the opinion that the judgment is clear and requires no interpretation and that to accept such a request would involve an amendment to that judgment.

6. On July, 1990, the Commission submitted a request for amplification of the petition for clarification of the judgment which refers to the material consequences resulting from the Honduran Government's failure to pay the damages stipulated in the judgment by the due date -that is, before October 20, 1989- which has given rise to a new situation which requires, authorizes and justifies the instant request for amplification of the petition for clarification at this point in time.

7. The Commission's communication was transmitted to the Government on July 11, 1990. The Government was also informed that the President had set August 10, 1990, as the deadline for receiving the Government's observations regarding that communication.

8. The Government submitted its observations within the time set by the President and asked the Court to reject the Commission's request.

9. On August 14, 1990, the Government presented a photocopy of Decree Number 59-90, published in the Republic of Honduras' "La Gaceta" of July 21, 1990, which authorized the payment of the damages decreed by the Court in its judgment of July 21, 1989. The cover letter stated that the amount in question has not been delivered to the interested parties because they are awaiting the results of the public hearing to be held on this date.

10. On that same date, the Court held a public hearing in order to hear the views of the parties regarding the Commission's request.

The following persons appeared before the Court:

- a) for the Government of Honduras  
Ambassador Edgardo Sevilla-Idiáquez, Agent
- b) for the Inter-American Commission on Human Rights  
Dr. Gilda M.C.M. de Russomano, Delegate and Member  
Dr. Jorge Seall-Saslain, Delegate.

#### II

11. On this occasion, the Court was composed of those judges who had decided the merits of the case as well as the corresponding claim for compensatory damages of

July 21, 1989. It is the latter judgment whose interpretation the Commission now seeks.

12. The composition of the Court was as prescribed by Article 54(3) of the Convention, which states that the judges of the Court shall continue to participate in those cases that they have begun to her and that are still at the judgment stage. That provision must also be applied to the decision regarding the interpretation of judgments to which Articles 67 of the Convention and 48 of the Rules of Procedure refer because, under general rules of procedural law, a contentious case cannot be deemed to have been concluded until the judgment has been fully complied with. By analogy, it follows that the judges shall continue to participate when the case is at the enforcement stage. This is so, in particular, because the Court decided in its judgment of July 21, 1989, that it would supervise compliance with the award of damages and that the case would not be deemed closed until compensation was paid in full.

13. Article 54(3) of the Convention is based on similar rules contained in the Statute of the International Court of Justice and in the (European) Convention for the Protection of Human Rights and Fundamental Freedoms. Article 13(3) of that Statute provides, essentially, that after the judges of the International Court of Justice have been replaced, they shall nevertheless continue to hear the cases they had begun and see them through to their conclusion. Article 40(6) of the European Convention declares that, in the same circumstances, the judges of the European Court shall continue to hear the cases that have been entrusted to them. According to Article 56 of that Court's Rules of Procedure, [t]he request for interpretation shall be considered by the Chamber which gave the judgment and which shall, as far as possible, be composed of the same judges ....

14. The Court has jurisdiction to comply with the instant request for interpretation because Article 67 of the Convention provides that:

The judgment of the Court shall be final and not subject to appeal. In case of disagreement as to the meaning or scope of the judgment, the Court shall interpret it at the request of any of the parties, provided the request is made within ninety days from the date of notification of the judgment.

Article 48 of the Rules of Procedure, for its part, states the following:

Article 48. Request for an interpretation of a judgment

1. Request for an interpretation allowed under the terms of Article 67 of the Convention shall be presented in twenty copies and shall indicate precisely the points in the operative provision of the judgment on which interpretation is requested. It shall be filed with the Secretary.
2. The Secretary shall communicate the request to any other party and, where appropriate, to the Commission, and shall invite them to submit, in twenty copies, any written comments within a period fixed by the President.
3. The nature of the proceedings shall be determined by the Court.
4. A request for interpretation shall not suspend the effect of the judgment.

The Commission is a party to this case and presented its request on October 2, 1989. Since the judgment was notified on July 21, 1989, the request was presented within the period stipulated by that Article.

15. In its brief of July 6, 1990, the Commission asked the Court to admit a request for amplification of the petition for clarification of the judgment, based on a new fact that was not known at the time of the first request, that is to say, the Government's delay in paying the damages. Since the Court will base its decision in the instant request on other grounds, it does not deem it necessary to address the possibility of extending a request beyond the specific period fixed by the Convention. The same reason makes it unnecessary for the Court to deal with the doctrine of new facts which is applied in other tribunals.

### III

16. In its Judgment of July 21, 1989, the Court

unanimously

1. Awards seven hundred and fifty thousand lempiras in compensatory damages to be paid to the family of Angel Manfredo Velásquez Rodríguez by the State of Honduras.

unanimously

2. Decides that the amount of the award corresponding to the wife of Angel Manfredo Velásquez Rodríguez shall be one hundred and eighty-seven thousand five hundred lempiras.

unanimously

3. Decides that the amount of the award corresponding to the children of Angel Manfredo Velásquez Rodríguez shall be five hundred and sixty-two thousand five hundred lempiras.

unanimously

4. Orders that the form and means of payment of the indemnity shall be those specified in paragraphs 57 and 58 of this judgment.

unanimously

5. Decides that the Court shall supervise the indemnification ordered and shall close the file only when the compensation has been paid.

17. Paragraphs 57 and 58 of the judgment read as follows:

52. Payment of the seven hundred and fifty thousand lempiras awarded by the Court must be carried out within ninety days from the date of notification of the judgment, free from any tax that might eventually be considered applicable. Nevertheless, the Government may pay in six equal monthly installments, the first being payable within ninety days and the remainder in successive months. In this case, the balance shall be incremented by the appropriate interest, which shall be at the interest rates current at the moment in Honduras.

53. One-fourth of the indemnity is awarded to the wife who shall receive that sum directly. The remaining three-fourths shall be distributed among the children. With the funds from the award to the children, a trust fund shall be

set up in the Central Bank of Honduras under the most favorable conditions permitted by Honduran banking practice. The children shall receive monthly payments from this trust fund, and at the age of twenty-five shall receive their proportionate part.

18. In its brief, dated September 29, 1989, the Commission justified its request in the following terms:

This petition for clarification refers to the sum of money that is to be deposited in trust at the Central Bank of Honduras for the benefit of Héctor Ricardo, Nadia Waleska and Herling Lizzett Velásquez Guzmán, the children of the victim, until they each reach the age of twenty-five years of age.

The judgment does not contemplate any protective mechanism to preserve the current purchasing power of the award in the face of inflation or possible devaluations of the lempira. As the Court is aware, and as we indicate below, that loss of purchasing power by units of currency has historically been high throughout Latin American, in some countries sometimes reaching catastrophic proportions.

Two fundamental reasons have persuaded the Commission to submit this petition:

First, if the meaning and scope of the judgment are not clarified with respect to the future value of the compensation placed in trust, irreparable damage could be caused to the injured parties. As we state below, that damage is neither hypothetical nor trivial, but predictable and could practically annul the very value of the Court's decision, as well as its compensatory intent.

Moreover, the Commission believes that such judgments in themselves hold a special, precedential legal value which goes well beyond the jurisdiction of the Inter-American Court and its case law, since by their very nature, content and effect they have deservedly earned universal attention and represent a milestone in the development of the international humanitarian legal order.

The Court's specific assumption of the supervision of compliance with its judgment is an eloquent indication of the responsibility the Court assigns to full and exact compliance, and serves to justify the importance of the interpretation we request.

In addressing the merits of the case, the Court will surely take into account the fact that the consumer price index (the indicator most relevant to this case) for the countries of Latin America taken as a whole increased by 721% in the five years from 1983 to 1988, that is, an average of 144% per annum. Without citing extreme cases of countries experiencing hyperinflation, Costa Rica, a country geographically close to Honduras, suffered an increase of 263% in its consumer price index over the last ten years. (Source: Report to the Inter-American Economic and Social Council CIES. OAS, September 1989).

In Honduras, such increases have been much milder. Nevertheless, even at the relatively low growth of the consumer price index in Honduras, if the trust in question had been set up 18 years ago (in 1971) in the amount of L.562,500, that sum would today be the equivalent of L.147,126, or approximately a quarter of its original value, given the changes experienced in the consumer price index of Honduras.

19. The Commission asked the Court to admit its request in order that

measures be taken to protect the purchasing power of the amounts (both principal and interest) involved in the trust to be set up on behalf of HECTOR RICARDO, NADIA WALESKA and HERLING LIZZETT VELASQUEZ GUZMAN by tying that portion of the damages to an index that will maintain its purchasing power. This should be done not only for each of the payments of interest

thereon but also for the payment of principal when it becomes due and payable to the beneficiaries, that is, when they each reach the age of twenty-five.

20. The Commission stated that

There are different ways of setting up a simple and clear protective mechanism that could be established by the Court in the clarification of judgment requested. None of them would offer complete protection to the beneficiaries, nor could they preserve absolutely the compensatory intent of the judgment, but at least they would to some degree counteract the current lack of protection and the expected loss of value.

The Commission is of the opinion that a suitable adjustment mechanism would be to estimate the real value of the capital placed in trust in United States dollars of October 20, 1989, and maintain it at that same value throughout the life of the trust. To achieve this, it should be adjusted to the amount of lempiras necessary to purchase that fixed amount of dollars initially arrived at on the free international exchange market. Thus, each interest payment would be calculated in lempiras on a principal, also in lempiras, readjusted on the basis of the mechanism described.

21. In a brief dated November 21, 1989, the Government based its opposition to the Commission's request on the following arguments:

1. The compensatory damages judgment handed down by the Honorable Court on July 21, 1989, in the case of MANFREDO VELASQUEZ RODRIGUEZ is perfectly clear and precise both in its findings and in its operative parts and thus needs no clarification or interpretation, inasmuch as that judgment fixes unequivocally the amount of lempiras to be set up in trust at the Central Bank and the interest rate that the trust fund shall accrue annually in that same currency.

2. In fixing the total amount of compensatory damages and the form of payment thereof, as regards both the amount corresponding to the trust and any earnings thereon, the Court selected the currency of the country in which the judgment was to be executed, that is, Honduras, without taking into consideration, or conditioning the judgment to, any possible decrease in the purchasing power of the Honduran currency; in addition, the judgment did not contemplate any other monetary guideline to serve as an adjustment index for the maintenance of such purchasing power.

3. Since such circumstances were not foreseen in the compensatory damages judgment, what the Inter-American Commission on Human Rights is seeking in its request for clarification is that the Honorable Court amend its Judgment of July 21, 1989, by introducing new factors of a monetary nature to its operative parts, when it asks the Court to provide for some index against which the damages settlement should be adjusted in order to maintain its purchasing power unaltered. As already stated, this is something that the judgment does not address.

For the above reasons, the Government of Honduras respectfully requests that the Honorable Court reject the request presented by the Inter-American Commission on Human Rights.

22. The Commission stated the following in its brief of July 6, 1990:

...eight months after the deadline set by the Court, the judgment has still not been complied with, resulting in various damages to the injured parties.

The damages stem from two sources: first, the time elapsed since October 20, 1989, without the injured parties having access to the use and enjoyment of the compensation due; and second, the devaluation of the lempira during that time, a devaluation legally introduced by the Government

to reflect the real loss of purchasing power that had occurred during that period.

...

Despite the above, the Commission nevertheless understands that both the gravity of the international proceedings and the respect that should be accorded a fair compensation as fixed by that Court, as well as the real loss of over 30 (thirty) per cent of the purchasing power resulting from the delay in payment, require that the Honorable Court declare in the interpretation being sought, that the amount of damages fixed should be understood to be linked to the period of time specified.

#### 23. For these reasons, the Commission

... respectfully requests that the Honorable Court admit this request for amplification of the petition for clarification of the judgment and, furthermore, that payment of interest be ordered for the period from October 20, 1989, to the date of effective payment, plus a retroactive adjustment of the purchasing power of the compensation to that date, to make up for the lempira's devaluation over that same period.

#### 24. The Government's objection to this last request was expressed in the following terms:

1. The compensatory damages judgments issued by the Honorable Court on July 21, 1989, in the cases of ANGEL MANFREDO VELASQUEZ and SAUL GODINEZ CRUZ are perfectly clear, both in their findings and in their operative parts, and thus require no clarification, for they fix in precise terms the total amounts to be paid in lempiras, including the amounts to be set up as trusts in the Central Bank and the interest rate that the trust funds shall accrue annually in that same currency.

2. In fixing the total amount of the compensatory damages and the form of payment thereof in lempiras (both for the sums held in trust and for earnings thereon) the Court acted without taking into consideration, or conditioning the judgments to, any possible decrease in the purchasing power of the Honduran currency. In addition, the judgment set no other monetary guidelines to serve as an adjustment index in order to preserve that purchasing power, nor did it order interest to be paid in the event of delays in meeting the compensation payment schedule.

3. Since such circumstances were not foreseen in the compensatory damages judgment, what the Inter-American Commission on Human Rights is seeking in its request for clarification is that the Honorable Court amend its judgments of July 21, 1989, by introducing new factors of a monetary nature to its operative parts, when it asks the Court to declare that, because of its delay in paying the compensation due, the Government of Honduras should pay interest and adjust the purchasing power of the amounts of compensation to the value they had when payment became due. As already stated, these are factors that were not addressed in the above-mentioned judgments.

4. Since the judgments of the Inter-American Court of Human Rights are final and not subject to appeal, they have the effect of res judicata. This prevents the parties from reopening a matter in order to obtain a second judgment from the Court, as would happen if the request of the Inter-American Commission on Human Rights were to be admitted and if, in addition, the judgments of July 21, 1989, were to be amended.

5. As has been established before that Honorable Court in the presentations made by the Government of Honduras on January 27 and March 5, 1990, during the period beginning July 21, 1989, my Government undertook all necessary steps to comply with the judgments. If there was a delay in the payment of compensatory damages, it was in no way due to negligence or lack

of interest on its part, but, rather, to economic and budgetary constraints that, once overcome, gave rise to Decree No. 59-90, approved by the National Congress on July 2, 1990. In faithful compliance with the judgments of that Honorable Court, the Decree set aside a sum in the General Budget of Income and Expenditures of the Republic to cover the payment of compensation to the families of ANGEL MANFREDO VELASQUEZ RODRIGUEZ and SAUL GODINEZ CRUZ in the manner and under the conditions established in the respective judgments.

25. The public hearing established that, despite the stability of the lempira over a period of many years, by the time the Court issued its judgment on damages, its rate of exchange was exhibiting a tendency to fluctuate against strong currencies. This fluctuation has continued and increased to date, although the official rate of exchange has remained unchanged. It also appeared that the current provisions governing international exchange in Honduras permit private persons to freely acquire other currencies.

#### IV

26. The interpretation of a judgment involves not only precisely defining the text of the operative parts of the judgment, but also specifying its scope, meaning and purpose, based on the considerations of the judgments. This has been the rule enunciated in the case law of international courts (see Eur. Court H.R., Ringeisen case (Interpretation of the judgment of 22 June 1972), judgment of 23 June 1973, Series A, Vol. 16).

27. The compensation due victims or their families under Article 63(1) of the Convention must attempt to provide restitutio in integrum for the damages caused by the measure or situation that constituted a violation of human rights. The desired aim is full restitution for the injury suffered. This is something that is unfortunately often impossible to achieve, given the irreversible nature of the damages suffered, which is demonstrated in the instance case. Under such circumstances, it is appropriate to fix the payment of "fair compensation" in sufficiently broad terms in order to compensate, to the extent possible, for the loss suffered.

28. Therefore, in fixing the measure of damages, the Court took into account loss of earnings, [b]ased upon a prudent estimate of the possible income of the victim for the rest of his probable life, as well as moral damages (Velasquez Rodriguez Case, Compensatory Damages, Judgment of July 21, 1989, (Art. 63(1) American Convention on Human Rights). Series C No. 7, paras. 49 and 52).

29. The fact that the damages fixed comprise loss of earnings, calculated on the basis of probable life-span, indicates that the restitutio in integrum concept is linked to the possibility of maintaining the real value of the damages stable over a relatively long period of time. One way of meeting this goal is so-called "indexing", which makes it possible to make periodic adjustments to the sums payable in order to keep the real value constant. In general, however, that method is only applicable to cases where damages are to be paid in installments over relatively long periods of time. That is not true of the instant case. Here the Court ordered payment of the full amount of compensation in one single payment, or, at most, in six consecutive monthly installments.

30. Despite the foregoing there is no reason why a case like the instant one should ignore the notion of preserving the real value of the amount fixed. After all, as has already been indicated, the compensation that was fixed for loss of earnings implies

that notion to a certain degree. That is why the Court decided, in the operative paragraph of the judgment that refers to paragraph 58, to employ a method for preserving the sums of money owed to the minor children of Manfredo Velásquez namely the establishment of a trust fund with the Central Bank of Honduras under the most favorable conditions permitted by Honduran banking practice.

31. The Court interprets the expression under the most favorable conditions as referring to the fact that any act or measure by the trustee must ensure that the amount assigned maintains its purchasing power and generates sufficient earnings or dividends to increase it; the phrase permitted by Honduran banking practice indicates that the trustee must faithfully perform his task as would a good head of family and that he has the power and the obligation to select diverse types of investment, whether through deposits in strong currencies, such as the United States dollar or others, the purchase of mortgage bonds, real estate, guaranteed securities or any other investment recommended by Honduran banking practice, precisely as ordered by the Court.

32. The Court at a given moment shared the concern expressed by the Commission in its briefs and at the hearing, insofar as it wished to ensure that the amount payable to Manfredo Velásquez' minor children would maintain its purchasing power until they reached the age of twenty-five and even beyond that time. It was for this reason that the Court decided to place that sum in a trust fund, an institution that, unlike regular bank accounts, is designed to maintain and increase the real value of the assets.

33. The judgment orders that the compensation be paid either in one single payment or in six consecutive monthly installments. The Commission requests that the Government be obliged to periodically disburse additional sums in order to maintain constant the value of the original assets, for as long as the trust remains in effect. It is evident that this request, as presented, would impose on the Government an obligation that is not provided for in the judgment. Consequently, since the Commission's request thus exceeds the scope of a mere interpretation, the Court must reject it.

## V

34. In its brief, received by the Court on July 6, 1990, the Commission expanded its request for interpretation of the judgment. The Commission emphasized that, despite the fact that eight months had elapsed since the damages became due and payable, the Government had still not complied with the judgment. It went on to request that, in order to compensate for the consequences of this delay, the Court order the payment of: a) interest for such delay and b) the adjustment of the purchasing power of the unit of currency in order to bring its current value on a par with what it was worth at the time that the payment should have been made.

35. With regard to this brief, the Court must determine, in the first place, whether it is empowered to admit the request as presented.

36. The Court notes that, according to Article 67 of the Convention, it is empowered to interpret its judgments whenever there is disagreement as to the meaning or scope thereof. In the Commission's brief now under consideration no mention is made of any aspects of the judgment of the Court whose meaning or scope are in doubt or controversial. On the contrary, the claim is that there has been non-performance of clearly stated terms of the judgment in question, such as the terms

within which the compensation ordered by the Court should have been paid. Consequently, the Court cannot admit the Commission's petition in the guise of an "amplification" of the request for interpretation previously presented by them.

37. Nevertheless, since in the judgment the Court assumed the supervision of the payment of the damages fixed and indicated that the case would be deemed closed only after full payment was made (Velásquez Rodríguez Case, Compensatory Damages, supra 28, para. 60(5)), it retains jurisdiction over the instant case and is empowered to decide on the consequences of the Government's delay in paying the assessed damages.

38. In this connection, the Court must point out initially that the delay is due to a situation attributable to the State of Honduras that continues to hold today. Despite efforts by the Executive Power to which the Government has attested, as well as to its good will, which the Court in no way questions -the truth is that to date payment has not been effected. This is the responsibility of the State and the consequences of this inaction must be indemnified by it to ensure that the rights of the beneficiaries of the compensation are in no way diminished.

39. The Court must also note that the Government did not indicate at any time that it would avail itself of the option to pay the damages in six consecutive monthly installments (Velásquez Rodríguez Case, Compensatory Damages, supra 28, para. 57). It also did not pay any of those installments which, in any event, are all past due. The basis for calculating the damages caused by the delay must, therefore, be the entire amount of the capital owed on the date it became due and payable, namely seven hundred fifty thousand lempiras as of October 21, 1989. The statement by the Government that the amounts owed have not been delivered to the interested parties because they are awaiting the results of the public hearing, in no way affects the above conclusion, because, among other reasons, the publication of the decree authorizing payment appeared one year after the judgment ordering it and only a few days before the hearing in question.

40. It is appropriate, therefore, to demand the payment of interest on the entire amount of the capital due, at the regular banking rate in effect in Honduras on the date of payment. If such interest were to be set by the Court in the event that the Government opts to pay by means of six monthly installments, it shall apply, a fortiori, to the delay in compliance with the terms of the judgment.

41. There are, furthermore, other damages that must be compensated. These relate to the rights of the beneficiaries of the compensation and, where applicable, to the obligation of the trustee to take appropriate measures to preserve the real value of the sum received when it became due and payable, thus ensuring the fulfillment of the goal of restitutio in integrum for the injuries suffered.

42. In this connection, the Court remarks that one of the easiest and most readily accessible ways to achieve this goal, namely the conversion of the amount received into one of the so-called hard currencies, has been severely impaired as a result of the lempira's loss of value against the United States dollar in the open exchange market since the date on which payment should have been effected. This real loss must be compensated by the Government, in addition to the current bank interest payable, by adding to the latter the value of the loss between the date on which the Government should have paid the damages by setting up the trust but neglected to do so, and the date on which it actually complies with its obligations.

43. Since the Government already has the required authorization to pay, as it has informed the Court, it must now immediately proceed to deliver to the beneficiaries of the compensation and the trust the amount fixed in Decree Number 59-90, applying it, as is customary practice, first to the above-mentioned compensation and to the interest, and subsequently to the capital. Any shortages of capital remaining after this payment shall be subject to the provisions of paragraph 42, *supra*, until fully paid.

44. It follows, from all that has been said above, that there are two specific issues that the Court must rule on, namely:

1. The interpretation of the meaning, scope and purpose of the expression under the most favorable conditions permitted by Honduran banking practice, utilized in paragraph 58 of the Judgment of July 21, 1989; and
2. The measures the Court must adopt in exercising the power it assumed under paragraph 5 of the operative part of that same judgment, that is, the supervision of the indemnification ordered until full payment is made.

**THEREFORE,**

**THE COURT,**

**DECIDES:**

unanimously

1. To declare admissible the request for interpretation of the Judgment of July 21, 1989, presented by the Inter-American Commission on Human Rights on October 2, 1989.

unanimously

2. To declare inadmissible the request for amplification of the petition for clarification of the judgment presented by the Inter-American Commission on Human Rights on July 6, 1990.

unanimously

3. To declare that the expression under the most favorable conditions permitted by Honduran banking practice must be interpreted in the manner stated in paragraph 31, *supra*.

unanimously

4. In the exercise of its power to supervise compliance with its Judgment of July 21, 1989, that the Government of Honduras must compensate the injured parties for the delays in the payment of damages and in setting up the trust as ordered, under the conditions stipulated in paragraphs 40, 42 and 43, *supra*.

Done in Spanish and English, the Spanish text being authentic. Read at the public hearing at the seat of the Court in San José, Costa Rica, on this seventeenth day of August, 1990\*

Héctor Fix-Zamudio  
President

Rodolfo E. Piza E.

Pedro Nikken

Rafael Nieto-Navia

Rigoberto Espinal-Irías

Manuel E. Ventura-Robles  
Secretary

So ordered,

Héctor Fix-Zamudio  
President

Manuel E. Ventura-Robles  
Secretary

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\* Judge Héctor Gros-Espiell did not participate in this judgment, having resigned his position as Judge of the Court. Judge Thomas Buergenthal also did not participate in this judgment, because he had not taken part in the Judgment of July 21, 1989.

circumstances (rebus sic stantibus)) are not given to remove the principle of estoppel; or that it is impossible to request a clarification or interpretation of the same, both by analogy, as indicated in the principal vote, and by the general principles mentioned, as confirmed by the very Judgment of July 21, 1989, inasmuch as it decided to keep the case open until it is fully complied with. However, that possibility is not the one contemplated in Article 67 of the Convention and, consequently, is not subject either to a petition by the parties, nor to time limits, but is maintained open for as long as necessary during the course of enforcing the definite judgment.

Rodolfo E. Piza E.

Manuel E. Ventura-Robles  
Secretary

#### SEPARATE VOTE OF JUDGE PIZA-ESCALANTE

I have concurred with the unanimous vote of the Court and with the general lines of reasoning employed, but I must distance myself from the argument put forward in paragraphs 12, 14 and 15, inasmuch as they invoke the immediate -and not merely analogical- applicability of Article 67 of the Convention, which governs requests for interpretation of judgments. In this connection, I must point out that such requests relate to that norm of the Convention only with respect to the judgment; that is to say, this obviously refers to the final judgment deciding the merits of the case, to which Articles 63(1) and 66 (among others) of that same Convention refer. It is only with respect to that final judgment that an express conventional provision becomes necessary, as well as the setting of a deadline within which to legitimately request it, because, according to universal principles of procedural law (whether domestic or international) only final judgments are irrevocable and they alone can acquire the authority of res judicata.

The remaining decisions, both those that pertain to the principal proceedings and those belonging to the enforcement stage, despite the fact that they are also called "judgments" whether out of habit or as a matter of fact, are interlocutory and always subject to others that, whether by means of remedies or simply through adversary jurisdiction, interpret, complement, clarify or add to or even modify or revoke them. This last, of course, in keeping with the respect due to the principle of estoppel and good faith.

The so-called "compensatory damages judgment" of July 21, 1989, is not the definitive judgment ruling alluded to in Articles 63(1) and 66. Nor, consequently, is it subject to the kind of interpretation to which Article 67 of the Convention refers, although it is, of course, subject to any interpretation, complement, clarification or addition, or even modification or revocation, under the terms mentioned above.

In the instant case, the final judgment or ruling could only be that of July 29, 1988, which conclusively decided on the merits of the case. This sole definitive judgment required no interpretation under the terms of Article 67, nor was any requested. Insofar as compensatory damages were concerned, it did not go beyond condemning the Government of Honduras, in the abstract, to paying such damages to the successors of Manfredo Velásquez Rodríguez, reserving the fixing of the amount and form of payment to what would obviously be a subsequent state of the enforcement of judgment. Thus the Court availed itself of the customary procedural opinion of leaving for a later stage the settlement of certain general statements contained in the judgment itself, by means of decisions endowed with the same binding and enforceable force of the judgment itself (in this case, that of Articles 65 and 68 of the Convention) although lacking its nature and, as has been stated, lacking its definitiveness, that is, its irrevocability or intangibility. That is what the Court did in its decision of July 21, 1989: enforce the judgment. That is what it is doing today and what it can and possibly should continue to do in the future, for as long as the case remains open because of non-compliance with the judgment.

By the foregoing I do not mean to imply either that the Court can continue indefinitely to modify its decision at the enforcement stage for as long as the familiar procedural justifications (such as, for example, nullities or a fundamental change in

**European Court of Human Rights**

**McCann and Others v. United Kingdom  
Judgment of 27 September 1995 [GC]**

**Application No. 18984/91, paras. 145-214**

as resulting from the use of force which was no more than absolutely necessary in defence of the people of Gibraltar from unlawful violence and the Court was invited to find that the facts disclosed no breach of Article 2 (art. 2) of the Convention in respect of any of the three deceased.

144. The applicants submitted that the Government have not shown beyond reasonable doubt that the planning and execution of the operation was in accordance with Article 2 para. 2 (art. 2-2) of the Convention. Accordingly, the killings were not absolutely necessary within the meaning of this provision (art. 2-2).

## AS TO THE LAW

### I. ALLEGED VIOLATION OF ARTICLE 2 (art. 2) OF THE CONVENTION

145. The applicants alleged that the killing of Mr McCann, Ms Farrell and Mr Savage by members of the security forces constituted a violation of Article 2 (art. 2) of the Convention which reads:

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article (art. 2) when it results from the use of force which is no more than absolutely necessary:

- (a) in defence of any person from unlawful violence;
- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

#### A. Interpretation of Article 2 (art. 2)

##### 1. General approach

146. The Court's approach to the interpretation of Article 2 (art. 2) must be guided by the fact that the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective (see, *inter alia*, the *Soering v. the United Kingdom* judgment of 7 July 1989, Series A no. 161, p. 34, para. 87, and the *Loizidou v. Turkey* (Preliminary Objections) judgment of 23 March 1995, Series A no. 310, p. 27, para. 72).

147. It must also be borne in mind that, as a provision (art. 2) which not only safeguards the right to life but sets out the circumstances when the deprivation of life may be justified, Article 2 (art. 2) ranks as one of the most fundamental provisions in the Convention - indeed one which, in peacetime, admits of no derogation under Article 15 (art. 15). Together with Article 3 (art. 15+3) of the Convention, it also enshrines one of the basic values of the democratic societies making up the Council of Europe (see the above-mentioned *Soering* judgment, p. 34, para. 88). As such, its provisions must be strictly construed.

148. The Court considers that the exceptions delineated in paragraph 2 (art. 2-2) indicate that this provision (art. 2-2) extends to, but is not concerned exclusively with, intentional killing. As the Commission has pointed out, the text of Article 2 (art. 2), read as a whole, demonstrates that paragraph 2 (art. 2-2) does not primarily define instances where it is permitted intentionally to kill an individual, but describes the situations where it is permitted to "use force" which may result, as an unintended outcome, in the deprivation of life. The use of force, however, must be no more than "absolutely necessary" for the achievement of one of the purposes set out in sub-paragraphs (a), (b) or (c) (art. 2-2-a, art. 2-2-b, art. 2-2-c) (see application no. 10044/82, *Stewart v. the United Kingdom*, 10 July 1984, Decisions and Reports 39, pp. 169-71).

149. In this respect the use of the term "absolutely necessary" in Article 2 para. 2 (art. 2-2) indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is "necessary in a democratic society" under paragraph 2 of Articles 8 to 11 (art. 8-2, art. 9-2, art. 10-2, art. 11-2) of the Convention. In particular, the force used must be strictly proportionate to the achievement of the aims set out in sub-paragraphs 2 (a), (b) and (c) of Article 2 (art. 2-2-a-b-c).

150. In keeping with the importance of this provision (art. 2) in a democratic society, the Court must, in making its assessment, subject deprivations of life to the most careful scrutiny, particularly where deliberate lethal force is used, taking into consideration not only the actions of the agents of the State who actually administer the force but also all the surrounding circumstances including such matters as the planning and control of the actions under examination.

##### 2. The obligation to protect life in Article 2 para. 1 (art. 2-1)

###### (a) Compatibility of national law and practice with Article 2 (art. 2) standards

151. The applicants submitted under this head that Article 2 para. 1 (art. 2-1) of the Convention imposed a positive duty on States to "protect" life. In particular, the national law must strictly control and limit the circumstances in which a person may be deprived of his life by agents of the

State. The State must also give appropriate training, instructions and briefing to its soldiers and other agents who may use force and exercise strict control over any operations which may involve the use of lethal force.

In their view, the relevant domestic law was vague and general and did not encompass the Article 2 (art. 2) standard of absolute necessity. This in itself constituted a violation of Article 2 para. 1 (art. 2-1). There was also a violation of this provision (art. 2-1) in that the law did not require that the agents of the State be trained in accordance with the strict standards of Article 2 para. 1 (art. 2-1).

152. For the Commission, with whom the Government agreed, Article 2 (art. 2) was not to be interpreted as requiring an identical formulation in domestic law. Its requirements were satisfied if the substance of the Convention right was protected by domestic law.

153. The Court recalls that the Convention does not oblige Contracting Parties to incorporate its provisions into national law (see, *inter alia*, the *James and Others v. the United Kingdom* judgment of 21 February 1986, Series A no. 98, p. 47, para. 84, and *The Holy Monasteries v. Greece* judgment of 9 December 1994, Series A no. 301-A, p. 39, para. 90). Furthermore, it is not the role of the Convention institutions to examine in abstracto the compatibility of national legislative or constitutional provisions with the requirements of the Convention (see, for example, the *Klass and Others v. Germany* judgment of 6 September 1978, Series A no. 28, p. 18, para. 33).

154. Bearing the above in mind, it is noted that Article 2 of the Gibraltar Constitution (see paragraph 133 above) is similar to Article 2 (art. 2) of the Convention with the exception that the standard of justification for the use of force which results in the deprivation of life is that of "reasonably justifiable" as opposed to "absolutely necessary" in paragraph 2 of Article 2 (art. 2-2). While the Convention standard appears on its face to be stricter than the relevant national standard, it has been submitted by the Government that, having regard to the manner in which the standard is interpreted and applied by the national courts (see paragraphs 134-35 above), there is no significant difference in substance between the two concepts.

155. In the Court's view, whatever the validity of this submission, the difference between the two standards is not sufficiently great that a violation of Article 2 para. 1 (art. 2-1) could be found on this ground alone.

156. As regards the applicants' arguments concerning the training and instruction of the agents of the State and the need for operational control, the Court considers that these are matters which, in the context of the present case, raise issues under Article 2 para. 2 (art. 2-2) concerning the proportionality of the State's response to the perceived threat of a terrorist attack. It suffices to note in this respect that the rules of engagement issued to the soldiers and the police in the present case provide a series of rules

governing the use of force which carefully reflect the national standard as well as the substance of the Convention standard (see paragraphs 16, 18 and 136-37 above).

**(b) Adequacy of the inquest proceedings as an investigative mechanism**

157. The applicants also submitted under this head, with reference to the relevant standards contained in the UN Force and Firearms Principles (see paragraphs 138-39 above), that the State must provide an effective *ex post facto* procedure for establishing the facts surrounding a killing by agents of the State through an independent judicial process to which relatives must have full access.

Together with the *amici curiae*, Amnesty International and British-Irish Rights Watch and Others, they submitted that this procedural requirement had not been satisfied by the inquest procedure because of a combination of shortcomings. In particular, they complained that no independent police investigation took place of any aspect of the operation leading to the shootings; that normal scene-of-crime procedures were not followed; that not all eyewitnesses were traced or interviewed by the police; that the Coroner sat with a jury which was drawn from a "garrison" town with close ties to the military; that the Coroner refused to allow the jury to be screened to exclude members who were Crown servants; that the public interest certificates issued by the relevant Government authorities effectively curtailed an examination of the overall operation.

They further contended that they did not enjoy equality of representation with the Crown in the course of the inquest proceedings and were thus severely handicapped in their efforts to find the truth since, *inter alia*, they had had no legal aid and were only represented by two lawyers; witness statements had been made available in advance to the Crown and to the lawyers representing the police and the soldiers but, with the exception of ballistic and pathology reports, not to their lawyers; they did not have the necessary resources to pay for copies of the daily transcript of the proceedings which amounted to £500-£700.

158. The Government submitted that the inquest was an effective, independent and public review mechanism which more than satisfied any procedural requirement which might be read into Article 2 para. 1 (art. 2-1) of the Convention. In particular, they maintained that it would not be appropriate for the Court to seek to identify a single set of standards by which all investigations into the circumstances of death should be assessed. Moreover, it was important to distinguish between such an investigation and civil proceedings brought to seek a remedy for an alleged violation of the right to life. Finally, they invited the Court to reject the contention by the intervenors British-Irish Rights Watch and Others that a violation of Article 2 para. 1 (art. 2-1) will have occurred whenever the Court finds serious

differences between the UN Principles on Extra-Legal Executions and the investigation conducted into any particular death (see paragraph 140 above).

159. For the Commission, the inquest subjected the actions of the State to extensive, independent and highly public scrutiny and thereby provided sufficient procedural safeguards for the purposes of Article 2 (art. 2) of the Convention.

160. The Court considers that it is unnecessary to decide in the present case whether a right of access to court to bring civil proceedings in connection with deprivation of life can be inferred from Article 2 para. 1 (art. 2-1) since this is an issue which would be more appropriately considered under Articles 6 and 13 (art. 6, art. 13) of the Convention - provisions (art. 6, art. 13) that have not been invoked by the applicants.

161. The Court confines itself to noting, like the Commission, that a general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision (art. 2), read in conjunction with the State's general duty under Article 1 (art. 2+1) of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alios*, agents of the State.

162. However, it is not necessary in the present case for the Court to decide what form such an investigation should take and under what conditions it should be conducted, since public inquest proceedings, at which the applicants were legally represented and which involved the hearing of seventy-nine witnesses, did in fact take place. Moreover, the proceedings lasted nineteen days and, as is evident from the inquest's voluminous transcript, involved a detailed review of the events surrounding the killings. Furthermore, it appears from the transcript, including the Coroner's summing-up to the jury, that the lawyers acting on behalf of the applicants were able to examine and cross-examine key witnesses, including the military and police personnel involved in the planning and conduct of the anti-terrorist operation, and to make the submissions they wished to make in the course of the proceedings.

163. In light of the above, the Court does not consider that the alleged various shortcomings in the inquest proceedings, to which reference has been made by both the applicants and the intervenors, substantially hampered the carrying out of a thorough, impartial and careful examination of the circumstances surrounding the killings.

164. It follows that there has been no breach of Article 2 para. 1 (art. 2-1) of the Convention on this ground.

## B. Application of Article 2 (art. 2) to the facts of the case

### I. General approach to the evaluation of the evidence

165. While accepting that the Convention institutions are not in any formal sense bound by the decisions of the inquest jury, the Government submitted that the verdicts were of central importance to any subsequent examination of the deaths of the deceased. Accordingly, the Court should give substantial weight to the verdicts of the jury in the absence of any indication that those verdicts were perverse or ones which no reasonable tribunal of fact could have reached. In this connection, the jury was uniquely well placed to assess the circumstances surrounding the shootings. The members of the jury heard and saw each of the seventy-nine witnesses giving evidence, including extensive cross-examination. With that benefit they were able to assess the credibility and probative value of the witnesses' testimony. The Government pointed out that the jury also heard the submissions of the various parties, including those of the lawyers representing the deceased.

166. The applicants, on the other hand, maintained that inquests are by their very nature ill-equipped to be full and detailed inquiries into controversial killings such as in the present case. Moreover, the inquest did not examine the killings from the standpoint of concepts such as "proportionality" or "absolute necessity" but applied the lesser tests of "reasonable force" or "reasonable necessity". Furthermore, the jury focused on the actions of the soldiers as they opened fire as if it were considering their criminal culpability and not on matters such as the allegedly negligent and reckless planning of the operation.

167. The Commission examined the case on the basis of the observations of the parties and the documents submitted by them, in particular the transcript of the inquest. It did not consider itself bound by the findings of the jury.

168. The Court recalls that under the scheme of the Convention the establishment and verification of the facts is primarily a matter for the Commission (Articles 28 para. 1 and 31) (art. 28-1, art. 31). Accordingly, it is only in exceptional circumstances that the Court will use its powers in this area. The Court is not, however, bound by the Commission's findings of fact and remains free to make its own appreciation in the light of all the material before it (see, *inter alia*, the Cruz Varas and Others v. Sweden judgment of 20 March 1991, Series A no. 201, p. 29, para. 74, and the Klaas v. Germany judgment of 22 September 1993, Series A no. 269, p. 17, para. 29).

169. In the present case neither the Government nor the applicants have, in the proceedings before the Court, sought to contest the facts as they have been found by the Commission although they differ fundamentally as to the

conclusions to be drawn from them under Article 2 (art. 2) of the Convention.

Having regard to the submissions of those appearing before the Court and to the inquest proceedings, the Court takes the Commission's establishment of the facts and findings on the points summarised in paragraphs 13 to 132 above to be an accurate and reliable account of the facts underlying the present case.

170. As regards the appreciation of these facts from the standpoint of Article 2 (art. 2), the Court observes that the jury had the benefit of listening to the witnesses at first hand, observing their demeanour and assessing the probative value of their testimony.

Nevertheless, it must be borne in mind that the jury's finding was limited to a decision of lawful killing and, as is normally the case, did not provide reasons for the conclusion that it reached. In addition, the focus of concern of the inquest proceedings and the standard applied by the jury was whether the killings by the soldiers were reasonably justified in the circumstances as opposed to whether they were "absolutely necessary" under Article 2 para. 2 (art. 2-2) in the sense developed above (see paragraphs 120 and 148-49 above).

171. Against this background, the Court must make its own assessment whether the facts as established by the Commission disclose a violation of Article 2 (art. 2) of the Convention.

172. The applicants further submitted that in examining the actions of the State in a case in which the use of deliberate lethal force was expressly contemplated in writing, the Court should place on the Government the onus of proving, beyond reasonable doubt, that the planning and execution of the operation was in accordance with Article 2 (art. 2) of the Convention. In addition, it should not grant the State authorities the benefit of the doubt as if its criminal liability were at stake.

173. The Court, in determining whether there has been a breach of Article 2 (art. 2) in the present case, is not assessing the criminal responsibility of those directly or indirectly concerned. In accordance with its usual practice therefore it will assess the issues in the light of all the material placed before it by the applicants and by the Government or, if necessary, material obtained of its own motion (see the *Ireland v. the United Kingdom* judgment of 18 January 1978, Series A no. 25, p. 64, para. 160, and the above-mentioned *Cruz Varas and Others* judgment, p. 29, para. 75).

## 2. Applicants' allegation that the killings were premeditated

174. The applicants alleged that there had been a premeditated plan to kill the deceased. While conceding that there was no evidence of a direct order from the highest authorities in the Ministry of Defence, they claimed that there was strong circumstantial evidence in support of their allegation. They suggested that a plot to kill could be achieved by other means such as

hints and innuendoes, coupled with the choice of a military unit like the SAS which, as indicated by the evidence given by their members at the inquest, was trained to neutralise a target by shooting to kill. Supplying false information of the sort that was actually given to the soldiers in this case would render a fatal shooting likely. The use of the SAS was, in itself, evidence that the killing was intended.

175. They further contended that the Gibraltar police would not have been aware of such an unlawful enterprise. They pointed out that the SAS officer E gave his men secret briefings to which the Gibraltar police were not privy. Moreover, when the soldiers attended the police station after the shootings, they were accompanied by an army lawyer who made it clear that the soldiers were there only for the purpose of handing in their weapons. In addition, the soldiers were immediately flown out of Gibraltar without ever having been interviewed by the police.

176. The applicants referred to the following factors, amongst others, in support of their contention:

- The best and safest method of preventing an explosion and capturing the suspects would have been to stop them and their bomb from entering Gibraltar. The authorities had their photographs and knew their names and aliases as well as the passports they were carrying;

- If the suspects had been under close observation by the Spanish authorities from Malaga to Gibraltar, as claimed by the journalist, Mr Debelius, the hiring of the white Renault car would have been seen and it would have been known that it did not contain a bomb (see paragraph 128 above);

- The above claim is supported by the failure of the authorities to isolate the bomb and clear the area around it in order to protect the public. In Gibraltar there were a large number of soldiers present with experience in the speedy clearance of suspect bomb sites. The only explanation for this lapse in security procedures was that the security services knew that there was no bomb in the car;

- Soldier G, who was sent to inspect the car and who reported that there was a suspect car bomb, admitted during the inquest that he was not an expert in radio signal transmission (see paragraph 53 above). This was significant since the sole basis for his assessment was that the radio aerial looked older than the car. A real expert would have thought of removing the aerial to nullify the radio detonator, which could have been done without destabilising the explosive, as testified by Dr Scott. He would have also known that if the suspects had intended to explode a bomb by means of a radio signal they would not have used a rusty aerial - which would reduce the capacity to receive a clear signal - but a clean one (see paragraph 114 above). It also emerged from his evidence that he was not an explosives expert either. There was thus the possibility that the true role of Soldier G

was to report that he suspected a car bomb in order to induce the Gibraltar police to sign the document authorising the SAS to employ lethal force.

177. In the Government's submission it was implicit in the jury's verdicts of lawful killing that they found as facts that there was no plot to kill the three terrorists and that the operation in Gibraltar had not been conceived or mounted with this aim in view. The aim of the operation was to effect the lawful arrest of the three terrorists and it was for this purpose that the assistance of the military was sought and given. Furthermore, the jury must have also rejected the applicants' contention that Soldiers A, B, C and D had deliberately set out to kill the terrorists, whether acting on express orders or as a result of being given "a nod and a wink".

178. The Commission concluded that there was no evidence to support the applicants' claim of a premeditated plot to kill the suspects.

179. The Court observes that it would need to have convincing evidence before it could conclude that there was a premeditated plan, in the sense developed by the applicants.

180. In the light of its own examination of the material before it, the Court does not find it established that there was an execution plot at the highest level of command in the Ministry of Defence or in the Government, or that Soldiers A, B, C and D had been so encouraged or instructed by the superior officers who had briefed them prior to the operation, or indeed that they had decided on their own initiative to kill the suspects irrespective of the existence of any justification for the use of lethal force and in disobedience to the arrest instructions they had received. Nor is there evidence that there was an implicit encouragement by the authorities or hints and innuendoes to execute the three suspects.

181. The factors relied on by the applicants amount to a series of conjectures that the authorities must have known that there was no bomb in the car. However, having regard to the intelligence information that they had received, to the known profiles of the three terrorists, all of whom had a background in explosives, and the fact that Mr Savage was seen to "fiddle" with something before leaving the car (see paragraph 38 above), the belief that the car contained a bomb cannot be described as either implausible or wholly lacking in foundation.

182. In particular, the decision to admit them to Gibraltar, however open to criticism given the risks that it entailed, was in accordance with the arrest policy formulated by the Advisory Group that no effort should be made to apprehend them until all three were present in Gibraltar and there was sufficient evidence of a bombing mission to secure their convictions (see paragraph 37 above).

183. Nor can the Court accept the applicants' contention that the use of the SAS, in itself, amounted to evidence that the killing of the suspects was intended. In this respect it notes that the SAS is a special unit which has received specialist training in combating terrorism. It was only natural,

therefore, that in light of the advance warning that the authorities received of an impending terrorist attack they would resort to the skill and experience of the SAS in order to deal with the threat in the safest and most informed manner possible.

184. The Court therefore rejects as unsubstantiated the applicants' allegations that the killing of the three suspects was premeditated or the product of a tacit agreement amongst those involved in the operation.

### 3. *Conduct and planning of the operation*

#### (a) **Arguments of those appearing before the Court**

##### (1) *The applicants*

185. The applicants submitted that it would be wrong for the Court, as the Commission had done, to limit its assessment to the question of the possible justification of the soldiers who actually killed the suspects. It must examine the liability of the Government for all aspects of the operation. Indeed, the soldiers may well have been acquitted at a criminal trial if they could have shown that they honestly believed the ungrounded and false information they were given.

186. The soldiers had been told by Officer E (the attack commander) that the three suspects had planted a car bomb in Gibraltar, whereas Soldier G - the bomb-disposal expert - had reported that it was merely a suspect bomb; that it was a remote-control bomb; that each of the suspects could detonate it from anywhere in Gibraltar by the mere flicking of a switch and that they would not hesitate to do so the moment they were challenged. In reality, these "certainties" and "facts" were no more than suspicions or at best dubious assessments. However, they were conveyed as facts to soldiers who not only had been trained to shoot at the merest hint of a threat but also, as emerged from the evidence given during the inquest, to continue to shoot until they had killed their target.

In sum, they submitted that the killings came about as a result of incompetence and negligence in the planning and conduct of the anti-terrorist operation to arrest the suspects as well as a failure to maintain a proper balance between the need to meet the threat posed and the right to life of the suspects.

##### (2) *The Government*

187. The Government submitted that the actions of the soldiers were absolutely necessary in defence of persons from unlawful violence within the meaning of Article 2 para. 2 (a) (art. 2-2-a) of the Convention. Each of them had to make a split-second decision which could have affected a large number of lives. They believed that the movements which they saw the suspects make at the moment they were intercepted gave the impression that

the terrorists were about to detonate a bomb. This evidence was confirmed by other witnesses who saw the movements in question. If it is accepted that the soldiers honestly and reasonably believed that the terrorists upon whom they opened fire might have been about to detonate a bomb by pressing a button, then they had no alternative but to open fire.

188. They also pointed out that much of the information available to the authorities and many of the judgments made by them proved to be accurate. The three deceased were an IRA active service unit which was planning an operation in Gibraltar; they did have in their control a large quantity of explosives which were subsequently found in Spain; and the nature of the operation was a car bomb. The risk to the lives of those in Gibraltar was, therefore, both real and extremely serious.

189. The Government further submitted that in examining the planning of the anti-terrorist operation it should be borne in mind that intelligence assessments are necessarily based on incomplete information since only fragments of the true picture will be known. Moreover, experience showed that the IRA were exceptionally ruthless and skilled in counter-surveillance techniques and that they did their best to conceal their intentions from the authorities. In addition, experience in Northern Ireland showed that the IRA is constantly and rapidly developing new technology. They thus had to take into account the possibility that the terrorists might be equipped with more sophisticated or more easily concealable radio-controlled devices than the IRA had previously been known to use. Finally, the consequences of underestimating the threat posed by the active service unit could have been catastrophic. If they had succeeded in detonating a bomb of the type and size found in Spain, everyone in the car-park would have been killed or badly maimed and grievous injuries would have been caused to those in adjacent buildings, which included a school and an old-people's home.

190. The intelligence assessments made in the course of the operation were reasonable ones to make in the light of the inevitably limited amount of information available to the authorities and the potentially devastating consequences of underestimating the terrorists' abilities and resources. In this regard the Government made the following observations:

- It was believed that a remote-controlled device would be used because it would give the terrorists a better chance of escape and would increase their ability to maximise the proportion of military rather than civilian casualties. Moreover, the IRA had used such a device in Brussels only six weeks before.

- It was assumed that any remote-control such as that produced to the Court would be small enough to be readily concealed about the person. The soldiers themselves successfully concealed radios of a similar size about their persons.

- As testified by Captain Edwards at the inquest, tests carried out demonstrated that a bomb in the car-park could have been detonated from the spot where the terrorists were shot (see paragraph 116 above).

- Past experience strongly suggested that the terrorists' detonation device might have been operated by pressing a single button.

- As explained by Witness O at the inquest, the use of a blocking car would have been unnecessary because the terrorists would not be expected to have any difficulty in finding a free space on 8 March. It was also dangerous because it would have required two trips into Gibraltar, thereby significantly increasing the risk of detection (see paragraph 23 (e) above).

- There was no reason to doubt the bona fides of Soldier G's assessment that the car was a suspect car bomb. In the first place his evidence was that he was quite familiar with car bombs. Moreover, the car had been parked by a known bomb-maker who had been seen to "fiddle" with something between the seats and the car aerial appeared to be out of place. IRA car bombs had been known from experience to have specially-fitted aeriels and G could not say for certain from an external examination that the car did not contain a bomb (see paragraph 48 above). Furthermore, all three suspects appeared to be leaving Gibraltar. Finally the operation of cordoning off the area around the car began only twenty minutes after the above assessment had been made because of the shortage of available manpower and the fact that the evacuation plans were not intended for implementation until 7 or 8 March.

- It would have been reckless for the authorities to assume that the terrorists might not have detonated their bomb if challenged. The IRA were deeply committed terrorists who were, in their view, at war with the United Kingdom and who had in the past shown a reckless disregard for their own safety. There was still a real risk that if they had been faced with a choice between an explosion causing civilian casualties and no explosion at all, the terrorists would have preferred the former.

### (3) *The Commission*

191. The Commission considered that, given the soldiers' perception of the risk to the lives of the people of Gibraltar, the shooting of the three suspects could be regarded as absolutely necessary for the legitimate aim of the defence of others from unlawful violence. It also concluded that, having regard to the possibility that the suspects had brought in a car bomb which, if detonated, would have occasioned the loss of many lives and the possibility that the suspects could have been able to detonate it when confronted by the soldiers, the planning and execution of the operation by the authorities did not disclose any deliberate design or lack of proper care which might have rendered the use of lethal force disproportionate to the aim of saving lives.

**(b) The Court's assessment**

*(1) Preliminary considerations*

192. In carrying out its examination under Article 2 (art. 2) of the Convention, the Court must bear in mind that the information that the United Kingdom authorities received that there would be a terrorist attack in Gibraltar presented them with a fundamental dilemma. On the one hand, they were required to have regard to their duty to protect the lives of the people in Gibraltar including their own military personnel and, on the other, to have minimum resort to the use of lethal force against those suspected of posing this threat in the light of the obligations flowing from both domestic and international law.

193. Several other factors must also be taken into consideration.

In the first place, the authorities were confronted by an active service unit of the IRA composed of persons who had been convicted of bombing offences and a known explosives expert. The IRA, judged by its actions in the past, had demonstrated a disregard for human life, including that of its own members.

Secondly, the authorities had had prior warning of the impending terrorist action and thus had ample opportunity to plan their reaction and, in co-ordination with the local Gibraltar authorities, to take measures to foil the attack and arrest the suspects. Inevitably, however, the security authorities could not have been in possession of the full facts and were obliged to formulate their policies on the basis of incomplete hypotheses. 194. Against this background, in determining whether the force used was compatible with Article 2 (art. 2), the Court must carefully scrutinise, as noted above, not only whether the force used by the soldiers was strictly proportionate to the aim of protecting persons against unlawful violence but also whether the anti-terrorist operation was planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force. The Court will consider each of these points in turn.

*(2) Actions of the soldiers*

195. It is recalled that the soldiers who carried out the shooting (A, B, C and D) were informed by their superiors, in essence, that there was a car bomb in place which could be detonated by any of the three suspects by means of a radio-control device which might have been concealed on their persons; that the device could be activated by pressing a button; that they would be likely to detonate the bomb if challenged, thereby causing heavy loss of life and serious injuries, and were also likely to be armed and to resist arrest (see paragraphs 23, 24-27, and 28-31 above).

196. As regards the shooting of Mr McCann and Ms Farrell, the Court recalls the Commission's finding that they were shot at close range after making what appeared to Soldiers A and B to be threatening movements

with their hands as if they were going to detonate the bomb (see paragraph 132 above). The evidence indicated that they were shot as they fell to the ground but not as they lay on the ground (see paragraphs 59-67 above). Four witnesses recalled hearing a warning shout (see paragraph 75 above). Officer P corroborated the soldiers' evidence as to the hand movements (see paragraph 76 above). Officer Q and Police Constable Parody also confirmed that Ms Farrell had made a sudden, suspicious move towards her handbag (*ibid.*).

197. As regards the shooting of Mr Savage, the evidence revealed that there was only a matter of seconds between the shooting at the Shell garage (McCann and Farrell) and the shooting at Landport tunnel (Savage). The Commission found that it was unlikely that Soldiers C and D witnessed the first shooting before pursuing Mr Savage who had turned around after being alerted by either the police siren or the shooting (see paragraph 132 above).

Soldier C opened fire because Mr Savage moved his right arm to the area of his jacket pocket, thereby giving rise to the fear that he was about to detonate the bomb. In addition, Soldier C had seen something bulky in his pocket which he believed to be a detonating transmitter. Soldier D also opened fire believing that the suspect was trying to detonate the supposed bomb. The soldiers' version of events was corroborated in some respects by Witnesses H and J, who saw Mr Savage spin round to face the soldiers in apparent response to the police siren or the first shooting (see paragraphs 83 and 85 above).

The Commission found that Mr Savage was shot at close range until he hit the ground and probably in the instant as or after he had hit the ground (see paragraph 132 above). This conclusion was supported by the pathologists' evidence at the inquest (see paragraph 110 above).

198. It was subsequently discovered that the suspects were unarmed, that they did not have a detonator device on their persons and that there was no bomb in the car (see paragraphs 93 and 96 above).

199. All four soldiers admitted that they shot to kill. They considered that it was necessary to continue to fire at the suspects until they were rendered physically incapable of detonating a device (see paragraphs 61, 63, 80 and 120 above). According to the pathologists' evidence Ms Farrell was hit by eight bullets, Mr McCann by five and Mr Savage by sixteen (see paragraphs 108-10 above).

200. The Court accepts that the soldiers honestly believed, in the light of the information that they had been given, as set out above, that it was necessary to shoot the suspects in order to prevent them from detonating a bomb and causing serious loss of life (see paragraph 195 above). The actions which they took, in obedience to superior orders, were thus perceived by them as absolutely necessary in order to safeguard innocent lives.

It considers that the use of force by agents of the State in pursuit of one of the aims delineated in paragraph 2 of Article 2 (art. 2-2) of the Convention may be justified under this provision (art. 2-2) where it is based on an honest belief which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken. To hold otherwise would be to impose an unrealistic burden on the State and its law-enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and those of others.

It follows that, having regard to the dilemma confronting the authorities in the circumstances of the case, the actions of the soldiers do not, in themselves, give rise to a violation of this provision (art. 2-2).

201. The question arises, however, whether the anti-terrorist operation as a whole was controlled and organised in a manner which respected the requirements of Article 2 (art. 2) and whether the information and instructions given to the soldiers which, in effect, rendered inevitable the use of lethal force, took adequately into consideration the right to life of the three suspects.

(3) *Control and organisation of the operation*

202. The Court first observes that, as appears from the operational order of the Commissioner, it had been the intention of the authorities to arrest the suspects at an appropriate stage. Indeed, evidence was given at the inquest that arrest procedures had been practised by the soldiers before 6 March and that efforts had been made to find a suitable place in Gibraltar to detain the suspects after their arrest (see paragraphs 18 and 55 above).

203. It may be questioned why the three suspects were not arrested at the border immediately on their arrival in Gibraltar and why, as emerged from the evidence given by Inspector Ullger, the decision was taken not to prevent them from entering Gibraltar if they were believed to be on a bombing mission. Having had advance warning of the terrorists' intentions it would certainly have been possible for the authorities to have mounted an arrest operation. Although surprised at the early arrival of the three suspects, they had a surveillance team at the border and an arrest group nearby (see paragraph 34 above). In addition, the Security Services and the Spanish authorities had photographs of the three suspects, knew their names as well as their aliases and would have known what passports to look for (see paragraph 33 above).

204. On this issue, the Government submitted that at that moment there might not have been sufficient evidence to warrant the detention and trial of the suspects. Moreover, to release them, having alerted them to the authorities' state of awareness but leaving them or others free to try again, would obviously increase the risks. Nor could the authorities be sure that those three were the only terrorists they had to deal with or of the manner in which it was proposed to carry out the bombing.

205. The Court confines itself to observing in this respect that the danger to the population of Gibraltar - which is at the heart of the Government's submissions in this case - in not preventing their entry must be considered to outweigh the possible consequences of having insufficient evidence to warrant their detention and trial. In its view, either the authorities knew that there was no bomb in the car - which the Court has already discounted (see paragraph 181 above) - or there was a serious miscalculation by those responsible for controlling the operation. As a result, the scene was set in which the fatal shooting, given the intelligence assessments which had been made, was a foreseeable possibility if not a likelihood.

The decision not to stop the three terrorists from entering Gibraltar is thus a relevant factor to take into account under this head.

206. The Court notes that at the briefing on 5 March attended by Soldiers A, B, C, and D it was considered likely that the attack would be by way of a large car bomb. A number of key assessments were made. In particular, it was thought that the terrorists would not use a blocking car; that the bomb would be detonated by a radio-control device; that the detonation could be effected by the pressing of a button; that it was likely that the suspects would detonate the bomb if challenged; that they would be armed and would be likely to use their arms if confronted (see paragraphs 23-31 above).

207. In the event, all of these crucial assumptions, apart from the terrorists' intentions to carry out an attack, turned out to be erroneous. Nevertheless, as has been demonstrated by the Government, on the basis of their experience in dealing with the IRA, they were all possible hypotheses in a situation where the true facts were unknown and where the authorities operated on the basis of limited intelligence information.

208. In fact, insufficient allowances appear to have been made for other assumptions. For example, since the bombing was not expected until 8 March when the changing of the guard ceremony was to take place, there was equally the possibility that the three terrorists were on a reconnaissance mission. While this was a factor which was briefly considered, it does not appear to have been regarded as a serious possibility (see paragraph 45 above).

In addition, at the briefings or after the suspects had been spotted, it might have been thought unlikely that they would have been prepared to explode the bomb, thereby killing many civilians, as Mr McCann and Ms Farrell strolled towards the border area since this would have increased the risk of detection and capture (see paragraph 57 above). It might also have been thought improbable that at that point they would have set up the transmitter in anticipation to enable them to detonate the supposed bomb immediately if confronted (see paragraph 115 above).

Moreover, even if allowances are made for the technological skills of the IRA, the description of the detonation device as a "button job" without the qualifications subsequently described by the experts at the inquest (see paragraphs 115 and 131 above), of which the competent authorities must have been aware, over-simplifies the true nature of these devices.

209. It is further disquieting in this context that the assessment made by Soldier G, after a cursory external examination of the car, that there was a "suspect car bomb" was conveyed to the soldiers, according to their own testimony, as a definite identification that there was such a bomb (see paragraphs 48, and 51-52 above). It is recalled that while Soldier G had experience in car bombs, it transpired that he was not an expert in radio communications or explosives; and that his assessment that there was a suspect car bomb, based on his observation that the car aerial was out of place, was more in the nature of a report that a bomb could not be ruled out (see paragraph 53 above).

210. In the absence of sufficient allowances being made for alternative possibilities, and the definite reporting of the existence of a car bomb which, according to the assessments that had been made, could be detonated at the press of a button, a series of working hypotheses were conveyed to Soldiers A, B, C and D as certainties, thereby making the use of lethal force almost unavoidable.

211. However, the failure to make provision for a margin of error must also be considered in combination with the training of the soldiers to continue shooting once they opened fire until the suspect was dead. As noted by the Coroner in his summing-up to the jury at the inquest, all four soldiers shot to kill the suspects (see paragraphs 61, 63, 80 and 120 above). Soldier E testified that it had been discussed with the soldiers that there was an increased chance that they would have to shoot to kill since there would be less time where there was a "button" device (see paragraph 26 above). Against this background, the authorities were bound by their obligation to respect the right to life of the suspects to exercise the greatest of care in evaluating the information at their disposal before transmitting it to soldiers whose use of firearms automatically involved shooting to kill.

212. Although detailed investigation at the inquest into the training received by the soldiers was prevented by the public interest certificates which had been issued (see paragraph 104, at point 1. (iii) above), it is not clear whether they had been trained or instructed to assess whether the use of firearms to wound their targets may have been warranted by the specific circumstances that confronted them at the moment of arrest.

Their reflex action in this vital respect lacks the degree of caution in the use of firearms to be expected from law enforcement personnel in a democratic society, even when dealing with dangerous terrorist suspects, and stands in marked contrast to the standard of care reflected in the instructions in the use of firearms by the police which had been drawn to

their attention and which emphasised the legal responsibilities of the individual officer in the light of conditions prevailing at the moment of engagement (see paragraphs 136 and 137 above).

This failure by the authorities also suggests a lack of appropriate care in the control and organisation of the arrest operation.

213. In sum, having regard to the decision not to prevent the suspects from travelling into Gibraltar, to the failure of the authorities to make sufficient allowances for the possibility that their intelligence assessments might, in some respects at least, be erroneous and to the automatic recourse to lethal force when the soldiers opened fire, the Court is not persuaded that the killing of the three terrorists constituted the use of force which was no more than absolutely necessary in defence of persons from unlawful violence within the meaning of Article 2 para. 2 (a) (art. 2-2-a) of the Convention.

214. Accordingly, the Court finds that there has been a breach of Article 2 (art. 2) of the Convention.

## II. APPLICATION OF ARTICLE 50 (art. 50) OF THE CONVENTION

215. Article 50 (art. 50) of the Convention provides as follows:

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

216. The applicants requested the award of damages at the same level as would be awarded under English law to a person who was unlawfully killed by agents of the State. They also asked, in the event of the Court finding that the killings were both unlawful and deliberate or were the result of gross negligence, exemplary damages at the same level as would be awarded under English law to a relative of a person killed in similar circumstances.

217. As regards costs and expenses, they asked for all costs arising directly or indirectly from the killings, including the costs of relatives and lawyers attending the Gibraltar inquest and all Strasbourg costs. The solicitor's costs and expenses in respect of the Gibraltar inquest are estimated at £56,200 and his Strasbourg costs at £28,800. Counsel claimed £16,700 in respect of Strasbourg costs and expenses.

218. The Government contended that, in the event of a finding of a violation, financial compensation in the form of pecuniary and non-pecuniary damages would be unnecessary and inappropriate.

As regards the costs incurred before the Strasbourg institutions, they submitted that the applicants should be awarded only the costs actually and

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Advisory Opinion**

***I.C.J. Reports 1996, paras. 24-25***

19. In view of what is stated above, the Court concludes that it has the authority to deliver an opinion on the question posed by the General Assembly, and that there exist no "compelling reasons" which would lead the Court to exercise its discretion not to do so.

An entirely different question is whether the Court, under the constraints placed upon it as a judicial organ, will be able to give a complete answer to the question asked of it. However, that is a different matter from a refusal to answer at all.

\* \* \*

20. The Court must next address certain matters arising in relation to the formulation of the question put to it by the General Assembly. The English text asks: "Is the threat or use of nuclear weapons in any circumstance permitted under international law?" The French text of the question reads as follows: "Est-il permis en droit international de recourir à l'emploi d'armes nucléaires en toute circonstance?" It was suggested that the Court was being asked by the General Assembly whether it was permitted to have recourse to nuclear weapons in every circumstance, and it was contended that such a question would inevitably invite a simple negative answer.

The Court finds it unnecessary to pronounce on the possible divergences between the English and French texts of the question posed. Its real objective is clear: to determine the legality or illegality of the threat or use of nuclear weapons.

21. The use of the word "permitted" in the question put by the General Assembly was criticized before the Court by certain States on the ground that this implied that the threat or the use of nuclear weapons would only be permissible if authorization could be found in a treaty provision or in customary international law. Such a starting point, those States submitted, was incompatible with the very basis of international law, which rests upon the principles of sovereignty and consent; accordingly, and contrary to what was implied by use of the word "permitted" States are free to threaten or use nuclear weapons unless it can be shown that they are bound not to do so by reference to a prohibition in either treaty law or customary international law. Support for this contention was found in dicta of the Permanent Court of International Justice in the "Lotus" case that "restrictions upon the independence of States cannot . . . be presumed" and that international law leaves to States "a wide measure of discretion which is only limited in certain cases by prohibitive rules" (*P.C.I.J., Series A, No. 10*, pp. 18 and 19). Reliance was also placed on the dictum of the present Court in the case concerning *Militar. and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*) that:

"in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby

the level of armaments of a sovereign State can be limited" (*I.C.J. Reports 1986*, p. 135, para. 269).

For other States, the invocation of these dicta in the "Lotus" case was inapposite; their status in contemporary international law and applicability in the very different circumstances of the present case were challenged. It was also contended that the above-mentioned dictum of the present Court was directed to the possession of armaments and was irrelevant to the threat or use of nuclear weapons.

Finally, it was suggested that, were the Court to answer the question put by the Assembly, the word "permitted" should be replaced by "prohibited".

22. The Court notes that the nuclear-weapon States appearing before it either accepted, or did not dispute, that their independence to act was indeed restricted by the principles and rules of international law, more particularly humanitarian law (see below, paragraph 86), as did the other States which took part in the proceedings.

Hence, the argument concerning the legal conclusions to be drawn from the use of the word "permitted", and the questions of burden of proof to which it was said to give rise, are without particular significance for the disposition of the issues before the Court.

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23. In seeking to answer the question put to it by the General Assembly, the Court must decide, after consideration of the great corpus of international law norms available to it, what might be the relevant applicable law.

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24. Some of the proponents of the illegality of the use of nuclear weapons have argued that such use would violate the right to life as guaranteed in Article 6 of the International Covenant on Civil and Political Rights, as well as in certain regional instruments for the protection of human rights. Article 6, paragraph 1, of the International Covenant provides as follows: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

In reply, others contended that the International Covenant on Civil and Political Rights made no mention of war or weapons, and it had never been envisaged that the legality of nuclear weapons was regulated by that instrument. It was suggested that the Covenant was directed to the protection of human rights in peacetime, but that questions relating to unlawful loss of life in hostilities were governed by the law applicable in armed conflict.

25. The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.

26. Some States also contended that the prohibition against genocide, contained in the Convention of 9 December 1948 on the Prevention and Punishment of the Crime of Genocide, is a relevant rule of customary international law which the Court must apply. The Court recalls that in Article II of the Convention genocide is defined as

"any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group."

It was maintained before the Court that the number of deaths occasioned by the use of nuclear weapons would be enormous; that the victims could, in certain cases, include persons of a particular national, ethnic, racial or religious group; and that the intention to destroy such groups could be inferred from the fact that the user of the nuclear weapon would have omitted to take account of the well-known effects of the use of such weapons.

The Court would point out in that regard that the prohibition of genocide would be pertinent in this case if the recourse to nuclear weapons did indeed entail the element of intent, towards a group as such, required by the provision quoted above. In the view of the Court, it would only be possible to arrive at such a conclusion after having taken due account of the circumstances specific to each case.

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27. In both their written and oral statements, some States furthermore argued that any use of nuclear weapons would be unlawful by reference to existing norms relating to the safeguarding and protection of the environment, in view of their essential importance.

Specific references were made to various existing international treaties and instruments. These included Additional Protocol I of 1977 to the Geneva Conventions of 1949, Article 35, paragraph 3, of which prohibits the employment of "methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment"; and the Convention of 18 May 1977 on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, which prohibits the use of weapons which have "widespread, long-lasting or severe effects" on the environment (Art. 1). Also cited were Principle 21 of the Stockholm Declaration of 1972 and Principle 2 of the Rio Declaration of 1992 which express the common conviction of the States concerned that they have a duty

"to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction".

These instruments and other provisions relating to the protection and safeguarding of the environment were said to apply at all times, in war as well as in peace, and it was contended that they would be violated by the use of nuclear weapons whose consequences would be widespread and would have transboundary effects.

28. Other States questioned the binding legal quality of these precepts of environmental law; or, in the context of the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, denied that it was concerned at all with the use of nuclear weapons in hostilities; or, in the case of Additional Protocol I, denied that they were generally bound by its terms, or recalled that they had reserved their position in respect of Article 35, paragraph 3, thereof.

It was also argued by some States that the principal purpose of environmental treaties and norms was the protection of the environment in time of peace. It was said that those treaties made no mention of nuclear weapons. It was also pointed out that warfare in general, and nuclear warfare in particular, were not mentioned in their texts and that it would be destabilizing to the rule of law and to confidence in international negotiations if those treaties were now interpreted in such a way as to prohibit the use of nuclear weapons.

29. The Court recognizes that the environment is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment. The Court also recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The



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treatment was of such a serious and cruel nature that it can only be described as torture.

In view of the gravity of this conclusion, it is not necessary for the Court to examine the applicant's complaints of other forms of ill-treatment.

In conclusion, there has been a violation of Article 3 of the Convention (art. 3).

### **B. Alleged violation of Article 5 para. 3 of the Convention (art. 5-3)**

65. The applicant, with whom the Commission agreed, claimed that his detention violated Article 5 para. 3 of the Convention (art. 5-3). The relevant parts of Article 5 (art. 5) state:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence ...

...

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article (art. 5-1-c) shall be brought promptly before a judge or other officer authorised by law to exercise judicial power ..."

66. The Court recalls its decision in the case of Brogan and Others v. the United Kingdom (judgment of 29 November 1988, Series A no. 145-B, p. 33, para. 62), that a period of detention without judicial control of four days and six hours fell outside the strict constraints as to time permitted by Article 5 para. 3 (art. 5-3). It clearly follows that the period of fourteen or more days during which Mr Aksoy was detained without being brought before a judge or other judicial officer did not satisfy the requirement of "promptness".

67. However, the Government submitted that, despite these considerations, there had been no violation of Article 5 para. 3 (art. 5-3), in view of Turkey's derogation under Article 15 of the Convention (art. 15), which states:

"1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under [the] Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2 (art. 2), except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 (art. 3, art. 4-1, art. 7) shall be made under this provision (art. 15-1).

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed."

The Government reminded the Court that Turkey had derogated from its obligations under Article 5 of the Convention (art. 5) on 5 May 1992 (see paragraph 33 above).

#### *1. The Court's approach*

68. The Court recalls that it falls to each Contracting State, with its responsibility for "the life of [its] nation", to determine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle better placed than the international judge to decide both on the presence of such an emergency and on the nature and scope of the derogations necessary to avert it. Accordingly, in this matter a wide margin of appreciation should be left to the national authorities.

Nonetheless, Contracting Parties do not enjoy an unlimited discretion. It is for the Court to rule whether, *inter alia*, the States have gone beyond the "extent strictly required by the exigencies" of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision. In exercising this supervision, the Court must give appropriate weight to such relevant factors as the nature of the rights affected by the derogation and the circumstances leading to, and the duration of, the emergency situation (see the Brannigan and McBride v. the United Kingdom judgment of 26 May 1993, Series A no. 258-B, pp. 49-50, para. 43).

#### *2. Existence of a public emergency threatening the life of the nation*

69. The Government, with whom the Commission agreed on this point, maintained that there was a public emergency "threatening the life of the nation" in South-East Turkey. The applicant did not contest the issue, although he submitted that, essentially, it was a matter for the Convention organs to decide.

70. The Court considers, in the light of all the material before it, that the particular extent and impact of PKK terrorist activity in South-East Turkey has undoubtedly created, in the region concerned, a "public emergency threatening the life of the nation" (see, *mutatis mutandis*, the Lawless v. Ireland judgment of 1 July 1961, Series A no. 3, p. 56, para. 28, the

above-mentioned Ireland v. the United Kingdom judgment, p. 78, para. 205, and the above-mentioned Brannigan and McBride judgment, p. 50, para. 47).

3. *Whether the measures were strictly required by the exigencies of the situation*

a) **The length of the unsupervised detention**

71. The Government asserted that the applicant had been arrested on 26 November 1992 along with thirteen others on suspicion of aiding and abetting PKK terrorists, being a member of the Kiziltepe branch of the PKK and distributing PKK tracts (see paragraph 12 above). He was held in custody for fourteen days, in accordance with Turkish law, which allows a person detained in connection with a collective offence to be held for up to thirty days in the state of emergency region (see paragraph 29 above).

72. They explained that the place in which the applicant was arrested and detained fell within the area covered by the Turkish derogation (see paragraphs 31-33 above). This derogation was necessary and justified, in view of the extent and gravity of PKK terrorism in Turkey, particularly in the South East. The investigation of terrorist offences presented the authorities with special problems, as the Court had recognised in the past, because the members of terrorist organisations were expert in withstanding interrogation, had secret support networks and access to substantial resources. A great deal of time and effort was required to secure and verify evidence in a large region confronted with a terrorist organisation that had strategic and technical support from neighbouring countries. These difficulties meant that it was impossible to provide judicial supervision during a suspect's detention in police custody.

73. The applicant submitted that he was detained on 24 November 1992 and released on 10 December 1992. He alleged that the post-dating of arrests was a common practice in the state of emergency region.

74. While he did not present detailed arguments against the validity of the Turkish derogation as a whole, he questioned whether the situation in South-East Turkey necessitated the holding of suspects for fourteen days or more without judicial supervision. He submitted that judges in South-East Turkey would not be put at risk if they were permitted and required to review the legality of detention at shorter intervals.

75. The Commission could not establish with any certainty whether the applicant was first detained on 24 November 1992, as he claimed, or on 26 November 1992, as alleged by the Government, and it therefore proceeded on the basis that he was held for at least fourteen days without being brought before a judge or other officer authorised by law to exercise judicial power.

76. The Court would stress the importance of Article 5 (art. 5) in the Convention system: it enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty. Judicial control of interferences by the executive with the individual's right to liberty is an essential feature of the guarantee embodied in Article 5 para. 3 (art. 5-3), which is intended to minimise the risk of arbitrariness and to ensure the rule of law (see the above-mentioned Brogan and Others judgment, p. 32, para. 58). Furthermore, prompt judicial intervention may lead to the detection and prevention of serious ill-treatment, which, as stated above (paragraph 62), is prohibited by the Convention in absolute and non-derogable terms.

77. In the Brannigan and McBride judgment (cited at paragraph 68 above), the Court held that the United Kingdom Government had not exceeded their margin of appreciation by derogating from their obligations under Article 5 of the Convention (art. 5) to the extent that individuals suspected of terrorist offences were allowed to be held for up to seven days without judicial control.

In the instant case, the applicant was detained for at least fourteen days without being brought before a judge or other officer. The Government have sought to justify this measure by reference to the particular demands of police investigations in a geographically vast area faced with a terrorist organisation receiving outside support (see paragraph 72 above).

78. Although the Court is of the view - which it has expressed on several occasions in the past (see, for example, the above-mentioned Brogan and Others judgment) - that the investigation of terrorist offences undoubtedly presents the authorities with special problems, it cannot accept that it is necessary to hold a suspect for fourteen days without judicial intervention. This period is exceptionally long, and left the applicant vulnerable not only to arbitrary interference with his right to liberty but also to torture (see paragraph 64 above). Moreover, the Government have not adduced any detailed reasons before the Court as to why the fight against terrorism in South-East Turkey rendered judicial intervention impracticable.

b) **Safeguards**

79. The Government emphasised that both the derogation and the national legal system provided sufficient safeguards to protect human rights. Thus, the derogation itself was limited to the strict minimum required for the fight against terrorism; the permissible length of detention was prescribed by law and the consent of a public prosecutor was necessary if the police wished to remand a suspect in custody beyond these periods. Torture was prohibited by Article 243 of the Criminal Code (see paragraph 24 above) and Article 135 (a) stipulated that any statement made in consequence of the administration of torture or any other form of ill-treatment would have no evidential weight.

80. The applicant pointed out that long periods of unsupervised detention, together with the lack of safeguards provided for the protection of prisoners, facilitated the practice of torture. Thus, he was tortured with particular intensity on his third and fourth days in detention, and was held thereafter to allow his injuries to heal; throughout this time he was denied access to either a lawyer or a doctor. Moreover, he was kept blindfolded during interrogation, which meant that he could not identify those who mistreated him. The reports of Amnesty International ("Turkey: a Policy of Denial", February 1995), the European Committee for the Prevention of Torture and the United Nations Committee against Torture (cited at paragraph 46 above) showed that the safeguards contained in the Turkish Criminal Code, which were in any case inadequate, were routinely ignored in the state of emergency region.

81. The Commission considered that the Turkish system offered insufficient safeguards to detainees, for example there appeared to be no speedy remedy of habeas corpus and no legally enforceable rights of access to a lawyer, doctor, friend or relative. In these circumstances, despite the serious terrorist threat in South-East Turkey, the measure which allowed the applicant to be detained for at least fourteen days without being brought before a judge or other officer exercising judicial functions exceeded the Government's margin of appreciation and could not be said to be strictly required by the exigencies of the situation.

82. In its above-mentioned Brannigan and McBride judgment (cited at paragraph 68), the Court was satisfied that there were effective safeguards in operation in Northern Ireland which provided an important measure of protection against arbitrary behaviour and incommunicado detention. For example, the remedy of habeas corpus was available to test the lawfulness of the original arrest and detention, there was an absolute and legally enforceable right to consult a solicitor forty-eight hours after the time of arrest and detainees were entitled to inform a relative or friend about their detention and to have access to a doctor (op. cit., pp. 55-56, paras. 62-63).

83. In contrast, however, the Court considers that in this case insufficient safeguards were available to the applicant, who was detained over a long period of time. In particular, the denial of access to a lawyer, doctor, relative or friend and the absence of any realistic possibility of being brought before a court to test the legality of the detention meant that he was left completely at the mercy of those holding him.

84. The Court has taken account of the unquestionably serious problem of terrorism in South-East Turkey and the difficulties faced by the State in taking effective measures against it. However, it is not persuaded that the exigencies of the situation necessitated the holding of the applicant on suspicion of involvement in terrorist offences for fourteen days or more in incommunicado detention without access to a judge or other judicial officer.

#### 4. *Whether the Turkish derogation met the formal requirements of Article 15 para. 3 (art. 15-3)*

85. None of those appearing before the Court contested that the Turkish Republic's notice of derogation (see paragraph 33 above) complied with the formal requirements of Article 15 para. 3 (art. 15-3), namely to keep the Secretary General of the Council of Europe fully informed of the measures which were taken in derogation from the Convention and the reasons therefor.

86. The Court is competent to examine this issue of its own motion (see the above-mentioned Lawless judgment, p. 55, para. 22, and the above-mentioned Ireland v. the United Kingdom judgment, p. 84, para. 223), and in particular whether the Turkish notice of derogation contained sufficient information about the measure in question, which allowed the applicant to be detained for at least fourteen days without judicial control, to satisfy the requirements of Article 15 para. 3 (art. 15-3). However, in view of its finding that the impugned measure was not strictly required by the exigencies of the situation (see paragraph 84 above), the Court finds it unnecessary to rule on this matter.

#### 5. *Conclusion*

87. In conclusion, the Court finds that there has been a violation of Article 5 para. 3 of the Convention (art. 5-3).

#### **C. Alleged lack of remedy**

88. The applicant complained that he was denied access to a court, in violation of Article 6 para. 1 of the Convention (art. 6-1), which provides, so far as is relevant:

"In the determination of his civil rights ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law

..."

In addition, he claimed that there was no effective domestic remedy available to him, contrary to Article 13 of the Convention (art. 13), which states:

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

89. The Government contended that, since the applicant had never even attempted to bring proceedings, it was not open to him to complain that he had been denied access to a court. They further argued, as they had in

**Human Rights Committee**

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Views of 18 October 2000**

**Communication No. 806/1998**



**International Covenant  
on Civil and  
Political Rights**

Distr.  
RESTRICTED\*

CCPR/C/70/D/806/1998  
5 December 2000

Original: ENGLISH

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HUMAN RIGHTS COMMITTEE  
Seventieth session  
16 October – 3 November 2000

IEWS

Communication No. 806/1998

Submitted by:  
Mr. Eversley Thompson (represented  
by Mr. Saul Lehrfreund of Simons,  
Muirhead & Burton, London)

Alleged victim:  
The author

State party:  
St. Vincent & the Grenadines

Date of communication:  
17 February 1998

Prior decisions:  
Special Rapporteur's combined rule  
86/91 decision, transmitted to the  
State party on 19 February 1998 (not  
issued in document form)

Date of adoption of Views:  
18 October 2000

On 18 October 2000, the Human Rights Committee adopted its Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 806/1998. The text of the Views is appended to the present document.

[ANNEX]

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\* Made public by decision of the Human Rights Committee.

ANNEX

VIEWS OF THE HUMAN RIGHTS COMMITTEE UNDER ARTICLE 5, PARAGRAPH 4, OF  
THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT  
ON CIVIL AND POLITICAL RIGHTS

- Seventieth session -  
concerning

Communication No. 806/1998\*\*

Submitted by: Mr. Eversley Thompson (represented by  
Mr. Saul Lehrfreund of Simons, Muirhead  
& Burton, London)

Alleged victim: The author  
State party: St. Vincent & the Grenadines

Date of communication: 17 February 1998

Prior decisions: Special Rapporteur's combined rule  
86/91 decision, transmitted to the State  
party on 19 February 1998 (not issued in  
document form)

The Human Rights Committee, established under article 28 of the International Covenant on Civil  
and Political Rights,

Meeting on 18 October 2000

Having concluded its consideration of communication No. 806/1998 submitted to the Human Rights  
Committee by Mr. Eversley Thompson under the Optional Protocol to the International Covenant on Civil  
and Political Rights,

Having taken into account all written information made available to it by the author of the  
communication, and the State party,

Adopts the following:

\*\* The following members of the Committee participated in the examination of the case: Mr.  
Abdefattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Lord Colville, Ms.  
Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Mr.  
Rajssoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr.  
Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakaria. The text of two individual opinions  
signed by five Committee members is appended to this document.

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Eversley Thompson, a Vincentian national born on 7 July 1962. He  
is represented by Saul Lehrfreund of Simons, Muirhead & Burton, London. Counsel claims that the author  
is a victim of violations of articles 6(1) and (4), 7, 10(1), 14(1) and 26 of the Covenant.

The facts as submitted by counsel

2.1 The author was arrested on 19 December 1993 and charged with the murder of D'Andre Olliviere,  
a four-year old girl who had disappeared the day before. The High Court (Criminal Division) convicted  
him as charged and sentenced him to death on 21 June 1995. His appeal was dismissed on 15 January  
1996. In his petition for special leave to appeal to the Judicial Committee of the Privy Council, counsel  
raised five grounds of appeal, relating to the admissibility of the author's confession statements and to  
the directions of the judge to the jury. On 6 February 1997, the Judicial Committee of the Privy Council  
granted leave to appeal, and after having remitted the case to the local Court of Appeal on one issue,  
it rejected the appeal on 16 February 1998. With this, all domestic remedies are said to have been  
exhausted.

2.2 At trial, the evidence for the prosecution was that the little girl disappeared on 18 December 1993  
and that the author had been seen hiding under a tree near her home. Blood, faecal material and the  
girl's panty were found on the beach near the family's home. The girl's body was never found.

2.3 According to the prosecution, police officers apprehended the author at his home early in the  
morning of 19 December 1993. They showed him a red slipper found the evening before and he said  
that it was his. After having been brought to the police station, the author confessed that he had sexually  
abused the girl and then thrown the girl into the sea from the beach. He went with the policemen to point  
out the place where it happened. Upon return, he made a confession statement.

2.4 The above evidence by the police was subject to a *voir dire* during trial. The author contested ever  
having made a statement. He testified that the police officers had beaten him at home and at the police  
station, and that he had been given electric shocks and had been struck with a gun and a shovel. His  
parents gave evidence that they had seen him on 20 December 1993 with his face and hands badly  
swollen. After the *voir dire*, the judge ruled that the statement was voluntary and admitted it into  
evidence. Before the jury, the author gave sworn evidence and again challenged the statement.

The complaint

3.1 Counsel claims that the imposition of the sentence of death in the author's case constitutes cruel and  
unusual punishment, because under the law of St. Vincent the death sentence is the mandatory sentence  
for murder. He also points out that no criteria exist for the exercise of the power of pardon, nor has the  
convicted person the opportunity to make any comments on any information which the Governor-

General may have received in this respect<sup>1</sup>. In this context, counsel argues that the death sentence should be reserved for the most serious of crimes and that a sentence which is indifferently imposed in every category of capital murder fails to retain a proportionate relationship between the circumstances of the actual crime and the offender and the punishment. It therefore becomes cruel and unusual punishment. He argues therefore that it constitutes a violation of article 7 of the Covenant.

3.2 The above is also said to constitute a violation of article 26 of the Covenant, since the mandatory nature of the death sentence does not allow the judge to impose a lesser sentence taking into account any mitigating circumstances. Furthermore, considering that the sentence is mandatory, the discretion at the stage of the exercise of the prerogative of mercy violates the principle of equality before the law.

3.3 Counsel further claims that the mandatory nature of the death sentence violates the author's rights under article 6(1) & (4).

3.4 Counsel also claims that article 14(1) has been violated because the Constitution of St. Vincent does not permit the Applicant to allege that his execution is unconstitutional as inhuman or degrading or cruel or unusual. Further, it does not afford a right to a hearing or a trial on the question whether the penalty should be either imposed or carried out.

3.5 Counsel submits that the following conditions in Kingstown prison amount to violations of articles 7 and 10(1) in relation to the author. He is detained in a cell measuring 8 feet by 6 feet; there is a light in his cell that remains constantly lit 24 hours a day; there is no furniture or bedding in his cell; his only possessions in his cell are a blanket and a slop pail and a cup; there is no adequate ventilation as there is no window in his cell; sanitation is extremely poor and inadequate; food is of bad quality and unpalatable and his diet consists of rice every day; he is allowed to exercise three times a week for half an hour in the dormitory. Counsel also alleges that the conditions in prison are in breach of the domestic

<sup>1</sup> Under section 65 of the Constitution, the Governor General may exercise the prerogative of mercy, in accordance with the advice of the Minister who acts as Chairman of the Advisory Committee on the prerogative of mercy. The Advisory Committee consists of the Chairman (one of the Cabinet Ministers), the Attorney-General and three to four other members appointed by the Governor General on the advice of the Prime Minister. Of the three or four Committee members at least one shall be a Minister and one other shall be a medical practitioner. Before deciding on the exercise of the prerogative of mercy in any death penalty case, the Committee shall obtain a written report of the case from the trial judge (or the Chief Justice, if a report from the trial judge cannot be obtained) together with such other information derived from the record of the case or elsewhere as he may require.

prison rules of St. Vincent and the Grenadines. Counsel also alleges that the author's punishment is being aggravated by these conditions.

3.6 Counsel further argues that the author's detention in these conditions renders unlawful the carrying out of his sentence of death.

3.7 Counsel also claims a violation of article 14(1) because no legal aid is available for constitutional motions and the author, who is indigent, is therefore denied the right of access to court guaranteed by section 16(1) of the Constitution.

The Committee's request for interim measures of protection

4.1 On 19 February 1998, the communication was submitted to the State party, with the request to provide information and observations in respect of both admissibility and merits of the claims, in accordance with rule 91, paragraph 2, of the Committee's rules of procedure. The State party was also requested, under rule 86 of the Committee's rules of procedure, not to carry out the death sentence against the author, while his case was under consideration by the Committee.

4.2 On 16 September 1999, the Committee received information to the effect that a warrant for the author's execution had been issued. After having sent an immediate message to the State party, reminding it of the rule 86 request in the case, the State party informed the Committee that it was not aware of having received the request nor the communication concerned. Following an exchange of correspondence between the Special Rapporteur for New Communications and the State party's representatives, and after a constitutional motion had been presented to the High Court of St. Vincent and the Grenadines, the State party agreed to grant the author a stay of execution in order to allow the Committee to examine his communication.

The State party's submission

5.1 By submission of 16 November 1999, the State party notes that the author has sought redress for his grievances by way of constitutional motion, which was dismissed by the High Court on 24 September 1999. The Court rejected declarations sought by counsel for the author that he was tried without due process and the protection of the law, that the carrying out of the death sentence was unconstitutional because it constituted inhuman or degrading punishment, that the prison conditions amounted to inhuman and degrading treatment, and that the author had a legal right to have his petition considered by the United Nations Human Rights Committee. The State party submits that, in order to expedite the examination by the Committee, it will raise no objection to the admissibility of the communication for reasons of non-exhaustion of domestic remedies.

5.2 The State party submits that the mandatory nature of the death penalty is allowed under international law. It explains that a distinction is made in the criminal law in St. Vincent and the Grenadines between different types of unlawful killing. Killings which amount to manslaughter are not subject to the mandatory death penalty. It is only for the offence of murder that the death sentence is mandatory.

Murder is the most serious crime known to law. For these reasons the State party submits that the death penalty in the present case was imposed in accordance with article 6(2) of the Covenant. The State party also denies that a violation of article 7 occurred in this respect, since the reservation of the death penalty to the most serious crime known to law retains the proportionate relationship between the circumstances of the crime and the penalty. The State party likewise rejects counsel's claim that there has been discrimination within the meaning of article 26 of the Covenant.

5.3 The State party also notes that the author had a fair trial, and that his conviction was reviewed and upheld by the Court of Appeal and the Privy Council. Accordingly, the death penalty imposed upon the author does not constitute arbitrary deprivation of his life within the meaning of article 6(1) of the Covenant.

5.4 As to the alleged violation of article 6(4) of the Covenant, the State party notes that the author has the right to seek pardon or commutation and that the Governor General may exercise the prerogative of mercy pursuant to sections 65 and 66 of the Constitution in the light of advice received from the Advisory Committee.

5.5 With regard to prison conditions and treatment in prison, the State party notes that the author has not shown any evidence that his conditions of detention amount to torture or cruel, inhuman or degrading treatment or punishment. Nor is there any evidence that he was treated in violation of article 10(1) of the Covenant. According to the State party, the general statements made in the communication do not evidence any specific breach of the relevant articles. Moreover, the State party notes that this matter was considered by the High Court when hearing the constitutional motion, and that the Court rejected it. The State party refers to the Committee's constant jurisprudence that the Committee is not competent to reevaluate the facts and evidence considered by the Court, and concludes that the author's claim should be rejected. The State party further refers to the Committee's jurisprudence that prolonged periods of detention cannot be considered to constitute cruel, inhuman or degrading treatment if the convicted person is merely availing himself of appellate remedies.

5.6 The State party also argues that even if there had been a violation of the author's rights in relation to prison conditions, this would not render the carrying out of the death sentence unlawful and a violation of articles 6 and 7 of the Covenant. In this context, the State party makes reference to the Privy Council's decision in *Thomas and Hilaire v Attorney General of Trinidad and Tobago*, where the Privy Council considered that even if the prison conditions constituted a breach of the appellants' constitutional rights, commutation of the sentence would not be the appropriate remedy and the fact that the conditions in which the condemned man had been kept prior to execution infringed his constitutional rights did not make a lawful sentence unconstitutional.

5.7 As to counsel's claim that the author's right to access to the constitutional court was violated, the State party notes that the author has indeed presented and pursued a constitutional motion in the High Court, during which he was represented by experienced local counsel. After his motion was dismissed, the author gave notice of appeal. On 13 October 1999, he withdrew his appeal. During these proceedings he was again represented by the same counsel. The State party submits that this is evidence

that there has been no conduct on the part of the State which has had the practical effect of denying the author access to court.

#### Counsel's comments

6.1 In his comments, counsel maintains that the author's death sentence violates various provisions of the Covenant because he was sentenced to death without the sentencing judge considering and giving effect to his character, his personal circumstances or those of the crime. In this connection, counsel refers to the report by the Inter-American Commission on Human Rights in the case of *Hilaire v. Trinidad and Tobago*<sup>2</sup>.

6.2 With respect to the prerogative of mercy, counsel argues that the State party has not appreciated that the right to apply for pardon must be an effective right. In the author's case, he cannot effectively present his case for mercy and thus the right to apply for mercy is theoretical and illusory. The author cannot participate in the process, and is merely informed of the outcome. According to counsel, this means that the decisions on mercy are taken on an arbitrary basis. In this connection, counsel notes that the Advisory Committee does not interview the prisoner or his family. Moreover, no opportunity is given to the condemned person to respond to possible aggravating information which the Advisory Committee may have in its possession.

6.3 With regard to the prison conditions, counsel produces an affidavit sworn by the author, dated 30 December 1999. He states that his cell in Kingstown prison, where he was detained from 21 June 1995 to 10 September 1999, was 8 feet by 6 feet in size, and that the only articles with which he was supplied in his cell were a blanket, a slop pail, a small water container and a bible. He slept on the floor. In the cell there was no electric lighting, but there was an electric light bulb in the corridor adjacent to the cell, which was kept on night and day. He states that he was unable to read because of the poor lighting. He was allowed exercise for at least three times a week in the corridor adjacent to his cell. He did not exercise in the open air and did not get any sunlight. Guards were always present. The food was unpalatable and there was little variety (mainly rice). During a fire on 29 July 1999 caused by a prison riot, he was locked in his cell and only managed to save himself when other prisoners broke in through the roof. He is only allowed to wear prison clothes, which are rough on the skin. On 10 September 1999, he was placed in a cell in Fort Charlotte, an 18<sup>th</sup> century prison. The cell in which he is now held is moist and the floor is damp. He is supplied with a small mattress. The cell is dark night and day, as the light of the electric bulb in the corridor does not penetrate into the cell. He is given exercise daily but inside the building and he does not get any sunlight. Because of the damp conditions, his legs started swelling and he reported this to the authorities, who took him to hospital for examination on 29 December 1999. He adds that he was scheduled to be hanged on 13 September 1999 and that he was taken from his cell to the gallows and that his lawyer was able to obtain a stay of execution only fifteen minutes before the scheduled execution. He states that he has been traumatised and disoriented.

<sup>2</sup> Commission report No. 66/99, case No. 11.816, approved by the Commission on 21 April 1999, not made public.

6.4 Concerning the author's right of access to court, counsel submits that the fact that the author was fortunate enough to persuade counsel to take his recent constitutional case *pro bono* does not relieve the State party of its obligation to provide legal aid for constitutional motions.

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

7.2 The Committee notes that it appears from the facts before it that the author filed a constitutional motion before the High Court of St. Vincent and the Grenadines. The Committee considers therefore that the author has failed to substantiate, for purposes of admissibility, his claim under article 14(1) of the Covenant, that the State party denied the author the right of access to court in this respect.

7.3 The Committee considers that the author has sufficiently substantiated, for purposes of admissibility, that the remaining claims may raise issues under articles 6, 7, 10 and 26 of the Covenant. The Committee proceeds therefore without further delay to the consideration of the merits of these claims.

Consideration of the merits

8.1 The Human Rights Committee has considered the present communication in the light of all the written information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

8.2 Counsel has claimed that the mandatory nature of the death sentence and its application in the author's case, constitutes a violation of articles 6(1), 7 and 26 of the Covenant. The State party has replied that the death sentence is only mandatory for murder, which is the most serious crime under the law, and that this in itself means that it is a proportionate sentence. The Committee notes that the mandatory imposition of the death penalty under the laws of the State party is based solely upon the category of crime for which the offender is found guilty, without regard to the defendant's personal circumstances or the circumstances of the particular offense. The death penalty is mandatory in all cases of "murder" (intentional acts of violence resulting in the death of a person). The Committee considers that such a system of mandatory capital punishment would deprive the author of the most fundamental of rights, the right to life, without considering whether this exceptional form of punishment is appropriate in the circumstances of his or her case. The existence of a right to seek pardon or commutation, as required by article 6, paragraph 4, of the Covenant, does not secure adequate protection to the right to life, as these discretionary measures by the executive are subject to a wide range of other considerations compared to appropriate judicial review of all aspects of a criminal case. The Committee finds that the carrying out of the death penalty in the author's case would constitute an arbitrary deprivation of his life in violation of article 6, paragraph 1, of the Covenant.

8.3 The Committee is of the opinion that counsel's arguments related to the mandatory nature of the death penalty, based on articles 6(2), 7, 14(5) and 26 of the Covenant do not raise issues that would be separate from the above finding of a violation of article 6(1).

8.4 The author has claimed that his conditions of detention are in violation of articles 7 and 10(1) of the Covenant, and the State party has denied this claim in general terms and has referred to the judgement by the High Court, which rejected the author's claim. The Committee considers that, although it is in principle for the domestic courts of the State party to evaluate facts and evidence in a particular case, it is for the Committee to examine whether or not the facts as established by the Court constitute a violation of the Covenant. In this respect, the Committee notes that the author had claimed before the High Court that he was confined in a small cell, that he had been provided only with a blanket and a slop pail, that he slept on the floor, that an electric light was on day and night, and that he was allowed out of the cell into the yard one hour a day. The author has further alleged that he does not get any sunlight, and that he is at present detained in a moist and dark cell. The State party has not contested these claims. The Committee finds that the author's conditions of detention constitute a violation of article 10(1) of the Covenant. In so far as the author means to claim that the fact that he was taken to the gallows after a warrant for his execution had been issued and that he was removed only fifteen minutes before the scheduled execution constituted cruel, inhuman or degrading treatment, the Committee notes that nothing before the Committee indicates that the author was not removed from the gallows immediately after the stay of execution had been granted. The Committee therefore finds that the facts before it do not disclose a violation of article 7 of the Covenant in this respect.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights, is of the view that the facts before it disclose a violation of articles 6(1) and 10(1) of the Covenant.

10. Under article 2, paragraph 3(a), of the Covenant, the State party is under the obligation to provide Mr. Thompson with an effective and appropriate remedy, including commutation. The State party is under an obligation to take measures to prevent similar violations in the future.

11. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within ninety days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be translated into Arabic, Chinese and Russian as part of the Committee's Annual Report to the General Assembly.]

Appendix

Individual opinion by Lord Colville (dissenting)

The majority decision is based solely on the law which imposes a mandatory death sentence upon the category of crime, murder, for which the offender is found guilty, without regard to the defendant's personal circumstances or the circumstances of the particular offence. This conclusion has been reached without any assessment of either such set of circumstances, which exercise would in any case be beyond the Committee's jurisdiction. The majority, therefore, have founded their opinion on the contrast between the common law definition of murder, which applies in the State, and a gradation of categories of homicide in civil law jurisdictions and, by statute, in some States whose criminal law derives from common law. Thus the majority decision is not particular to this author but has wide application on a generalised basis. The point has now for the first time been taken in this communication despite Views on numerous earlier communications arising under (inter alia) a mandatory death sentence for murder; on those occasions no such stance was adopted.

In finding, in this communication, that the carrying out of the death penalty in the author's case would constitute an arbitrary deprivation of his life in violation of article 6.1 of the Covenant, the wrong starting-point is chosen. The terms of paragraph 8.2 of the majority decision fail to analyse the carefully-constructed provisions of the entirety of article 6. The article begins from a position in which it is accepted that capital punishment, despite the exhortation in article 6.6, remains an available sentence. It then specifies safeguards, and these are commented on as follows: -

- (a) The inherent right to life is not to be subject to arbitrary deprivation. The subsequent provisions of the article state the requirements which prevent arbitrariness but which are not addressed by the majority except for article 6.4, as to which there now exists jurisprudence which appears to have been overlooked: (see below);
- (b) Article 6.2 underlines the basic flaw in the majority's reasoning. There is no dispute that murder is a most serious crime; that is, however, subject to the majority's view that a definition of murder in common law may encompass offences which are not to be described as "most serious." Whilst this does not form part of their decision in those terms, the inevitable implication is that "murder" must be redefined.

The second point on article 6.2 emphasises that the death penalty can only be carried out pursuant to a final decision by a competent court. It follows inescapably from this that the actual law which compels the trial judge to pass a sentence of death when a person is convicted of murder does not and cannot in itself offend article 6.1 and certainly not because factual and personal circumstances are ignored: if the prosecuting authority decides, in a homicide case, to bring a charge of murder, a number of avenues immediately exist for the defence to counter, in the trial court, this accusation. These include -

- self-defence: unless the prosecution can satisfy the tribunal of fact that the defendant's

actions, which led to the death, exceeded a proportional response, in his own perception of the circumstances, to the threat with which he was faced, the defendant must be completely acquitted of any crime;

- other circumstances, surrounding the crime and relating fundamentally to the prevailing situation or the defendant's state of mind, enable the tribunal of fact to find that, if these defences have not been disproved by the prosecution (the onus is never on the defendant), the charge of murder can be reduced to manslaughter which does not carry a mandatory death sentence. According to the approach adopted by the defence and the evidence adduced by the parties, the judge is bound to explain these issues; if this is not done in accordance with legal precedent the failure will lead to any conviction being quashed;
- the issues which may thus be raised by the defence need only be exemplified: one is diminished responsibility by the defendant for his actions (falling short of such mental disorder as would lead, not to a conviction, but to an order for treatment in a psychiatric hospital); or provocation, which by judicial decision has been extended to include the "battered partner syndrome", whether resulting from an instantaneous or cumulative basis of aggravation by the victim;
- as a result, the verdict indicates whether murder is the only possible crime for which the defendant can be convicted. Questions of law which may undermine a conviction for murder can be taken to the highest appellate tribunal. It was by such an appeal that the law has recognised prolonged domestic violence or abuse as constituting a "provocation", thereby reducing murder, in proper cases, to manslaughter.

No comments arise in this case under article 6.3 or 6.5. Article 6.4 has, however, recently assumed a significance which the majority decision appears to have disregarded. It has always been the case that the Head of State must be advised by the relevant Minister or advisory body such as the Privy Council, whether the death penalty shall in fact be carried out. This system is necessitated by article 6.4 and it involves a number of preliminary steps: as the majority says in paragraph 8.2, these discretionary measures by the executive are subject to a wide range of other considerations compared to appropriate judicial review of all aspects of a criminal case. This is not only a correct statement but constitutes the essence and virtue of article 6.4; exactly this process is in place in the State.

The Judicial Committee of the Privy Council has, however, delivered its advice in the case of Lewis and others v. A.G. of Jamaica & another, dated 12 September 2000. Whilst Lord Slynn's majority opinion is not binding in any common law jurisdiction, it has such persuasive authority that it is certain to be given effect. He indicates that in Jamaica by its Constitution, but similarly elsewhere -

- A written report from the trial judge is available to the person or body advising on pardon or commutation of sentence. (It should be said, by way of gloss to this practice, that the trial judge will have seen the defendant and the witnesses at first hand in the course of the trial, and also will have had access to other material relating

- to the circumstances of the case and of the defendant which was never used in the trial itself. Evidence, inadmissible for production to the tribunal of fact, may, for example, contain much revealing information).
- "Such other information derived from the record of the case or elsewhere" shall be forwarded to the authority empowered to grant clemency.
- In practice the condemned accused has never been denied the opportunity to make representations which will be considered by that authority.

Where Lewis breaks new ground is in the advice that the procedures followed in the process of considering a person's petition are open to judicial review. It is necessary that the condemned person should be given notice of the date on which the clemency authority will consider his case. That notice should be sufficient for him or his advisers to prepare representations before a decision is taken. Lewis thus formalises a defendant's right to make representations and requires that these be considered.

The inevitable result of this analysis of article 6 as a whole together with judicial ruling likely to be given effect on all common law jurisdictions, including St. Vincent and the Grenadines, is that questions of arbitrariness do not depend on the trial and sentence at first instance, let alone in the mandatory nature of the sentence to be imposed on conviction for murder. There is no suggestion that arbitrariness has arisen in the course of the appellate procedures. The majority's view, therefore, must depend on a decision that the terms of article 6.4, as given effect in a common law jurisdiction, must incorporate an arbitrary decision, "without considering whether this exceptional form of punishment is appropriate in the circumstances" of the particular case (para 8.2). This is manifestly incorrect, as a matter of long-standing practice and now of persuasive advice from the Privy Council; it is no longer merely a matter of conscientious consideration by the authority but a matter of judicial reviewability of its decision.

Any interpretation finding arbitrariness in the light of existing common law procedures can only imply that full compliance with article 6.4 does not escape the association of arbitrariness under article 6.1. Such internal inconsistency should not be applied to interpretation of the Covenant, and can only be the result of a mistaken straining of the words of article 6.

On the facts of this case and the course of any clemency process which may yet ensue, I cannot agree that there has been any violation of article 6.1 of the Covenant.

Lord Colville [signed]

[Done in English, French and Spanish, the English text being the original version. Subsequently to be translated in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Individual opinion by Mr. David Kretzner, co-signed by Mr. Abdelfattah Amor, Mr. Maxwell Yalden and Mr. Abdallah Zakhia (dissenting)

A. Past jurisprudence

1. Like many of my colleagues, I find it unfortunate that the Covenant does not prohibit the death penalty. However, I do not find this a reason to depart from accepted rules of interpretation when dealing with the provisions of the Covenant on the death penalty. I am therefore unable to agree with the Committee's view that by virtue of the fact that the death sentence imposed on the author was mandatory, the State party would violate the author's right, protected under article 6, paragraph 1, not to be arbitrarily deprived of his life, were it to carry out the sentence.

2. Mandatory death sentences for murder are not a novel question for the Committee. For many years the Committee has dealt with communications from persons sentenced to death under legislation that makes a death sentence for murder mandatory. (See, e.g., Communication no. 719/1996, Conroy Levy v. Jamaica; Communication no. 750/1996, Silbert Daley v. Jamaica; Communication no. 775/1997, Christopher Brown v. Jamaica.) In none of these cases has the Committee intimated that the mandatory nature of the sentence involves a violation of article 6 (or any other article) of the Covenant. Furthermore, in fulfilling its function under article 40 of the Covenant, the Committee has studied and commented on numerous reports of States parties in which legislation makes a death sentence for murder mandatory. While in dealing with individual communications the Committee usually confines itself to arguments raised by the authors, in studying State party reports the initiative in raising arguments regarding the compatibility of domestic legislation with the Covenant lies in the hands of the Committee itself. Nevertheless, the Committee has never expressed the opinion in Concluding Observations that a mandatory death sentence for murder is incompatible with the Covenant. (See, e.g., the Concluding Observations of the Committee of 19.1.97 on Jamaica's second periodic report, in which no mention is made of the mandatory death sentence).

It should also be recalled that in its General Comment no.6 that concerns article 6 of the Covenant, the Committee discussed the death penalty. It gave no indication that mandatory death sentences are incompatible with article 6.

The Committee is not bound by its previous jurisprudence. It is free to depart from such jurisprudence and should do so if it is convinced that its approach in the past was mistaken. It seems to me, however, that if the Committee wishes States parties to take its jurisprudence seriously and to be guided by it in implementing the Covenant, when it changes course it owes the States parties and all other interested persons an explanation of why it chose to do so. I regret that in its Views in the present case the Committee has failed to explain why it has decided to depart from its previous position on the mandatory death sentence.

B. Article 6 and mandatory death sentences

3. In discussing article 6 of the Covenant, it is important to distinguish quite clearly between a mandatory death sentence and mandatory capital punishment. The Covenant itself makes a clear distinction between imposition of a death sentence and carrying out the sentence. Imposition of the death sentence by a court of law after a trial that meets all the requirements of article 14 of the Covenant is a necessary, but insufficient, condition for carrying out the death penalty. Article 6, paragraph 4, gives every person sentenced to death the right to seek pardon or commutation of the sentence. It is therefore obvious that the Covenant expressly prohibits a mandatory death penalty. However, the question that arises in this case does not relate to mandatory capital punishment or a mandatory death penalty, but to a mandatory death sentence. The difference is not a matter of semantics. Unfortunately, in speaking of the mandatory death penalty the Committee has unwittingly conveyed the wrong impression. In my mind this has also led it to misstate the issue that arises. That issue is not whether a State party may carry out the death penalty without regard to the personal circumstances of the crime and the defendant, but whether the Covenant requires that courts be given discretion in determining whether to impose the death sentence for murder.

4. Article 6, paragraph 1, protects the inherent right to life of every human being. It states that no one shall be arbitrarily deprived of his life. Had this paragraph stood alone, a very strong case could have been made out that capital punishment itself is a violation of the right to life. This is indeed the approach which has been taken by the constitutional courts of two states when interpreting their constitutions (see the decision of the South African Constitutional Court in *State v. Makwanyane* [1995] 1 LRC 269; Decision No. 23/1990 (X:31) AB of the Hungarian Constitutional Court.) Unfortunately, the Covenant precludes this approach, since article 6 permits the death penalty in countries which have not abolished it, provided the stringent conditions laid down in paragraphs 2, 4 and 5 and in other provisions of the Covenant are met. When article 6 of the Covenant is read in its entirety, the ineluctable conclusion must be that carrying out a death penalty cannot be regarded as a violation of article 6, paragraph 1, provided all these stringent conditions have been met. The ultimate question in gauging whether carrying out a death sentence constitutes violation of article 6 therefore hinges on whether the State party has indeed complied with these conditions.

5. The first condition that must be met is that sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the offence. In the present case the Committee does not expressly base its finding of a violation on breach of this condition. However, the Committee mentions that "mandatory imposition of the death penalty under the laws of the State party is based solely upon the category of crime for which the offender is found guilty" and that the "death penalty is mandatory in all cases of murder". While the Committee does not mention article 6, paragraph 2, in the absence of any other explanation it would seem that the Committee has doubts about the compatibility with the Covenant of imposition of the death sentence for murder (the category of crime for which the death sentence is mandatory in the law of the State party). One can only assume that these doubts are based on the fear that the category of murder may include crimes that are not the most serious. I find it quite disturbing that the Committee is prepared to intimate that cases

of murder may not be a most serious crime. The Committee itself has stated that the right to life is the supreme right (see General Comment no. 6). Intentional taking of another person's life in circumstances which give rise to criminal liability must therefore, by its very nature, be regarded as a most serious crime. From the materials presented to the Committee in this communication it appears that a person is guilty of the crime of murder under the law of the State party if, with malice aforethought, he or she causes the death of another. The State party has explained (and this has not been contested) that the crime of murder does not include "killings which amount to manslaughter (for example by reason of provocation or diminished responsibility)." In these circumstances every case of murder, for which a person is criminally liable, must be regarded as a most serious crime. This does not mean, of course, that the death penalty should be imposed, nor that a death sentence should be carried out, if imposed. It does mean, however, that imposition of the death sentence cannot, *per se*, be regarded as incompatible with the Covenant.

6. In determining whether a defendant on a charge of murder is criminally liable the court must consider various personal circumstances of the defendant, as well as the circumstances of the particular act which forms the basis of the crime. As has been demonstrated in the opinion of my colleague, Lord Colville, these circumstances will be relevant in determining both the *mens rea* and *actus reus* required for criminal liability, as well as the availability of potential defences to criminal liability, such as self-defence. These circumstances will also be relevant in determining whether there was provocation or diminished responsibility, which, under the law of the State party, remove an act of intentional killing from the category of murder. As all these matters are part of the determination of the criminal charge against the defendant, under article 14, paragraph 1, of the Covenant they must be decided by a competent, independent and impartial tribunal. Were courts to be denied the power to decide on any of these matters, the requirements of article 14 would not be met. According to the jurisprudence of the Committee, in a case involving the death penalty this would mean that carrying out the death sentence would constitute a violation of article 6. It has not been argued that the above conditions were not complied with in the present case. Nevertheless, the Committee states that it would be a violation of the author's right not to be arbitrarily deprived of his life, if the State party were to carry out the death penalty "without regard to the defendant's personal circumstances or the circumstances of the particular offense." (See para. 8.2 of the Committee's Views). As it has not been claimed that personal circumstances of the particular offence relevant to the criminal liability for murder of the author were not taken into account by the courts, it is obvious that the Committee is referring to other circumstances, which have no bearing on the author's liability for murder. Article 6, paragraph 4, of the Covenant does indeed demand that the State party have regard to such circumstances before carrying out sentence of death. There is absolutely nothing in the Covenant, however, that demands that the courts of the State party must be the domestic organ that has regard to these circumstances, which, as stated, are not relevant in determination of the criminal charge.

7. In many societies, the law lays down a maximum punishment for a given crime and courts are given discretion in determining the appropriate sentence in a given case. This may very well be the best system of sentencing (although many critics argue that it inevitably results in uneven or discriminatory sentencing). However, in dealing with the issue of sentencing, as with all other issues relating to interpretation of the Covenant, the question that the Committee must ask is not whether a specific

system seems the best, but whether such a system is demanded under the Covenant. It is all too easy to assume that the system with which Committee members are most familiar is demanded under the Covenant. But this is an unacceptable approach in interpreting the Covenant, which applies at the present time to 144 State parties, with different legal regimes, cultures and traditions.

8. The essential question in this case is whether the *Covenant demands* that courts be given discretion in deciding the appropriate sentence in each case. There is no provision in the Covenant that would suggest that the answer to this question is affirmative. Furthermore, an affirmative answer would seem to imply that minimum sentences for certain crimes, such as rape and drug-dealing (accepted in many jurisdictions) are incompatible with the Covenant. I find it difficult to accept this conclusion.

Mandatory sentences (or minimum sentences, which are in essence mandatory) may indeed raise serious issues under the Covenant. If such sentences are disproportionate to the crimes for which they are imposed, their imposition may involve a violation of article 7 of the Covenant. If a mandatory death sentence is imposed for crimes that are not the most serious crimes, article 6, paragraph 2 of the Covenant is violated. However, whether such sentences are advisable or not, if all provisions of the Covenant regarding punishment are respected, the fact that the minimum or exact punishment for the crime is set by the legislature, rather than the court, does not of itself involve a violation of the Covenant. Carrying out such a sentence that has been imposed by a competent, independent and impartial tribunal established under law after a trial that meets all the requirements of article 14 cannot be regarded as an arbitrary act.

I am well aware that in the present case the mandatory sentence is the death sentence. Special rules do indeed apply to the death sentence. It may only be imposed for the most serious crimes. Furthermore, the Covenant expressly demands that persons sentenced to death be given the right to request pardon or commutation before the sentence is carried out. No parallel right is given to persons sentenced to any other punishment. There is, however, no provision in the Covenant that demands that courts be given sentencing discretion in death penalty cases that they do not have to be given in other cases.

In summary: there is no provision in the Covenant that requires that courts be given discretion to determine the exact sentence in a criminal case. If the sentence itself does not violate the Covenant, the fact that it was made mandatory under legislation, rather than determined by the court, does not change its nature. In death penalty cases, if the sentence is imposed for a most serious crime (and any instance of murder is, by definition, a most serious crime), it cannot be regarded as incompatible with the Covenant. I cannot accept that carrying out a death sentence that has been imposed by a court in accordance with article 6 of the Covenant after a trial that meets all the requirements of article 14 can be regarded as an *arbitrary* deprivation of life.

9. As stated above, there is nothing in the Covenant that demands that courts be given sentencing discretion in criminal cases. Neither is there any provision that makes *sentencing* in cases of capital offences any different. This does not mean, however, that a duty is not imposed on States parties to consider personal circumstances of the defendant or circumstances of the particular offence before

carrying out a death sentence. On the contrary, a death sentence is different from other sentences in that article 6, paragraph 4, expressly demands that anyone under sentence of death shall have the right to seek pardon or commutation and that amnesty, pardon or commutation may be granted in all cases. It must be noted that article 6, paragraph 4, recognizes a *right*. Like all other rights, recognition of this right by the Covenant imposes a legal obligation on States parties to respect and ensure it. States parties are therefore legally bound to consider in good faith all requests for pardon or commutation by persons sentenced to death. A State party that fails to do so violates the right of a condemned person under article 6, paragraph 4, with all the consequences that flow from violation of a Covenant right, including the victim's right to an effective remedy.

The Committee states that "existence of a right to seek a pardon or commutation does not secure adequate protection to the right to life, as these discretionary measures by the executive are subject to a wide range of other considerations compared to the appropriate judicial review of all aspects of a criminal case". This statement does not help to make the Committee's approach coherent. In order to comply with the requirements of article 6, paragraph 4, a State party is bound to consider in good faith all personal circumstances and circumstances of the particular crime which the condemned person wishes to present. It is indeed true that the decision-making body in the State party may also take into account other factors, which may be considered relevant in granting the pardon or commutation. However, a court which has discretion in sentencing may also take into account a host of factors other than the defendant's personal circumstances or circumstances of the crime.

10. I may now summarize my understanding of the legal situation regarding mandatory death sentences for murder:

- a. The question of whether a death sentence is compatible with the Covenant depends on whether the conditions laid down in article 6 and other articles of the Covenant, especially article 14, are complied with.
- b. Carrying out a death sentence imposed in accordance with the requirements of article 6 and other articles of the Covenant cannot be regarded as arbitrary deprivation of life.
- c. There is nothing in the Covenant that demands that courts be given discretion in sentencing. Neither is there a special provision that makes sentencing in death penalty cases different from other cases.
- d. The Covenant expressly demands that States parties must have regard to particular circumstances of the defendant or the particular offence before carrying out a death sentence. A State party has a legal obligation to take such circumstances into account in considering applications for pardon or commutation. The consideration must be carried out in good faith and according to a fair procedure.

#### C. Violation of the author's rights in the present case

11. Even if I had agreed with the Committee on the legal issue I would have found it difficult to agree that the author's rights were violated in this case.

In the context of an individual communication under the Optional Protocol the issue is not the compatibility of legislation with the Covenant, but whether the author's rights were violated. (See, e.g.,

*Faurisson v. France*, in which the Committee stressed that it was not examining whether the legislation on the basis of which the author had been convicted was compatible with article 19 of the Covenant, but whether in convicting the author on the specific facts of his case the author's right to freedom of expression had been violated). In the present case the author was convicted of a specific crime: murder of a little girl. Even if the category of murder under the law of the State party may include some crimes which are not the most serious, it is clear that the crime of which the author was convicted is not among these. Neither has the author pointed to any personal circumstances or circumstances of the crime that should have been regarded as mitigating circumstances but could not be considered by the courts.

12. Finally I wish to emphasize that the Covenant imposes strict limitations on use of the death penalty, including the limitation in article 6, paragraph 4. In the present case, it has not been contested that the author has the right to apply for pardon or commutation of his sentence. An advisory committee must look into the application and make recommendations to the Governor-General on any such application. Under the rules laid down by the Privy Council in the recent case of *Neville Lewis et al v. Jamaica*, the State party must allow the applicant to submit a detailed petition setting out the circumstances on which he bases his application, he must be allowed access to the information before the committee and the decision on the pardon or commutation must be subject to judicial review.

While the author has made certain general observations relating to the pardon or commutation procedures in the State party, he has not argued that he has submitted an application for pardon or commutation that has been rejected. He therefore cannot claim to be a victim of violation of his rights under article 6, paragraph 4, of the Covenant. Clearly, were the author to submit an application for pardon or commutation that was not given due consideration as required by the Covenant and the domestic legal system he would be entitled to an effective remedy. Were that remedy denied him the doors of the Committee would remain open to consider a further communication.

David Kretzmer [signed]  
Abdelfattah Amor [signed]  
Maxwell Yalden [signed]  
Abdallah Zakhia [signed]

[Done in English, French and Spanish, the English text being the original version. Subsequently to be translated in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]



**Human Rights Committee**

**Judge *v.* Canada  
Views of 5 August 2002**

**Communication No. 829/1998**



**International covenant  
on civil and  
political rights**

Distr.  
RESTRICTED\*

CCPR/C/78/D/829/1998  
13 August 2003

Original: ENGLISH

**HUMAN RIGHTS COMMITTEE**

Seventy-eighth session  
14 July – 8 August 2003

**VIEWS**

**Communication No. 829/1998**

Submitted by: Roger Judge (represented by counsel,  
Mr. Eric Sutton)

Alleged victim: The author

State party: Canada

Date of communication: 7 August 1998 (initial submission)

Document references:  
- Special Rapporteur's rule 91 decision, transmitted to the State party on 20 August 1999 (not issued in document form)  
- CCPR/C/75/D/829/1998/Rev.1 – decision on admissibility dated 17 July 2002

Date of adoption of Views: 5 August 2002

On 5 August 2003, the Human Rights Committee adopted its Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 829/1998. The text of the Views is appended to the present document.

[ANNEX]

\* Made public by decision of the Human Rights Committee.

**ANNEX**

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights

Seventy-eighth session  
concerning

**Communication No. 829/1998\*\***

Submitted by: Roger Judge (represented by counsel,  
Mr. Eric Sutton)

Alleged victim: The author

State party: Canada

Date of communication: 7 August 1998 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 5 August 2002,

Having concluded its consideration of communication No. 829/1998, submitted to the Human Rights Committee on behalf of Mr. Roger Judge under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party.

Adopts the following:

**Views under article 5, paragraph 4, of the Optional Protocol**

1. The author of the communication, dated 7 August 1998, is Mr. Roger Judge, a citizen of the United States of America, at the time of the submission detained at Ste-Anne-des-Plaines,

\*\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullaachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Franco Depasquale, Mr. Maurice Glelé Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen and Mr. Roman Wieruszewski.

Pursuant to rule 85 of the Committee's rules of procedure, Ms. Ruth Wedgwood did not participate in adoption of the views.

An individual opinion signed by Committee member Mr. Rajsoomer Lallah is appended to the present document.

Québec, Canada, and deported to the United States on the day of submission, i.e. 7 August 1998. He claims to be a victim of violations by Canada of articles 6, 7, 10 and 14 of the International Covenant on Civil and Political Rights. He is represented by counsel.

Facts as submitted by the author

2.1 On 15 April 1987, the author was convicted on two counts of first-degree murder and possession of an instrument of crime, by the Court of Common Pleas of Philadelphia, Pennsylvania. On 12 June 1987, he was sentenced to death, by electric chair. He escaped from prison on 14 June 1987 and fled to Canada.<sup>1</sup>

2.2 On 13 July 1988, the author was convicted of two robberies committed in Vancouver, Canada. On 8 August 1988, he was sentenced to 10 years' imprisonment. The author appealed his convictions, but on 1 March 1991, his appeal was dismissed.

2.3 On 15 June 1993, the author was ordered deported from Canada. The order was conditional as he had announced his intention to claim refugee status. On 8 June 1994, he withdrew his claim for refugee status, at which point the deportation order became effective.

2.4 On 26 January 1995, on recommendation of the Correctional Services of Canada, his case was reviewed by the National Parole Board which ordered him detained until expiry of his sentence, i.e. 8 August 1998.<sup>2</sup>

2.5 On 10 November 1997, the author wrote to the Minister of Citizenship and Immigration requesting ministerial intervention with a view to staying the deportation order against him, until such time as a request for extradition from the United States authorities might be sought and received in his case. If removed under the Extradition Treaty, Canada could have asked for assurances from the United States that he not be executed. In a letter, dated 18 February 1998, the Minister refused his request.<sup>3</sup>

2.6 The author applied to the Federal Court of Canada for leave to commence an application for judicial review of the Minister's refusal. In this application, the author requested a stay of the implementation of the deportation order until such time as he would be surrendered for extradition, and a declaration that his detention in Canada and deportation to the United States violated his rights under the Canadian Charter. The author's application for leave was denied on 23 June 1998. No reasons were provided and no appeal is possible from the refusal to grant leave.

<sup>1</sup> The author states that the mode of execution was subsequently changed to execution by lethal injection.

<sup>2</sup> As later explained by the State party, pursuant to the Corrections and Conditional Release Act, a prisoner in Canada is entitled to be released after having served two thirds of his sentence (i.e. the statutory release date). However, the Correctional Services of Canada reviews each case, through the National Parole Board, to determine whether, if released on the statutory release date, there are reasonable grounds to believe that the released prisoner would commit an offence causing death or serious harm. Correctional Services of Canada did so find with respect to the author.

<sup>3</sup> As later explained by the State party and evidenced in the documentation provided, the Minister informed the author that there was no provision under sections 49 and 50 of the Immigration Act to defer removal pending receipt of an extradition request or order. However, in the event that an extradition request was received by the Minister of Justice, the removal order would be deferred pursuant to paragraph 50(1)(a) of the Immigration Act. An extradition request was never received.

2.7 The author then petitioned the Superior Court of Québec, whose jurisdiction is concurrent with that of the Federal Court of Canada, for relief identical to that sought before the Federal Court. On 6 August 1998, the Superior Court declined jurisdiction given that proceedings had already been undertaken in the Federal Court, albeit unsuccessfully.

2.8 The author contends that, although the ruling of the Superior Court of Québec could be appealed to the Court of Appeal, it cannot be considered an effective remedy, as the issue would be limited to the jurisdiction of the court rather than the merits of the case.

The complaint

3.1 The author claims that Canada imposed mental suffering upon him that amounts to cruel, inhuman and degrading treatment or punishment, having detained him for ten years while the certainty of capital punishment was hanging over his head at the conclusion of his sentence, and this constitutes a breach of article 7 of the Covenant. He argues that he suffered from the "death row phenomenon", during his detention in Canada. This is explained as a state of mental or psychological anguish, and, according to him, it matters little that he would not be executed on Canadian soil. The author claims that the State party had no valid sentencing objective since he was sentenced to death in any event, even though in another State party, and therefore only served to prolong the agony of his confinement while he awaited deportation and execution. It is also submitted that in this respect, the author was not treated with humanity and respect for the inherent dignity of the human person, in violation of article 10 of the Covenant.

3.2 The author claims that "by detaining [him] for ten years despite the fact that he faced certain execution at the end of his sentence, and proposing now to remove him to the United States, Canada has violated [his] right to life, in violation of article 6 of the Covenant."

3.3 The author also claims that, because of his status as a fugitive he is denied a full appeal in the United States, under Pennsylvania law, and therefore by returning him to the United States Canada participated in a violation of article 14, paragraph 5, of the Covenant. In this regard, the author states that the trial judge made errors in instructing the jury, which would have laid the groundwork for appeals against both his conviction and sentence.

State party's observations on admissibility

4.1 The State party contends that the author's claims are inadmissible for failure to exhaust domestic remedies, failure to raise issues under the Covenant, failure to substantiate his claims and incompatibility with the Covenant.

4.2 On the issue of non-exhaustion with respect to the author's detention in Canada, the State party argues firstly that the author failed to raise his claims before the competent courts in Canada at the material times. Both during his 1988 sentencing hearing and on appeal of his convictions of robbery the author failed to complain, as he now alleges, that a 10-year sentence, in light of his convictions and sentences in the United States, constituted cruel treatment or punishment in violation of section 12 of the Canadian Charter of Rights and Freedoms. These arguments were not made until 1998, when the author's removal from Canada was imminent.

4.3 Secondly, the State party argues that the author failed to appeal to the Appeal Division of the National Parole Board of Canada or to challenge before the courts both the National Parole Board's decision not to release him before the expiration of his full sentence and the annual reviews of that decision. If he had been successful with these appeal avenues, he might have been released prior to the expiration of his sentence. Failure to pursue such remedies is clearly inconsistent with the author's position that Canada violated his Covenant rights in detaining him in Canada rather than removing him to the United States.

4.4 Thirdly, the State party argues that if the author had wanted to be removed to the United States rather than continue to be detained in Canada, he could also have requested the Department of Citizenship and Immigration to intervene before the National Parole Board for the purposes of arguing that he be released and removed to the United States. Furthermore, he could have applied to have been transferred to Pennsylvania pursuant to the Transfer of Offenders Treaty between Canada and the United States of America on the Execution of Penal Sentences. In the State party's view, the author's failure diligently to pursue such avenues casts doubt on the genuineness of his assertion that he wanted to be removed to the United States, where he had been sentenced to death.

4.5 On the issue of non-exhaustion with respect to the author's request for a stay of the deportation order to the United States, the State party submits that the author failed to appeal the ruling of the Superior Court of Québec to the Court of Appeal. Contrary to the author's view, that this remedy would not be useful as it would be limited to the jurisdiction of the court rather than the merits of the case, the State party argues that the author's petition was dismissed for both procedural and substantive reasons, and, therefore, the Court of Appeal could have reviewed the judgement on the merits.

4.6 The State party contends that the author has failed to show that his detention and subsequent removal to the United States raise any issues under articles 6, 7, 10 or 14, paragraph 5 of the Covenant. If the Committee is of the opinion that these articles do apply to the instant case, the State party argues that the author has failed to substantiate any of these claims for the purposes of admissibility.

4.7 With respect to the alleged violation of articles 7 and 10, the State party argues that the author has not cited any authority in support of his proposition that the "death row phenomenon" can apply to a prisoner detained in an abolitionist State for crimes committed in that State, where that person has been previously sentenced to capital punishment in another State. The author was sentenced to imprisonment for robberies he committed in Canada and was not on death row in Canada. It is submitted, therefore, that the "death row phenomenon" does not apply in the circumstances and he has no claim under articles 7 and 10.

4.8 On the author's argument that the sentencing in Canada had no valid objective as he had been sentenced to death in the United States, the State party submits that the sentencing principle of retribution, denunciation and deterrence require the imposition of a sentence in Canada for crimes committed in Canada.

4.9 According to the State party, if fugitives in Canada facing the death penalty were not prosecuted and sentenced for crimes in Canada, this would lead to potential abuses. First, it would create a double standard of justice. Such fugitives would be immune from prosecution

while individuals not facing the death penalty would be prosecuted and sentenced, even though the crime committed in Canada was the same in both cases. Similarly, it would encourage lawlessness among such fugitives since in Canada they would be de facto immune from prosecution and imprisonment. In essence, fugitives sentenced to death for murder in the United States would be given a "carte blanche" to commit subsequent offences in Canada.

4.10 If the Committee were to find that the facts of this case do raise issues under articles 7 and 10, the State party submits that the author has not substantiated a violation of these articles for the purposes of admissibility. The State party argues that the Committee has on many occasions reiterated that lengthy detention on death row does not constitute a violation of articles 7 and 10 in the absence of some further compelling circumstances.<sup>4</sup> It states that the facts and circumstances of each case need to be examined, and that in the past the Committee has had regard to the relevant personal factors of the author, the specific conditions of detention on death row and whether the proposed method of execution is particularly abhorrent. No such circumstances apply in this case. Moreover, it states that, where the delay in awaiting execution is the fault of the accused, such as where he escapes custody, the accused cannot be allowed to take advantage of this delay. In this case, the delay arises from the author's own criminal acts, his escape and the robberies he committed in Canada.<sup>5</sup>

4.11 With respect to the alleged violation of article 6, the State party states that the author has provided no authority for his proposition that *detaining* an individual for crimes committed in that State despite the fact that the same person has been sentenced to death in another State raises an issue under article 6. The author was sentenced in Canada for robberies he committed there and is not facing the death penalty in Canada.

4.12 The State party contends that the author has failed to substantiate his claim that his *deportation* from Canada would violate article 6. It recalls the Committee's jurisprudence that "if a State party takes a decision relating to a person within its jurisdiction and the necessary and foreseeable consequences is that the person's rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant."<sup>6</sup> The State party also invokes the Committee's decision in *Reid v. Jamaica*, when it decided that the requirement of article 6 that a sentence of death may be "imposed in accordance with the law" implied that the procedural guarantees prescribed in the Covenant were observed.<sup>7</sup> According to the State party, if the procedural guarantees of the Covenant were observed, there is no violation of article 6. The only due process issue raised by the author was the narrower appeal of conviction and sentence allowed under Pennsylvania law. In this respect, the State party contends that the author has not substantiated his claim that he was deprived of his right to review by a higher tribunal and it refers *mutatis mutandis* to its submissions on article 14, paragraph 5, (below).

<sup>4</sup> The State party refers to the following cases *Pratt and Morgan v. Jamaica*, Communication Nos. 210/1986, 225/1987, *Barrrett and Sutcliffe v. Jamaica*, Communication Nos. 270/1988, 271/1988, *Kindler v. Canada*, Communication No. 470/1990, Views adopted on 30 July 1993, *Johnson v. Jamaica*, Communication No. 588/1994 and *Francis v. Jamaica*, Communication No. 606/1994.

<sup>5</sup> The State party refers to *Pratt and Morgan*, supra, *Wallen and Baptiste* (No. 2) (1994), 45 W.I.R. 405 at 436 (C.A., Trinidad & Tobago).

<sup>6</sup> *Kindler*, supra.

<sup>7</sup> *Reid v. Jamaica*, Communication No. 250/1987.

4.13 On article 14, paragraph 5, of the Covenant, the State party presents several arguments to demonstrate that an issue under this article does not arise. Firstly, it contends that the author's complaint has its basis in the law of the United States, State of Pennsylvania and not in Canadian law. Therefore, the author has no *prima facie* claim against Canada.

4.14 Secondly, the State party contends that the author's right to review by a higher tribunal should be treated under article 6 and not separately under article 14. It argues that, given that the Committee interprets article 6, paragraph 2, as requiring the maintenance of procedural guarantees in the Covenant, including the right to review by the higher tribunal stipulated in article 14, paragraph 5, to the extent that this case raises issues under article 6, this right to review should be treated under article 6 only.

4.15 Thirdly, the State party argues that the author's detention in and removal from Canada does not raise an issue under article 14, as his incarceration for robberies committed in Canada did not have any necessary and foreseeable consequence on his right to have his convictions and sentences reviewed in Pennsylvania. It is also submitted that the author's removal did not have any necessary and foreseeable consequence on his appeal rights since the author's appeal had already taken place in 1991, while he was imprisoned in Canada.

4.16 The State party argues that, although in the United States a prisoner's rights may be adversely affected in the event that he escapes from custody, the author has failed to substantiate his claim that his right to review by a higher tribunal was violated. It encloses the judgement of the Supreme Court of Pennsylvania on the author's appeal, indicating that the Supreme Court of Pennsylvania is statutorily mandated to review all death sentences, in particular the sufficiency of the evidence to sustain a conviction for first degree murder. This statutory review was undertaken with respect to the author's case, on 22 October 1991, at which he was legally represented. The Supreme Court affirmed both the conviction and sentence. On the allegation that the trial judge committed errors in instructing the jury and that those errors had not been reviewed by the Supreme Court, the State party submits that even if the judge so erred, upon a realistic view of the evidence, a properly instructed jury could not have come to any other conclusion than that reached by the jury in the author's trial.

4.17 The State party further submits that two additional review recourses are available to the author in the United States. The first is a petition filed in the Court of Common Pleas under Pennsylvania's Post-Conviction Relief Act (PCRA) in which constitutional issues may be raised. The State party claims that the author has already filed a petition under this Act. The second is a petition for writ of habeas corpus filed in the District Court for the Eastern District of Pennsylvania. This court has the power to overturn the judgements of the courts of the Commonwealth of Pennsylvania, if it concludes that the conviction was pronounced in violation of rights guaranteed to criminal defendants under federal law. If the author is unsuccessful in both of these petitions, he may appeal to the higher courts and ultimately to the United States Supreme Court.

4.18 In addition, the State party submits that the author could petition the Governor of Pennsylvania for clemency or to have his sentence commuted to a less severe one. Prior flight does not preclude such an application. According to the State party, in light of the recourses available to a prisoner on death row, only two executions were carried out in Pennsylvania over the past thirty years.

4.19 Finally, with a view to admissibility of the communication as a whole, the State party argues that it is incompatible with the provisions of the Covenant, under article 3 of the Optional Protocol, and article 5, paragraph 1 of the Covenant. It is submitted that the provisions of the Covenant should not be raised as a shield to criminal liability and the author should not be allowed to rely on the Covenant to support his argument that he should not have been prosecuted in Canada for crimes he committed there. Moreover, the Covenant should not be used by those who through their own criminal acts have voluntarily waived certain rights. The State party contends that the author's claims are contradictory. On the one hand, he claims that his removal from Canada to the United States violates articles 6 and 14, paragraph 5 of the Covenant, on the other, that his detention violates articles 7 and 10. Canada is alleged therefore, to violate the Covenant by removing him as well as not removing him.

State party's response on the merits

5.1. With respect to the allegation of a violation of articles 7 and 10, the State party submits that contrary to what is implied in the author's submissions, the "death row phenomenon" is not solely the psychological stress experienced by inmates sentenced to death, but relates also to other conditions including, the periodic fixing of execution dates, followed by reprivies, physical abuse, inadequate food and isolation.

5.2 With respect to the author's request for a stay of his deportation until such time as Canada received an extradition request and an assurance that the death penalty would not be carried out, the State party submits that the United States has no obligation to seek extradition of a fugitive nor to give such assurances. The Government of Canada cannot be expected to wait for such a request or to wait for the granting of such assurances before removing fugitives to the United States. The danger of a fugitive going unpunished, the lack of authority to detain him while waiting for an extradition request and the importance of not providing a safe haven for those accused of or found guilty of murder, militate against the existence of such an obligation. Moreover, the Minister of Citizenship and Immigration has a statutory obligation to execute a removal order as soon as reasonably practicable.

5.3 On the alleged violation of article 6 and the author's contention that errors were committed during his trial in Pennsylvania, which would have provided the basis for an appeal, the State party states that it is not for the Committee to review the facts and evidence of a trial unless it could be shown to have been arbitrary or a denial of justice.<sup>8</sup> It would be inappropriate to impose an obligation on it to review trial proceedings, particularly given that they occurred in the United States.

5.4 In relation to the allegation of a violation of article 14, paragraph 5, the State party submits that this article does not specify what type of review is required and refers to the Travaux Préparatoires of the Covenant, which it claims envisaged a broad provision that recognised the principle of a right to review while leaving the type of review procedure to be determined in accordance with their respective legal systems.<sup>9</sup>

<sup>8</sup> *McTaggart v. Jamaica, Communication No. 749/1997.*

<sup>9</sup> The State party refers to M. Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary (Strasbourg: N.P. Engel, Publisher, 1993) at 266.

5.5 The State party reiterates that the author's case was fully reviewed by the Supreme Court of Pennsylvania. It submits that, although originally in Pennsylvania a defendant who escaped custody was held to have forfeited his right to a full appellate review, the Supreme Court of this state has recently departed from this position, holding that a fugitive should be allowed to exercise his post-trial rights in the same manner as he would have done had he not become a fugitive. This is dependent, the State party clarifies, on whether the fugitive returns on time to file post-trial motions or an appeal. It also notes that filing deadlines are subject to exceptions which allow for late filing.<sup>10</sup>

The author's comments on State party's response on admissibility and the merits

6.1 In relation to the State party's arguments on non-exhaustion of domestic remedies with respect to the author's detention in Canada, the author submits that it was not until 1993, almost 5 years after his robbery convictions, that he was ordered deported. He argues that he could have been granted early parole for the purposes of deportation to the United States and as such could not have known in 1988 that Canada would see fit to detain him for the full 10 years of his sentence. Furthermore, the author could not have known in 1988 that although the United States was willing to seek extradition, it would not do so "as the eventual deportation of the author to the United States appeared less problematic."

6.2 On the question of an appeal to the National Parole Board, including appeals of the annual reviews, the author submits that appeals of this nature would have been ineffective as, based on the evidence, the Board could only find that "if released" the author would likely cause, *inter alia*, serious harm to another person prior to expiry of sentence. However, as in reality the author would not have been released on completion of two-thirds of his sentence, but would have been turned over to the Canadian immigration services to be deported, the prison authorities should not have submitted the author's case to the Parole Board for review in the first place. Once seized with the case, the Board could not refuse to rule on the risk of harm, were the author to be released.

6.3 On the issue of the possibility of applying for transfer to the United States pursuant to the Transfer of Offenders Treaty, the author argues that the consent of both States parties is necessary for such a transfer and that Canada would never have agreed considering its refusal to deport him before he had served his full term of imprisonment. Further, the author argues that the onus should not be on him to pursue legal remedies, all of which he considers would have been futile, to hasten his return to the jurisdiction where he was sentenced to death.

6.4 With respect to a possible appeal of the author's request for a stay of the deportation order from the Superior Court of Québec, the author submits that this decision was rendered orally on 6 August 1998, at approximately 20:00. The Government of Canada removed the author in the early hours of 7 August 1998, before any appeal could be launched. Therefore, any appeal would have been moot and futile because the very subject of the proceedings was no longer within Canadian jurisdiction.

6.5 The author reiterates that the judge of the Superior Court declined jurisdiction to stay the deportation because the Federal Court had refused to intervene. He argues that although the

judge went on to analyse the case on the merits he should not have done so, having declined jurisdiction and that an appeal, had it not been moot, would have been limited to the question of whether he ought to have declined jurisdiction and not whether he had made a case that his rights under the Canadian Charter of Rights and Freedoms had been violated.

6.6 The author contests the State party's argument on incompatibility and states that the theory that *if* the author's crimes in Canada had gone unpunished a precedent would have been set whereby those subject to execution in one state could commit crimes with impunity in another state, is inherently flawed. On the contrary, the author argues that if death row inmates knew that they would be prosecuted for crimes in Canada this would encourage them to commit such crimes there in order to serve a prison sentence in Canada and prolong their life or indeed commit murder in Canada and stave off execution in the United States indefinitely. If the author had been "removed by way of extradition following apprehension in Canada in 1988, he would have had little in the way of arguments to put forth."

6.7 The author contests the State party's arguments on the merits. He confirms that he has no authority for the proposition that detention in Canada for crimes committed in Canada can constitute death row confinement as there is no such recorded instance. The author submits that the mental anguish that characterises death row confinement began with his apprehension in Canada in 1988 and "will only end upon his execution in the United States."

6.8 The author rejects as misinterpretation, the State party's point that the decision in Pratt and Morgan<sup>11</sup> is authority for the proposition that a prisoner cannot complain where delay is due to his own fault such as an "escape from custody". He concedes that the period when he was at large is not computed as part of the delay but this period began from the point of apprehension by the Canadian authorities. He further submits that he was not detained in Canada because of his escape but rather because he was prosecuted and convicted of robbery.

6.9 On the State party's reference to the conditions of detention in the Special Handling Unit, the author submits that this is the only super-maximum facility of its kind in Canada, and that he was subjected to "abhorrent living conditions". He also submits that the National Parole Board's decision to hold him for the full 10 years of his sentence and the subsequent annual reviews maintaining this decision constituted a form of retribute, albeit temporary, from his return to the United States where he was to be executed. In this regard, the author refers to the discussion of this issue in Pratt and Morgan (Privy Council), where Lord Griffith commented on the anguish attendant upon condemned prisoners who move from impending execution to retribute.

6.10 The author argues that to remove him to a jurisdiction which limits his right to appeal violates article 14, paragraph 5, of the Covenant, and submits that article 6 of the Covenant should be read together with article 14, paragraph 5. On the issue of the Supreme Court of Pennsylvania's review of his case, the author maintains that the Court refused to entertain any claims of error at trial and, therefore, reviewed the evidence and decided to uphold the conviction and sentence. Issues such as the propriety of jury instructions are excluded from this type of review.

<sup>10</sup> The State party refers to *Commonwealth of Pennsylvania v. Deemer*, 705 A. 2d 627 (Pa. 1997)

<sup>11</sup> *Pratt and Morgan v. Jamaica*, supra.

7.6 The State party had argued that the author could not avail himself of the Optional Protocol to complain about his *deportation to the United States*, as he had not appealed his request for a stay of the deportation order from the Superior Court of Québec to the Court of Appeal and therefore had not exhausted domestic remedies. The Committee observed the author's response, that an appeal would have been ineffective as the Court of Appeal would only have dealt with the issue of jurisdiction and not with the merits of the case, and that the State party removed the author within hours of the Superior Court's decision, thereby rendering an attempt to appeal this decision moot. The Committee noted that the State party had not contested the speed with which the author was deported, after the decision of the Superior Court and, therefore, irrespective of whether the author could have appealed his case on the merits, found that it would be unreasonable to expect the author to appeal such a case after his deportation, the very act which was claimed to violate the Covenant. Accordingly, the Committee did not accept the State party's argument that this part of the communication was inadmissible for failure to exhaust domestic remedies.

7.7 As regards the author's claim under article 14, paragraph 5, of the Covenant, and that Canada violated article 6 by deporting him, the Committee observed that the author had the *right* under Pennsylvania law to a full appeal against his conviction and sentence. Furthermore, the Committee noted that, according to the documents provided by the parties, while the extent of the appeal was limited after the author had become a fugitive, his conviction and sentence were reviewed by the Supreme Court of Pennsylvania, which has a statutory obligation to review all death penalty cases. According to these documents, the author was represented by counsel and the Court reviewed the evidence and law as well as the elements required to sustain a first-degree murder conviction and capital punishment. In these particular circumstances, the Committee found that the author had not substantiated, for purposes of admissibility, his claim that his right under article 14, paragraph 5, was violated and that, therefore, his deportation from Canada entailed a violation by Canada of article 6 of the Covenant.

7.8 Notwithstanding its decision that the claim based on article 14, paragraph 5, was inadmissible, the Committee considered that the facts before it raised two issues under the Covenant that were admissible and should be considered on the merits:

1. As Canada has abolished the death penalty, did it violate the author's right to life under article 6, his right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment under article 7, or his right to an effective remedy under article 2, paragraph 3, of the Covenant by deporting him to a State in which he was under sentence of death without ensuring that that sentence would not be carried out?
2. The State party had conceded that the author was deported to the United States before he could exercise his right to appeal the rejection of his application for a stay of his deportation before the Québec Court of Appeal. As a consequence the author was not able to pursue any further remedies that might be available. By deporting the author to a State in which he was under sentence of death before he could exercise all his rights to challenge that deportation, did the State party violate his rights under articles 6, 7 and 2 of the Covenant?

The Committee concluded that, given the seriousness of these questions, the parties should be afforded the opportunity to comment on them before the Committee expressed its Views on

6.11 Without wishing the Committee to consider the transcripts of the murder trial, the author also refers to alleged errors that occurred during the course of his trial that could have changed the outcome of the case. He refers to a question from the jury which sought to clarify the difference between 1<sup>st</sup> and 3<sup>rd</sup> degree murder and manslaughter. The jury's request was not answered, as the author's attorney could not be located. When the attorney appeared the next day, the jury was ready to deliver a verdict without receiving an answer to the request for clarification. A verdict of 1<sup>st</sup> degree murder was then returned.

6.12 The author submits that while a mechanism allowing limited review might be viewed as acceptable in cases in which non-capital crimes have been committed, he contends that this is wholly unacceptable where the defendant's life hangs in the balance, and when he is barred from having any claim of error at trial reviewed.

6.13 On the possibility of seeking relief under the PCRA, the author confirms that he did indeed seek relief by filing such a motion after he was deported to the United States. This motion was dismissed on 21 July 1999, and by reference to the previous case of *Commonwealth v. Kindler*, it was argued that the author's fugitive status had disqualified him from seeking such relief. The author further submits that as his application for relief under the PCRA was dismissed, he cannot seek federal habeas corpus relief, as PCRA relief was refused on the basis of the failure to respect a State statute.

6.14 On the possibility of a request to the Governor of Pennsylvania to seek commutation of his sentence to life, the author argues that the Governor is an elected politician who has no mandate to engage in an independent, neutral review of judicial decisions. It is submitted that his/her function in this respect "does not satisfy the requirements of articles 14(5) and 6 of the Covenant".

#### Committee's consideration admissibility

7.1 At its 75<sup>th</sup> session, the Committee considered the admissibility of the communication. It ascertained that the same matter was not being examined under another international procedure of international investigation or settlement.

7.3 As regards the author's complaint relating to prison conditions in Canada, the Committee found that the author had not substantiated this claim, for purposes of admissibility.

7.4 On the issue of an alleged violation of articles 7 and 10 of the Covenant in connection with the author's detention in Canada with the prospect of capital punishment awaiting him in the United States upon serving his term of imprisonment in Canada, the Committee noted that the author was not confined to death row in Canada, but serving a ten year sentence for robbery. Consequently, he had failed to raise an issue under articles 7 and 10 in this respect and this part of the communication was found to be inadmissible under articles 2 and 3 of the Optional Protocol.

7.5 As to the alleged violation of article 6 for *detaining* the author in Canada for crimes committed therein, the Committee considered that he had not substantiated, for purposes of admissibility, how his right to life was violated by his *detention* in Canada for crimes committed there. This aspect of the communication was declared inadmissible under article 2 of the Optional Protocol.

the merits. The parties were requested to provide information on the current procedural situation of the author in the United States and on any prospective appeals he might be able to pursue. The State party was requested to supplement its submissions in relation to the above questions and request for information as soon as possible, but in any event within three months of the date of transmittal of the admissibility decision. Any statements received from the State party were to be communicated to the author, who would be requested to respond within two months.

The State party's response on the merits pursuant to the Committee's request

8.1 By note verbale of 15 November 2002, the State party responded to the questions and request for further information by the Committee.

1. Whether Canada violated the Covenant by failing to seek assurances that the death penalty would not be carried out

8.2 The State party refers to article 6, paragraph 1, which declares that every human being has the right to life and guarantees that no one shall be arbitrarily deprived of his or her life. It submits that with respect to the imposition of the death penalty, article 6, paragraph 2, specifically permits its application in those countries which have not abolished it, but requires that it be imposed in a manner that respects the conditions outlined in article 6.

8.3 Article 6 does not explicitly refer to the situation where someone is extradited or removed to another state where that person is subject to the imposition of the death penalty. However, the State party notes that the Committee has held that "if a State party takes a decision relating to a person within its jurisdiction and the necessary and foreseeable consequence is that that person's rights under the *Covenant* will be violated in another jurisdiction, the State party itself may be in violation of the Covenant."<sup>12</sup> The Committee has thus found that article 6 applies to the situation where a State party seeks to extradite or remove an individual to a state where he/she faces the death penalty.

8.4 Article 6 allows States parties to extradite or remove an individual to a state where they face the death penalty as long as the conditions respecting the imposition of the death penalty in article 6 are met. The State party argues that the Committee, in the instant case, does not seem to question whether the imposition of the death penalty in the United States meets the conditions prescribed in article 6.<sup>13</sup> Rather, the Committee asked whether Canada violated the Covenant by failing to seek assurances that the death penalty would not be carried out against the author.

<sup>12</sup> *Kindler v. Canada*, supra, *Ng v. Canada*, Communication No. 469/1991, Views adopted on 5 November 1993, *Cox v. Canada*, Communication No. 539/1993, Views adopted on 31 October 1994, *G.T. v. Australia*, Communication No. 706/1996, Views adopted on 4 November 1997.

<sup>13</sup> According to the State party, with respect to the conditions under which the death penalty is applied in the State of Pennsylvania, the Committee found in paragraph 7.7 of its decision on admissibility that the author had the right under Pennsylvania law to a full appeal against his conviction and sentence and that the conviction and sentence were reviewed by the Supreme Court of Pennsylvania. The Committee held that the author's claim based on article 14, paragraph 5 was inadmissible.

8.5 According to the State party, article 6 and the Committee's General Comment 14 on article 6<sup>14</sup> are silent on the issue of seeking assurances, and no legal authority supports the proposition that abolitionist states must seek assurances as a matter of international law. The State party submits that to subsume such a requirement under article 6 would represent a significant departure from accepted rules of treaty interpretation, including the principle that a treaty should be interpreted in light of the intention of the states parties as reflected in the terms of the treaty.<sup>15</sup>

8.6 The State party recalls that the Committee has considered several communications respecting the extradition or removal of individuals from Canada to states where they face the death penalty. In none of these cases did the Committee raise concerns about the absence of seeking assurances. Furthermore, the State party observes that, the Committee has on previous occasions rejected the proposition that an abolitionist state that has ratified the Covenant is necessarily required to refuse extradition or to seek assurances that the death penalty would not be applied. In *Kindler v. Canada*,<sup>16</sup> the Human Rights Committee asked, "Did the fact that Canada had abolished capital punishment...require Canada to refuse extradition or request assurances from the United States...that the death penalty would not be imposed against Mr. Kindler". The State party notes the Committee's statement in this regard that it "does not find that the terms of article 6 of the Covenant necessarily require Canada to refuse to extradite or to seek assurances." These comments were repeated in the Committee's views in *Ng v. Canada*<sup>17</sup> and *Cox v. Canada*.<sup>18</sup>

8.7 As to the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty pursuant to which States parties are required to take all necessary measures to abolish the death penalty within their jurisdictions, the State party refers to the Committee's finding that for States parties to the Second Optional Protocol, its provisions are considered as additional provisions to the Covenant and in particular article 6.<sup>19</sup> It submits that the instrument is silent on the issue of extradition or removal to face the death penalty, including whether assurances are required. The State party expresses no view on whether this instrument can be interpreted as imposing a requirement that assurances be sought, but emphasizes that it is not currently a party to the Second Optional Protocol. Therefore, its actions may only be scrutinized under the provisions of the Covenant.

8.8 The State party argues that at the time of the author's removal, 7 August 1998, there was no domestic legal requirement, that Canada was required to seek assurances from the United States that the death penalty would not be carried out against him. While the Supreme Court of Canada had not ruled on this issue in the immigration context, they had dealt with it in

<sup>14</sup> HRI/GEN/1/Rev.6.

<sup>15</sup> The State party refers to Article 31 of the Vienna Convention on the Law of Treaties, U.N. Doc. A/Conf. 39/27 (1969) which states that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose". Article 31 requires that the ordinary meaning of the terms of a provision of the treaty be the primary source for interpreting its meaning. The context of a treaty for the purposes of interpreting its provisions includes any subsequent agreement or practice of states parties that confer an additional meaning to the provision (art. 31, paragraphs 2 and 3).

<sup>16</sup> Supra

<sup>17</sup> Supra

<sup>18</sup> Supra

<sup>19</sup> *G. T. v. Australia*, supra

relation to extradition, finding, in the cases of *Kindler v. Canada (Minister of Justice)*,<sup>20</sup> and *Reference Re Ng Extradition*,<sup>21</sup> that providing the Minister with discretion as to whether to seek assurances that the death penalty would not be carried out and the decision to extradite Kindler and Ng without seeking assurances did not violate the Canadian Constitution.<sup>22</sup>

8.9 It further argues that a State party's conduct must be assessed in light of the law applicable at the time when the alleged treaty violation took place: at the time of the author's removal there was no international legal requirement requiring Canada to seek assurances that the death penalty would not be carried out against Roger Judge. It submits that this is evidenced by the Committee's interpretation of the Covenant in *Kindler, Ng and Cox (supra)*. In addition, the United Nation's Model Treaty on Extradition<sup>23</sup> does not list the absence of assurances that the death penalty will not be carried out as a "mandatory ground for refusal" to extradite an individual but it is listed as an "optional ground for refusal". Finally, it submits that whether abolitionist states should be required to seek assurances in all cases when removing individuals to countries where they face the death penalty is a matter of state policy but not a legal requirement under the Covenant.

8.10 On the question of whether removing the author to a state where he was under a sentence of death without seeking assurances violates article 7 of the Covenant, the State party submits that the Committee has held that extradition or removal to face capital punishment, within the parameters of article 6, paragraph 2, does not *per se* violate article 7.<sup>24</sup> It also notes the Committee's finding that there may be issues that arise under article 7 in connection with the death penalty depending on the "personal factors regarding the author, the specific conditions of detention on death row, and whether the proposed method of execution is particularly abhorrent".<sup>25</sup>

8.11 The State party argues that, in the instant case, the Committee rejected as inadmissible any claims respecting the author's personal factors, conditions of detention on death row or the method of execution. The only issue that is raised is whether Canada's failure to seek assurances that the death penalty will not be applied violates the author's rights under article 7. The State party argues that if the imposition of the death penalty within the parameters of article 6, paragraph 2, does not violate article 7, then the failure of a state to seek assurances that the death penalty will not be applied cannot violate article 7. To hold otherwise would mean that the imposition of the death penalty within the parameters of article 6, paragraph 2, by State X, would not constitute torture, cruel, inhuman or degrading treatment or punishment, but that a state which extradites to State X without seeking assurances that the death penalty would not be applied, would be found to have placed the individual at a real risk of torture, cruel, inhuman or degrading treatment or punishment. In the State party's view, this amounts to an untenable interpretation of article 7. For these reasons, the State party asserts that it is not in violation of article 7 for having removed Roger Judge to the United States without seeking assurances.

<sup>20</sup> [1991] 2 S.C.R. 779.

<sup>21</sup> [1991] 2 S.C.R. 858.

<sup>22</sup> *Ibid.*, at page 840.

<sup>23</sup> U.N. Doc A/RES/45/116, adopted 14 December 1990.

<sup>24</sup> *Kindler v. Canada*, *supra*.

<sup>25</sup> *Kindler v. Canada*, *supra*.

8.12 The State party submits that article 2, paragraph 3, of the Covenant requires States parties to ensure that any person whose rights or freedoms have been violated under the Covenant, have an effective remedy, that claims of rights violations can be heard before competent authorities and that any remedies be enforced. The State party relies on its submissions on articles 6 and 7 and asserts in light of those arguments, that it did not violate the author's rights or freedoms under the Covenant. Canada's obligations under article 2, paragraphs 3(a) and (c), thus do not arise in this case.

8.13 Furthermore, the State party submits that individuals who claim violations of their rights and freedoms, can have such claims determined by competent judicial authorities and if such claims are substantiated, be provided an effective remedy. More particularly, it argues, that the issue of whether it was required to seek assurances that the death penalty not be applied to the author could have been raised before domestic courts.<sup>26</sup>

2. Did the removal of the author to a state in which he was under sentence of death before he could exercise all his rights to challenge that removal violate the author's rights under articles 6, 7 and 2 of the Covenant

8.14 The State party relies, *mutatis mutandis*, on its previous submissions with respect to the first question posed by the Committee. In particular, its argument that article 6 and the Committee's relevant General Comment<sup>27</sup> are silent on the issue of whether a state is required to allow an individual to exercise all rights of appeal prior to removing them to a state where they have been sentenced to death. No legal authority has been found for this proposition and finding such a requirement under article 6 would represent a significant departure from accepted rules of treaty interpretation. In the State party's view, articles 6, paragraph 4, and 14, paragraph 5, provide important safeguards for the State party seeking to impose the death penalty<sup>28</sup> but do not apply to a State Party that removes or extradites an individual to a State where they have been sentenced to death.

8.15 The State party explains that Section 48 of the Immigration Act<sup>29</sup> stipulates that a removal order must be executed as soon as reasonably practicable subject to statutory or judicial stays. That is, where there are no stays on its execution, a removal order is a mandatory one which the Minister is legally bound to execute as soon as reasonably practicable, having little discretion in this regard. In the present case, the State party submits that, none of the statutory stays available under sections 49 and 50 of the Immigration Act applied to the author, and his requests for a judicial stay were dismissed by the reviewing courts.

<sup>26</sup> The State party refers to Canadian Charter of Rights and Freedoms, s. 24(1) which, in a similar manner to the Covenant, protects individuals' right to "life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice" (s. 7) and the right "not to be subjected to any cruel and unusual treatment or punishment" (s.12). Anyone who claims that his or her rights or freedoms have been infringed may apply to a competent court to obtain such remedy as the court considers just and appropriate in the circumstances.

<sup>27</sup> *Supra*

<sup>28</sup> In the instant case, the Committee found that the author's claim of a violation of a right to an appeal under Article 14, paragraph 5, of the Covenant was not substantiated for the purposes of the admissibility of the communication (at para. 7.7).

<sup>29</sup> This provision has been repealed and replaced by a similar provision in the Immigration and Refugee Protection Act.

8.16 The State party argues that the application for leave to commence an application for judicial review of the Minister's response that he was unable to defer removal including a lengthy memorandum of argument was considered by the Federal Court and denied. Similarly, the Superior Court of Québec considered the author's petition for the same relief dismissing it for both procedural and substantive reasons. Neither court found sufficient reason to stay removal. If the State party were to grant stays on removal orders until all levels of appeal could be exhausted, it argues that this would mean that individuals, such as the author, who committed serious crimes, would remain in Canada for significantly longer periods, which would result in lengthy delays on removals with no guarantee that serious criminals, such as the author, could be held in detention throughout the appeal process.<sup>30</sup>

8.17 On whether there has been a violation of article 7 in this regard, the State party relies, *mutatis mutandis*, on its previous submissions with respect to the first question posed by the Committee. In particular, if the imposition of the death penalty within the parameters of article 6, paragraph 2, does not violate article 7, then the failure of a state to allow an individual the possibility of exercising all judicial recourses prior to removal to the state imposing the death penalty cannot be a violation of article 7. The State party argues that the crucial issue is whether a State party imposing the death penalty has met the standards set out in article 6 and other relevant provisions of the Covenant and not whether the State party removing an individual to a State where he is under sentence of death has provided that individual with sufficient opportunity for judicial review of the decision to remove.

8.18 With respect to article 2, paragraph 3 of the Covenant, the State party submits that it has not violated any of the author's Covenant rights as he enjoyed sufficient judicial review of his removal order, prior to his removal to the United States, including review of whether the removal would violate his human rights.

8.19 On the author's current situation in the United States, the State party submits that it has been informed by the Philadelphia District Attorney's Office, State of Pennsylvania that the author is currently incarcerated in a state penitentiary, and that no execution date has been set for him.

8.20 On 23 May 2002, the Supreme Court of Pennsylvania denied the author's application for post conviction relief. The author has recently filed a petition for habeas corpus in the Federal District Court. An adverse decision rendered by the District Court can be appealed to the Federal Court of Appeals for the Third Circuit. This may be followed by an appeal to the U.S. Supreme Court. If the author's federal appeals are denied, an application for clemency can be filed with the State Governor. In addition, the State party reiterates that, according to the state of Pennsylvania, there have only been three persons executed since the reintroduction of the death penalty in 1976.

<sup>30</sup> The State party further explains that under the former Immigration Act and the new Immigration and Refugee Protection Act, the Minister could argue in favour of detention during the appeal process based on the grounds that the person was likely to pose a danger to the public, or unlikely to appear for removal. The reasons for detention would be reviewed by an independent decision-maker. The Minister however, would not be able to guarantee the continued detention of the person and the longer the period of detention, the more likely that the individual would be released into the public.

8.21 Without prejudice to any of the preceding submissions, the State party apprises the Committee of domestic developments that have occurred since the events at issue in this case. On 15 February 2001, the Supreme Court of Canada held, in *United States v. Burns*,<sup>31</sup> that the government must seek assurances, in all but exceptional cases, that the death penalty would not be applied prior to extraditing an individual to a state where they face capital punishment. The State party submits that Citizenship and Immigration Canada is considering the potential impact of this decision on immigration removals.

The author's response on the merits pursuant to the Committee's request

9.1 By letter of 24 January 2003, the author responded to the request for information by the Committee and commented on the State party's submission. He submits that by relying on the decision in *Kindler v. Canada*,<sup>32</sup> in its argument that in matters of extradition or removal, the Covenant is not necessarily breached by an abolitionist state where assurances that the death penalty not be carried out are not requested, the State party has misconstrued not only the facts of *Kindler* but the effect of the Committee's decision therein.

9.2 Firstly, the author argues that *Kindler* dealt with extradition as opposed to deportation. He recalls the Committee's statement that there would have been a violation of the Covenant "if the decision to extradite without assurances would have been taken arbitrarily or summarily". However, since the Minister of Justice considered Mr. Kindler's arguments prior to ordering his surrender without assurances, the Committee could not find that the decision was made "arbitrarily or summarily". The case currently under consideration concerns deportation, which lacks any legal process under which the deportee may request assurances that the death penalty not be carried out.

9.3 Secondly, the author reiterates that he petitioned the Canadian courts to declare that his removal by deportation would violate his rights under the Canadian Charter of Rights and Freedoms, so as to suspend his removal from Canada and "force" the United States to request his extradition, at which point he could have requested the Minister of Justice to seek assurances that the death penalty not be carried out. As the Minister of Justice has no such power under the deportation process, the State party was able to exclude the author from the protections afforded by the extradition treaty and no review of the appropriateness of requesting assurances was ever carried out. The author submits that the United States would have requested his extradition and encloses a letter, dated 3 February 1994, from the Philadelphia District Attorney's Office, exhibited with the author's proceedings in Canada, indicating that it will initiate extradition proceedings if necessary. Any refusal by the Minister to require assurances could then have been reviewed through the domestic court system. In "sidestepping" the extradition process and returning the author to face the death penalty, the State party is said to have violated the author's rights under articles 6, 7, and 2 (3) of the Covenant, as unlike *Kindler*, it did not consider the merits of assurances.

9.4 As to whether the State party violated his rights by deporting him before he could exercise all his rights to challenge his deportation, the author submits that the State party's interpretation of its obligations are too restrictive and that death penalty cases require special consideration. By removing him within hours after the Superior Court of Québec's decision

<sup>31</sup> Neutral citation 2001 SCC 7. [2001] S.C.J. No. 8.

<sup>32</sup> *Supra*

(handed down late evening), it is argued that the State party ensured that the civil rights issues raised by the author could not benefit from any appellate review.

9.5 The author argues that this restrictive approach is contrary to the wording of the General Comment on article 2 which States "...The Committee considers it necessary to draw the attention of State parties to the fact that the obligation under the Covenant is not confined to the respect of human rights, but that State parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction." By deporting the author to ensure that he could not avail himself of his right of appeal, not only did the State party violate article 2, paragraph 3, of the Covenant, but the spirit of this general comment.

9.6 The author submits that the Minister has some discretion, under section 48 of the Immigration Act and is not under an obligation to remove him "immediately". Also, domestic jurisprudence recognises that the Minister has a duty to exercise this discretion on a case-by-case basis. He refers to the case of *Wang v. The Minister of Citizenship & Immigration*<sup>33</sup>, where it was held that "the discretion to be exercised is whether or not to defer to another process which may render the removal order ineffective or unenforceable, the object of that process being to determine whether removal of that person would expose him to a risk of death or other extreme sanction". According to this principle, the author believes that he should not have been deported until he had had an opportunity to avail himself of appellate review. It is submitted that had his right to appeal not been curtailed by his deportation, his case would still have been in the Canadian judicial system when the Supreme Court of Canada determined, in *United States of America v. Burns*<sup>34</sup>, that except in exceptional cases, assurances must be requested in all cases in which the death penalty could otherwise be imposed, and he would have benefited from it.

9.7 On the State party's argument (paragraph 8.13) that "the issue of whether Canada was required to seek assurances that the death penalty not be applied to Roger Judge could have been raised before domestic courts", the author submits that the State party misconstrued his legal position. The author's proceedings in Canada were intended to result in a stay of his deportation, so as to compel the United States to seek extradition, and only at this point could the issue of assurances have been raised.

9.8 On the author's current legal position, it is contested that no execution date has been set. It is submitted that a Death Warrant was signed by the Governor on 22 October 2002, and his execution scheduled for 10 December 2002. However, his execution has since been stayed, pending habeas corpus proceedings before the Federal District Court.

#### Issues and proceedings before the Committee

10.1 The Human Rights Committee has examined the communication in light of all the information made available to it by the parties, as provided for in article 5, paragraph 1, of the Optional Protocol.

Question 1. As Canada has abolished the death penalty, did it violate the author's right to life under article 6, his right not to be subjected to torture or to cruel, inhuman or degrading

treatment or punishment under article 7, or his right to an effective remedy under article 2, paragraph 3, of the Covenant by deporting him to a State in which he was under sentence of death without ensuring that that sentence would not be carried out?

10.2 In considering Canada's obligations, as a State party which has abolished the death penalty, in removing persons to another country where they are under sentence of death, the Committee recalls its previous jurisprudence in *Kindler v. Canada*,<sup>35</sup> that it does not consider that the deportation of a person from a country which has abolished the death penalty to a country where he/she is under sentence of death amounts *per se* to a violation of article 6 of the Covenant. The Committee's rationale in this decision was based on an interpretation of the Covenant which read article 6, paragraph 1, together with article 6, paragraph 2, which does not prohibit the imposition of the death penalty for the most serious crimes. It considered that as Canada itself had not imposed the death penalty but had extradited the author to the United States to face capital punishment, a state which had not abolished the death penalty, the extradition itself would not amount to a violation by Canada unless there was a real risk that the author's rights under the Covenant would be violated in the United States. On the issue of assurances, the Committee found that the terms of article 6 did not necessarily require Canada to refuse to extradite or to seek assurances but that such a request should at least be considered by the removing state.

10.3 While recognizing that the Committee should ensure both consistency and coherence of its jurisprudence, it notes that there may be exceptional situations in which a review of the scope of application of the rights protected in the Covenant is required, such as where an alleged violation involves that most fundamental of rights – the right to life – and in particular if there have been notable factual and legal developments and changes in international opinion in respect of the issue raised. The Committee is mindful of the fact that the abovementioned jurisprudence was established some 10 years ago, and that since that time there has been a broadening international consensus in favour of abolition of the death penalty, and in states which have retained the death penalty, a broadening consensus not to carry it out. Significantly, the Committee notes that since *Kindler* the State party itself has recognized the need to amend its own domestic law to secure the protection of those extradited from Canada under sentence of death in the receiving state, in the case of *United States v. Burns*. There, the Supreme Court of Canada held that the government ~~must~~ seek assurances, in all but exceptional cases, that the death penalty will not be applied prior to extraditing an individual to a state where he/she faces capital punishment. It is pertinent to note that under the terms of this judgment, "Other abolitionist countries do not, in general, extradite without assurances."<sup>36</sup> The Committee considers that the Covenant should be interpreted as a living instrument and the rights protected under it should be applied in context and in the light of present-day conditions.

10.4 In reviewing its application of article 6, the Committee notes that, as required by the Vienna Convention on the Law of Treaties, a treaty should be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Paragraph 1 of article 6, which states that "Every human being has the inherent right to life...", is a general rule: its purpose is to protect life. States parties that have abolished the death penalty have an obligation under this paragraph to

<sup>33</sup> [2001] FCT 148 (March 6, 2001).

<sup>34</sup>. Supra

<sup>35</sup> Supra

<sup>36</sup>. Supra

so protect in all circumstances. Paragraphs 2 to 6 of article 6 are evidently included to avoid a reading of the first paragraph of article 6, according to which that paragraph could be understood as abolishing the death penalty as such. This construction of the article is reinforced by the opening words of paragraph 2 ("In countries which have not abolished the death penalty...") and by paragraph 6 ("Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant."). In effect, paragraphs 2 to 6 have the dual function of creating an exception to the right to life in respect of the death penalty and laying down limits on the scope of that exception. Only the death penalty pronounced when certain elements are present can benefit from the exception. Among these limitations are that found in the opening words of paragraph 2, namely, that only States parties that "have not abolished the death penalty" can avail themselves of the exceptions created in paragraphs 2 to 6. For countries that *have* abolished the death penalty, there is an obligation not to expose a person to the real risk of its application. Thus, they may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out.

10.5 The Committee acknowledges that by interpreting paragraphs 1 and 2 of article 6 in this way, abolitionist and retentionist States parties are treated differently. But it considers that this is an inevitable consequence of the wording of the provision itself, which, as becomes clear from the Travaux Préparatoires, sought to appease very divergent views on the issue of the death penalty, in an effort at compromise among the drafters of the provision. The Committee notes that it was expressed in the Travaux that, on the one hand, one of the main principles of the Covenant should be abolition, but on the other, it was pointed out that capital punishment existed in certain countries and that abolition would create difficulties for such countries. The death penalty was seen by many delegates and bodies participating in the drafting process as an "anomaly" or a "necessary evil". It would appear logical, therefore, to interpret the rule in article 6, paragraph 1, in a wide sense, whereas paragraph 2, which addresses the death penalty, should be interpreted narrowly.

10.6 For these reasons, the Committee considers that Canada, as a State party which has abolished the death penalty, irrespective of whether it has not yet ratified the Second Optional Protocol to the Covenant Aiming at the Abolition of the Death Penalty, violated the author's right to life under article 6, paragraph 1, by deporting him to the United States, where he is under sentence of death, without ensuring that the death penalty would not be carried out. The Committee recognizes that Canada did not itself impose the death penalty on the author. But by deporting him to a country where he was under sentence of death, Canada established the crucial link in the causal chain that would make possible the execution of the author.

10.7 As to the State party's claim that its conduct must be assessed in the light of the law applicable at the time when the alleged treaty violation took place, the Committee considers that the protection of human rights evolves and that the meaning of Covenant rights should in principle be interpreted by reference to the time of examination and not, as the State party has submitted, by reference to the time the alleged violation took place. The Committee also notes that prior to the author's deportation to the United States the Committee's position was evolving in respect of a State party that had abolished capital punishment (and was a State party to the Second Optional Protocol to the International Covenant on Human Rights, aiming at the abolition of the death penalty), from whether capital punishment would subsequent to removal to another State be applied in violation of the Covenant to whether

there was a real risk of capital punishment as such (Communication No. 692/1996, A.R.J. v. Australia, Views adopted on 28 July 1997 and Communication No. 706/1996, G.T. v. Australia, Views adopted on 4 November 1997). Furthermore, the State party's concern regarding possible retroactivity involved in the present approach has no bearing on the separate issues to be addressed under question 2 below.

Question 2. The State party had conceded that the author was deported to the United States before he could exercise his right to appeal the rejection of his application for a stay of his deportation before the Québec Court of Appeal. As a consequence the author was not able to pursue any further remedies that might be available. By deporting the author to a State in which he was under sentence of death before he could exercise all his rights to challenge that deportation, did the State party violate his rights under articles 6, 7 and 2, paragraph 3 of the Covenant?

10.8 As to whether the State party violated the author's rights under articles 6, and 2, paragraph 3, by deporting him to the United States where he is under sentence of death, before he could exercise his right to appeal the rejection of his application for a stay of deportation before the Québec Court of Appeal and, accordingly, could not pursue further available remedies, the Committee notes that the State party removed the author from its jurisdiction within hours after the decision of the Superior Court of Québec, in what appears to have been an attempt to prevent him from exercising his right of appeal to the Court of Appeal. It is unclear from the submissions before the Committee to what extent the Court of Appeal could have examined the author's case, but the State party itself concedes that as the author's petition was dismissed by the Superior Court for procedural and substantive reasons (see para. 4.5 above), the Court of Appeal could have reviewed the judgment on the merits.

10.9 The Committee recalls its decision in *A. R. J. v. Australia*<sup>37</sup>, a deportation case where it did not find a violation of article 6 by the returning state as it was not foreseeable that he would be sentenced to death and "because the judicial and immigration instances seized of the case heard extensive arguments" as to a possible violation of article 6. In the instant case, the Committee finds that, by preventing the author from exercising an appeal available to him under domestic law, the State party failed to demonstrate that the author's contention that his deportation to a country where he faces execution would violate his right to life, was sufficiently considered. The State party makes available an appellate system designed to safeguard any petitioner's, including the author's, rights and in particular the most fundamental of rights – the right to life. Bearing in mind that the State party has abolished capital punishment, the decision to deport the author to a state where he is under sentence of death without affording him the opportunity to avail himself of an available appeal, was taken arbitrarily and in violation of article 6, together with article 2, paragraph 3, of the Covenant.

10.10. Having found a violation of article 6, paragraph 1 alone and, read together with article 2, paragraph 3 of the Covenant, the Committee does not consider it necessary to address whether the same facts amount to a violation of article 7 of the Covenant.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal a violation by Canada of articles 6, paragraph 1 alone

<sup>37</sup> Supra

and, read together with 2, paragraph 3, of the International Covenant on Civil and Political Rights.

12. Pursuant to article 2, paragraph 3 (a) of the Covenant, the Committee concludes that the author is entitled to an appropriate remedy which would include making such representations as are possible to the receiving state to prevent the carrying out of the death penalty on the author.

13. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognised the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The Committee is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

**Individual opinion by Committee member Mr. Nisuko Ando  
concerning Committee's admissibility decision on communication  
No. 829/1998 (Judge v. Canada) adopted on 17 July 2002**

With regret, I must point out that I am unable to share the Committee's conclusion set forth in paragraph 7.8 in which it draws attention of both the author and the State party and requests them to address the two issues mentioned therein which relate to articles 6, 7 and 2 of the Covenant.

In its decision on admissibility of the communication the Committee makes clear that the communication is inadmissible as far as it relates to issues under articles 7, 10 (para. 7.4), article 6 (para. 7.5) and article 14 (5) (para. 7.7), and yet the Committee concludes that the facts presented by the author raise the two issues mentioned above. It is my understanding that in the present communication both the author and the State party have presented their cases in view of the Committee's earlier jurisprudence on Case No. 470/1991 (~~J. Kandler v. Canada~~), because in those two communications the relevant facts are very similar or almost identical. The Committee's line of argument in the present communication also suggests this. Under the circumstances I consider it illogical for the Committee to state that the communication is inadmissible in matters relating to articles 7, 10, 6 and 14 (5), on the one hand, but that it raises issues under articles 6, 7 and 2, on the other, unless it specifies how these apparent contradictions are to be solved. A mere reference to "the seriousness of these questions" (para. 7.8) does not suffice: Hence, this individual opinion!

(Signed): Mr. Nisuko Ando

**Individual opinion submitted by Mrs. Christine Chanet  
concerning Committee's admissibility decision on communication  
No. 829/1998 (Judge v. Canada) adopted on 17 July 2002**

Unlike its position in the case of Kindler v. Canada, in this case the Committee directly addresses the fundamental question of whether Canada, having abolished the death penalty, violated the author's right to life under article 6 of the Covenant by extraditing him to a State where he faced capital punishment, without ascertaining that that sentence would not in fact be carried out.

I can only subscribe to this approach, which I advocated and had wished to see applied in the Kindler case; indeed, that was the basis of the individual opinion I submitted in that case.

In my view, asking that question obviates the need for a response such as the Committee gives in this case concerning a violation by Canada of article 14, paragraph 5, of the Covenant.

The position adopted by the Committee on this point implies that it declares itself competent to consider the author's arguments concerning a possible violation of article 14, paragraph 5, of the Covenant, as a result of irregularities in the proceedings taken against the author in the United States, a position identical to that adopted in the Kindler case (para. 14.3).

In my view, while the Committee can declare itself competent to assess the degree of risk to life (death sentence) or to physical integrity (torture), it is less obvious that it can base an opinion that a violation has occurred in a State party to the Covenant on a third State's failure to observe a provision of the Covenant.

Taking the opposite position would amount to requiring a State party that called into question respect for human rights in its relations with a third State to be answerable for respect by that third State for all rights guaranteed by the Covenant vis-à-vis the person concerned.

And why not? It would certainly be a step forward in the realization of human rights, but legal and practical problems would immediately arise.

What is a third State, for example? What of States non-parties to the Covenant? What of a State that is party to the Covenant but does not participate in the procedure? Does the obligation of a State party to the Covenant in its relations with third States cover all the rights in the Covenant or only some of them? Could a State party to the Covenant enter a reservation to exclude implementation of the Covenant from its bilateral relations with another State?

Even setting aside the complex nature of the answers to these questions, applying the "maximalist" solution in practice is fraught with problems.

For while the Committee can ascertain that a State party has not taken any undue risks, and may perhaps give an opinion on the precautions taken by the State party to that

end, it can never really be sure whether a third State has violated the rights guaranteed by the Covenant if that State is not a party to the procedure.

In my view, therefore, the Committee should in this case have refrained from giving an opinion with respect to article 14, paragraph 5, and should have awaited a reply from the State party on the fundamental issue of expulsion by an abolitionist State to a State where the expelled individual runs the risk of capital punishment, since the terms in which the problem of article 14, paragraph 5, is couched will vary depending whether the answer to the first question is affirmative or negative.

For if an abolitionist State cannot expel or extradite a person to a State where that person could be executed, the issue of the regularity of the procedure followed in that State becomes irrelevant.

If, on the other hand, the Committee maintains the position adopted in the Kindler case, it will need to make a thorough study of the problem of States parties' obligations under the Covenant in their relations with third States.

\_\_\_\_\_): Ms. Christine Chanet  
(Signed

**Individual opinion by Committee member Mr. Hipólito Solari-Yrigoyen concerning Committee's admissibility decision on communication No. 829/1998 (Judge v. Canada) adopted on 17 July 2002 (dissenting)**

I disagree with regard to the present communication on the grounds set forth below:

The Committee is of the view that the author's counsel has substantiated for the purposes of admissibility, his allegation that the State party has violated his right to life under article 6 and article 14, paragraph 5, of the Covenant by deporting him to the United States, where he has been sentenced to death, and that his claim is compatible with the Covenant. The Committee therefore declares that this part of the communication is admissible and should be considered on the merits.

Committee's consideration of the merits

With regard to a potential violation by Canada of article 6 of the Covenant for having deported the author to face the imposition of the death penalty in the United States, the Committee refers to the criteria set forth in its prior jurisprudence. Namely, for States that have abolished capital punishment and that extradite a person to a country where that person may face the imposition of a death penalty, the extraditing State must ensure itself that the person is not exposed to a real risk of a violation of his rights under article 6 of the Covenant.<sup>38</sup>

The Committee notes that the State party's argument in the present communication, that several additional review recourses were available to the author, such as filing a petition in the Court of Common Pleas under Pennsylvania's Post-Conviction Relief Act, filing a writ of habeas corpus in the United States District Court for the Eastern District of Pennsylvania, making a request to the Governor of Pennsylvania for clemency, and appealing to the Pennsylvania Supreme Court. The Committee observes that the automatic review of the author's sentence by the Pennsylvania Supreme Court took place in absentia, when the author was in prison in Canada. Although the author was represented by counsel, the Supreme Court did not undertake a full review of the case, nor did it review the sufficiency of evidence, possible errors at trial, or propriety of sentence. A review of this nature is not compatible with the right protected under article 14, paragraph 5, of the Covenant, which calls for a full evaluation of the evidence and the court proceedings. The Committee considers that such limitations in a capital case amount to a denial of a fair trial, which is not compatible with the right protected under article 14, paragraph 5, of the Covenant, and that the author's flight from the United States to avoid the death penalty does not absolve Canada from its obligations under the Covenant. In the light of the foregoing, the Committee considers the State party accountable for the violation of article 6 of the Covenant as a consequence of the violation of article 14, paragraph 5.

The Committee has noted the State party's argument that there was no law under which it could have detained the author on expiry of his sentence and therefore had to deport him. The Committee takes the view that this response is unsatisfactory for three reasons,

<sup>38</sup> Communication No. 692/1996, *A.R.J. v. Australia*; No. 706/1996, *T. v. Australia*; No. 470/1991, *Kindler v. Canada*; No. 469/1991, *Chitai Ng v. Canada* and No. 486/1992, *Cox v. Canada*.

namely: (1) Canada deported the author knowing that he would not have the right to appeal in a capital case; (2) the speed with which Canada deported the author did not allow him the opportunity to appeal the decision to remove him; and (3) in the present case, Canada took a unilateral decision and therefore cannot invoke its obligations under the Extradition Treaty with the United States, since at no time did the United States request the extradition.

The Committee, acting under article 5, paragraph 4, of the Optional Protocol finds that Canada has violated its obligations under article 2 of the Covenant to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant because, when it deported the author to the United States, it did not take sufficient precautions to ensure that his rights under article 6 and to article 14, paragraph 5, of the Covenant would be fully observed.

The Human Rights Committee requests the State party to do everything possible, as a matter of urgency to avoid the imposition of the death penalty or to provide the author with a full review of his conviction and sentence. The State party has the obligation to ensure that similar violations do not occur in the future.

Bearing in mind that by signing the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish these Views.

(Signed): Mr. Hipólito Solari-Yrigoyen

**APPENDIX**

**Individual opinions submitted pursuant to rule 94, paragraph 3, of the Committee's rules of procedure, concerning the Committee's views on communication No. 470/1991 (Joseph Kindler v. Canada)**

**A. Individual opinion submitted by Mr. Bertil Wennergren (dissenting)**

I cannot share the Committee's views on a non-violation of article 6 of the Covenant. In my opinion, Canada violated article 6, paragraph 1, of the Covenant by extraditing the author to the United States, without having sought assurances for the protection of his life, i.e. non-execution of a death sentence imposed upon him. I justify this conclusion as follows:

Firstly, I would like to clarify my interpretation of article 6 of the Covenant. The Vienna Convention on the Law of Treaties stipulates that a treaty must be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The object of the provisions of article 6 is human life and the purpose of its provisions is the protection of such life. Thus, paragraph 1 emphasizes this point by guaranteeing to every human being the inherent right to life. The other provisions of article 6 concern a secondary and subordinate object, namely to allow States parties that have not abolished capital punishment to resort to it until such time they feel ready to abolish it. In the *travaux préparatoires* to the Covenant, the death penalty was seen by many delegates and bodies participating in the drafting process as "anomaly" or a "necessary evil". Against this background, it would appear to be logical to interpret the fundamental rule in article 6, paragraph 1, in a wide sense, whereas paragraph 2, which addresses the death penalty, should be interpreted narrowly. The principal difference between my and the Committee's views on this case lies in the importance I attach to the fundamental rule in paragraph 1 of article 6, and my belief that what is said in paragraph 2 about the death penalty has a limited objective that cannot by any reckoning override the cardinal principle in paragraph 1.

The rule in article 6, paragraph 1, of the Covenant stands out from among the others laid down in article 6; moreover, article 4 of the Covenant makes it clear that no derogations from this rule are permitted, not even in time of a public emergency threatening the life of the nation. No society, however, has postulated an absolute right to life. All human rights, including the right to life, are subject to the rule of necessity. If, but only if, absolute necessity so requires, it may be justifiable to deprive an individual of his life to prevent him from killing others or so as to avert man-made disasters. For the same reason, it is justifiable to send citizens into war and thereby expose them to a real risk of their being killed. In one form or another, the rule of necessity is inherent in all legal systems; the legal system of the Covenant is no exception.

Article 6, paragraph 2, makes an exception for States parties that have not abolished the death penalty. The Covenant permits them to continue applying the death penalty. This "dispensation" for States parties should not be construed as a justification for the deprivation of the life of individuals, albeit lawfully sentenced to death, and does not make the execution of a death sentence strictly speaking legal. It merely provides a possibility for States parties to be released from their obligations under articles 2 and 6 of the Covenant, namely to respect

**Individual Opinion of Committee Member Mr. Rajsoomer Lallah  
(concurring)**

I entirely agree with the Committee's revision of the approach which it had adopted in *Kindler v. Canada* in relation to the correct interpretation to be given to the "inherent right to life" guaranteed under article 6(1) of the Covenant. This revised interpretation is well explicated in paragraphs 10.4 and 10.5 of the present Views of the Committee. I wish, however, to add three observations.

First, while it is encouraging to note, as the Committee does in paragraph 10.3 of the present Views, that there is a broadening international consensus in favour of the abolition of the death penalty, it is appropriate to recall that, even at the time when the Committee was considering its views in *Kindler* some 10 years ago, the Committee was quite divided as to the obligations which a State party undertakes under article 6(1) of the Covenant, when faced with a decision as to whether to remove an individual from its territory to another State where that individual had been sentenced to death. No less than five members of the Committee dissented from the Committee's Views, precisely on the nature, operation and interpretation of article 6(1) of the Covenant. The reasons which led those five members to dissent were individually expressed in separate individual opinions which are appended to this separate opinion as A, B, C, D and E. In the case of the separate opinion at E, only the fact that appears most relevant is reproduced (paragraph 19 to 25).

My second observation is that other provisions of the Covenant, in particular, articles 5(2) and 26, may be relevant in interpreting article 6(1), as noted in some of the individual opinions.

It is also encouraging that the Supreme Court of Canada has held that in similar cases assurances must, as the Committee notes, be obtained, subject to exceptions. I wonder to what extent these exceptions could conceptually be envisaged given the autonomy of article 6(1) and the possible impact of article 5(2) and also article 26 which governs the legislative, executive and judicial behaviour of States parties. That, however, is a bridge to be crossed by the Committee in an appropriate case.

(Signed): Rajsoomer Lallah

under article 6, paragraph 1, is permitted. This is why Canada, in my view, violated article 6, paragraph 1, by consenting to extradite Mr. Kindler to the United States, without having secured assurances that Mr. Kindler would not be subjected to the execution of a death sentence.

B. Wennergren

[Done in English, French and Spanish, the English text being the original version.]

and to ensure to all individuals within their territory and under their jurisdiction the inherent right to life without any distinction, and enables them to make a distinction with regard to persons having committed the "most serious crime(s)".

The standard way to ensure the protection of the right to life is to criminalize the killing of human beings. The act of taking human life is normally subsumed under terms such as "manslaughter", "homicide" or "murder". Moreover, there may be omissions which can be subsumed under crimes involving the intentional taking of life, inaction or omission that causes the loss of a person's life, such as a doctor's failure to save the life of a patient by intentionally failing to activate life-support equipment, or failure to come to the rescue of a person in a life-threatening situation of distress. Criminal responsibility for the deprivation of life lies with private persons and representatives of the State alike. The methodology of criminal legislation provides some guidance when assessing the limits for a State party's obligations under article 2, paragraph 1, of the Covenant, to protect the right to life within its jurisdiction.

What article 6, paragraph 2, does not, in my view, is to permit States parties that have abolished the death penalty to reintroduce it at a later stage. In this way, the "dispensation" character of paragraph 2 has the positive effect of preventing a proliferation of the deprivation of peoples' lives through the execution of death sentences among States parties to the Covenant. The Second Optional Protocol to the Covenant was drafted and adopted so as to encourage States parties that have not abolished the death penalty to do so.

The United States has not abolished the death penalty and therefore may, by operation of article 6, paragraph 2, deprive individuals of their lives by the execution of death sentences lawfully imposed. The applicability of article 6, paragraph 2, in the United States should not however be construed as extending to other States when they must consider issues arising under article 6 of the Covenant in conformity with their obligations under article 2, paragraph 1, of the Covenant. The "dispensation" clause of paragraph 2 applies merely domestically and as such concerns only the United States, as a State party to the Covenant.

Other States, however, are in my view obliged to observe their duties under article 6, paragraph 1, namely to protect the right to life. Whether they have or have not abolished capital punishment does not, in my opinion, make any difference. The dispensation in paragraph 2 does not apply in this context. Only the rule in article 6, paragraph 1, applies, and it must be applied strictly. A State party must not defeat the purpose of article 6, paragraph 1, by failing to provide anyone with such protection as is necessary to prevent his/her right to life from being put at risk. And under article 2, paragraph 1, of the Covenant, protection shall be ensured to all individuals without distinction of any kind. No distinction must therefore be made on the ground, for instance, that a person has committed a "most serious crime".

The value of life is immeasurable for any human being, and the right to life enshrined in article 6 of the Covenant is the supreme human right. It is an obligation of States parties to the Covenant to protect the lives of all human beings on their territory and under their jurisdiction. If issues arise in respect of the protection of the right to life, priority must not be accorded to the domestic laws of other countries or to (bilateral) treaty articles. Discretion of any nature permitted under an extradition treaty cannot apply, as there is no room for it under Covenant obligations. It is worth repeating that no derogation from a State's obligations

**B. Individual opinion submitted by Mr. Rajsoomer Lallah (dissenting)**

1. I am unable to subscribe to the Committee's views to the effect that the facts before it do not disclose a violation by Canada of any provision of the Covenant.
- 2.1 I start by affirming my agreement with the Committee's opinion, as noted in paragraph 13.1 of the views, that what is at issue is not whether Mr. Kindler's rights have been, or run the real risk of being, violated in the United States and that a State party to the Covenant is required to ensure that it carries out other commitments it may have under a bilateral treaty in a manner consistent with its obligations under the Covenant. I further agree with the Committee's view, in paragraph 13.2, to the effect that, where a State party extradites a person in such circumstances as to expose him to a real risk that his rights under the Covenant will be violated in the jurisdiction to which that person is extradited, then that State party may itself be in violation of the Covenant.
- 2.2 I wonder, however, whether the Committee is right in concluding that, by extraditing Mr. Kindler, and thereby exposing him to the real risk of being deprived of his life, Canada did not violate its obligations under the Covenant. The question whether the author ran that risk under the Covenant in its concrete application to Canada must be examined, as the Committee sets out to do, in the light of the fact that Canada's decision to abolish the death penalty for all civil, as opposed to military, offences was given effect to in Canadian law.
- 2.3 The question which arises is what exactly are the obligations of Canada with regard to the right to life guaranteed under article 6 of the Covenant even if read alone and, perhaps and possibly, in the light of other relevant provisions of the Covenant, such as equality of treatment before the law under article 26 and the obligations deriving from article 5(2) which prevents restrictions or derogations from Covenant rights on the pretext that the Covenant recognizes them to a lesser extent. The latter feature of the Covenant would have, in my view, all its importance since the right to life is one to which Canada gives greater protection than might be thought to be required, on a minimal interpretation, under article 6 of the Covenant.
- 2.4 It would be useful to examine, in turn, the requirements of articles 6, 26 and 5(2) of the Covenant and their relevance to the facts before the Committee.
- 3.1 Article 6(1) of the Covenant proclaims that everyone has the inherent right to life. It requires that this right shall be protected by law. It also provides that no one shall be arbitrarily deprived of his life. Undoubtedly, in pursuance of article 2 of the Covenant, domestic law will normally provide that the unlawful violation of that right will give rise to penal sanctions as well as civil remedies. A State party may further give appropriate protection to that right by outlawing the deprivation of life by the State itself as a method of punishment where the law previously provided for such a method of punishment. Or, with the same end in view, the State party which has not abolished the death penalty is required to restrict its application to the extent permissible under the remaining paragraphs of article 6, in particular, paragraph 2. But, significantly, paragraph 6 has for object to prevent States from invoking the limitations in article 6 to delay or to prevent the abolition of capital punishment. And Canada has decided to abolish this form of punishment for civil, as opposed to military, offences. It can be said that, in so far as civil offences are concerned, paragraph 2 is not

- applicable to Canada, because Canada is not a State which, in the words of that paragraph, has not abolished the death penalty.
- 3.2 It seems to me, in any event, that the provisions of article 6(2) are in the nature of a derogation from the inherent right to life proclaimed in article 6(1) and must therefore be strictly construed. Those provisions cannot justifiably be resorted to in order to have an adverse impact on the level of respect for, and the protection of, that inherent right which Canada has undertaken under the Covenant "to respect and to ensure to all individuals within its territory and subject to its jurisdiction". In furtherance of this undertaking, Canada has enacted legislative measures to do so, going to the extent of abolishing the death penalty for civil offences. In relation to the matter in hand, three observations are called for.
  - 3.3 First, the obligations of Canada under article 2 of the Covenant have effect with respect to "all individuals within its territory and subject to its jurisdiction", irrespective of the fact that Mr. Kindler is not a citizen of Canada. The obligations towards him are those that must avail to him in his quality as a human being on Canadian soil. Secondly, the very notion of "protection" requires prior preventive measures, particularly in the case of a deprivation of life. Once an individual is deprived of his life, it cannot be restored to him. These preventive measures necessarily include the prevention of any real risk of the deprivation of life. By extraditing Mr. Kindler without seeking assurances, as Canada was entitled to do under the Extradition Treaty, that the death sentence would not be applied to him, Canada put his life at real risk. Thirdly, it cannot be said that unequal standards are being expected of Canada as opposed to other States. In its very terms, some provisions of article 6 apply to States which do not have the death penalty and other provisions apply to those States which have not yet abolished that penalty. Besides, unequal standards may, unfortunately, be the result of reservations which States may make to particular articles of the Covenant though, I hasten to add, it is questionable whether all reservations may be held to be valid.
  - 3.4 A further question arises under article 6(1), which requires that no one shall be arbitrarily deprived of his life. The question is whether the granting of the same and equal level of respect and protection is consistent with the attitude that, so long as the individual is within Canada's territory, that right will be fully respected and protected to that level, under Canadian law viewed in its total effect even though expressed in different enactments (penal law and extradition law), whereas Canada might be free to abrogate that level of respect and protection by the deliberate and coercive act of sending that individual away from its territory to another State where the fatal act runs the real risk of being perpetrated. Could this inconsistency be held to amount to a real risk of an "arbitrary" deprivation of life within the terms of article 6(1) in that unequal treatment is in effect meted out to different individuals within the same jurisdiction? A positive answer would seem to suggest itself as Canada, through its judicial arm, could not sentence an individual to death under Canadian law whereas Canada, through its executive arm, found it possible under its extradition law to extradite him to face the real risk of such a sentence.
  - 3.5 For the above reasons, there was, in my view, a case before the Committee to find a violation by Canada of article 6 of the Covenant.
  4. Consideration of the possible application of articles 26 and 5 of the Covenant would, in my view, lend further support to the case for a violation of article 6.

5. In the light of the considerations discussed in paragraph 3.4 above, it would seem that article 26 of the Covenant which guarantees equality before the law has been breached. Equality under this article, in my view, includes substantive equality under a State party's law viewed in its totality and its effect on the individual. Effectively, different and unequal treatment may be said to have been meted out to Mr. Kindler when compared with the treatment which an individual having committed the same offence would have received in Canada. It does not matter, for this purpose, whether Canada metes out this unequal treatment by reason of the particular arm of the State through which it acts, that is to say, through its judicial arm or through its executive arm. Article 26 regulates a State party's legislative, executive as well as judicial behaviour. That, in my view, is the prime principle, in questions of equality and non-discrimination under the Covenant, guaranteeing the application of the rule of law in a State party.

6. I have grave doubts as to whether, in deciding to extradite Mr. Kindler, Canada would have reached the same decision if it had properly directed itself on its obligations deriving from article 5(2), in conjunction with articles 2, 6 and 26, of the Covenant. It would appear that Canada rather considered, in effect, the question whether there were, or there were not, special circumstances justifying the application of the death sentence to Mr. Kindler, well realizing that, by virtue of Canadian law, the death sentence could not have been imposed in Canada itself on Mr. Kindler on conviction there for the kind of offence he had committed. Canada had exercised its sovereign decision to abolish the death penalty for civil, as distinct from military, offences, thereby ensuring greater respect for, and protection of the individual's inherent right to life. Article 5(2) would, even if article 6 of the Covenant were given a minimal interpretation, have prevented Canada from invoking that minimal interpretation to restrict or give lesser protection to that right by an executive act of extradition though, in principle, permissible under Canadian extradition law.

R. Lallah

[Done in English, French and Spanish, the English text being the original version.]

**C. Individual opinion submitted by Mr. Fausto Pocar (dissenting)**

While I agree with the decision of the Committee in so far as it refers to the consideration of the claim under article 7 of the Covenant, I am not able to agree with the findings of the Committee that in the present case there has been no violation of article 6 of the Covenant. The question whether the fact that Canada had abolished capital punishment except for certain military offences required its authorities to refuse extradition or request assurances from the United States that the death penalty would not be imposed against Mr. Kindler, must in my view receive an affirmative answer.

Regarding the death penalty, it has to be recalled that, although article 6 of the Covenant does not prescribe categorically the abolition of capital punishment, it imposes a set of obligations on States parties that have not yet abolished it. As the Committee has pointed out in its General Comment 6(16), "the article also refers generally to abolition in terms which strongly suggest that abolition is desirable." Furthermore, the wording of paragraphs 2 and 6 clearly indicates that article 6 tolerates - within certain limits and in view of a future abolition - the existence of capital punishment in States parties that have not yet abolished it, but may by no means be interpreted as implying for any State party an authorization to delay its abolition or, *a fortiori*, to enlarge its scope or to introduce or reintroduce it. Consequently, a State party that has abolished the death penalty is in my view under the legal obligation, according to article 6 of the Covenant, not to reintroduce it. This obligation must refer both to a direct reintroduction within the State's jurisdiction, and to an indirect one, as it is the case when the State's jurisdiction, and to an indirect one, as it is the case when the State acts - through extradition, expulsion or compulsory return - in such a way that an individual within its territory and subject to its jurisdiction may be exposed to capital punishment in another State. I therefore conclude that in the present case there has been a violation of article 6 of the Covenant.

F. Pocar

[Done in English, French and Spanish, the English text being the original version.]

**D. Individual opinion submitted by Mrs. Christine Chanet (dissenting)**

The questions posed to the Human Rights Committee by Mr. Kindler's communication are clearly set forth in paragraph 14.1 of the Committee's decision.

Paragraph 14.2 does not require any particular comment on my part.

On the other hand, when replying to the questions thus identified in paragraph 14.1, the Committee, in order to conclude in favour of a non-violation by Canada of its obligations under article 6 of the Covenant, was forced to undertake a joint analysis of paragraphs 1 and 2 of article 6 of the Covenant.

There is nothing to show that this is a correct interpretation of article 6. It must be possible to interpret every paragraph of an article of the Covenant separately, unless expressly stated otherwise in the text itself or deducible from its wording.

That is not so in the present case.

The fact that the Committee found it necessary to use both paragraphs in support of its argument clearly shows that each paragraph, taken separately, led to the opposite conclusion, namely, that a violation had occurred.

According to article 6, paragraph 1, no one shall be arbitrarily deprived of his life; this principle is absolute and admits of no exception.

Article 6, paragraph 2, begins with the words: "In countries which have not abolished the death penalty ...". This form of words requires a number of comments:

It is negative and refers not to countries in which the death penalty exists but to those in which it has not been abolished. Abolition is the rule, retention of the death penalty the exception.

Article 6, paragraph 2, refers only to countries in which the death penalty has not been abolished and thus rules out the application of the text to countries which have abolished the death penalty.

Lastly, the text imposes a series of obligations on the States in question. Consequently, by making a "joint" interpretation of the first two paragraphs of article 6 of the Covenant, the Committee has, in my view, committed three errors of law:

One error, in that it is applying to a country which has abolished the death penalty, Canada, a text exclusively reserved by the Covenant - and that in an express and unambiguous way - for non-abolitionist States.

The second error consists in regarding as an authorization to re-establish the death penalty in a country which has abolished it what is merely an implicit recognition of its existence. This is an extensive interpretation which runs counter to the proviso in paragraph 6 of article 6 that "nothing in this article shall be invoked ... to prevent the abolition of capital

punishment". This extensive interpretation, which is restrictive of rights, also runs counter to the provision in article 5, paragraph 2, of the Covenant that "there shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent". Taken together, these texts prohibit a State from engaging in distributive application of the death penalty. There is nothing in the Covenant to force a State to abolish the death penalty but, if it has chosen to do so, the Covenant forbids it to re-establish it in an arbitrary way, even indirectly.

The third error of the Committee in the Kindler decision results from the first two. Assuming that Canada is implicitly authorized by article 6, paragraph 2, of the Covenant, to re-establish the death penalty, on the one hand, and to apply it in certain cases on the other, the Committee subjects Canada in paragraphs 14.3, 14.4 and 14.5, as if it were a non-abolitionist country, to a scrutiny of the obligations imposed on non-abolitionist States: penalty imposed only for the most serious crimes, judgement rendered by a competent court, etc.

This analysis shows that, according to the Committee, Canada, which had abolished the death penalty on its territory, has by extraditing Mr. Kindler to the United States re-established it by proxy in respect of a certain category of persons under its jurisdiction.

I agree with this analysis but, unlike the Committee, I do not think that this behaviour is authorized by the Covenant.

Moreover, having thus re-established the death penalty by proxy, Canada is limiting its application to a certain category of persons: those that are extraditable to the United States.

Canada acknowledges its intention of so practising in order that it may not become a haven for criminals from the United States. Its intention is apparent from its decision not to seek assurances that the death penalty would not be applied in the event of extradition to the United States, as it is empowered to do by its bilateral extradition treaty with that country.

Consequently, when extraditing persons in the position of Mr. Kindler, Canada is deliberately exposing them to the application of the death penalty in the requesting State.

In so doing, Canada's decision with regard to a person under its jurisdiction according to whether he is extraditable to the United States or not, constitutes a discrimination in violation of article 2, paragraph 1, and article 26 of the Covenant.

Such a decision affecting the right to life and placing that right, in the last analysis, in the hands of the Government which, for reasons of penal policy, decides whether or not to seek assurances that the death penalty will not be carried out, constitutes an arbitrary deprivation of the right to life forbidden by article 6, paragraph 1, of the Covenant and, consequently, a misreading by Canada of its obligations under this article of the Covenant.

Ch. Chanet

[Done in English, French and Spanish, the French text being the original version.]

**E. Dissenting opinion by Mr. Francisco Jose Aguilar Urbina**

19. The problem that arises with the extradition of Mr. Kindler to the United States without any assurances having been requested is that he has been deprived of the enjoyment of a right in conformity with the Covenant. Article 6, paragraph 2, of the Covenant, although it does not prohibit the death penalty, cannot be understood as an unrestricted authorization for it. In the first place, it has to be viewed in the light of paragraph 1, which declares that every human being has the inherent right to life. It is an unconditional right admitting of no exception. In the second place, it constitutes - for those States which have not abolished the death penalty - a limitation on its application, in so far as it may be imposed only for the most serious crimes. For those States which have abolished the death penalty it represents an insurmountable barrier. The spirit of the article is to eliminate the death penalty as a punishment, and the limitations which it imposes are of an absolute nature.

20. In this connection, when Mr. Kindler entered Canadian territory he already enjoyed an unrestricted right to life. By extraditing him without having requested assurances that he would not be executed, Canada has denied the protection which he enjoyed and has necessarily exposed him to be sentenced to death and foreseeably to being executed. Canada has therefore violated article 6 of the Covenant.

21. Further, Canada's misinterpretation of the rule in article 6, paragraph 2, of the International Covenant on Civil and Political Rights raises the question of whether it has also violated article 5, specifically paragraph 2 thereof. The Canadian Government has interpreted article 6, paragraph 2, as authorizing the death penalty. For that reason it has found that Mr. Kindler's extradition, even though he will necessarily be sentenced to death and will foreseeably be executed, would not be prohibited by the Covenant, since the latter would authorize the application of the death penalty. In making such a misinterpretation of the Covenant, the State party asserts that Mr. Kindler's extradition would not be contrary to the Covenant. In this connection, then, Canada has denied Mr. Joseph John Kindler a right which he enjoyed under its jurisdiction, adducing that the Covenant would give a lesser protection - in other words, that the International Covenant on Civil and Political Rights would recognize the right to life in a lesser degree than Canadian legislation. In so far as the misinterpretation of article 6, paragraph 2, has led Canada to consider that the Covenant recognizes the right to life in a lesser degree than its domestic legislation and has used that as a pretext to extradite the author to a jurisdiction where he will certainly be executed, Canada has also violated article 5, paragraph 2, of the Covenant.

22. I have to insist that Canada has misinterpreted article 6, paragraph 2, and that, when it abolished the death penalty, it became impossible for it to apply that penalty directly in its territory, except for the military offences for which it is still in force, or indirectly through the handing-over to another State of a person who runs the risk of being executed or who will be executed. Since it abolished the death penalty, Canada has to guarantee the right to life of all persons within its jurisdiction, without any limitation.

23. One final aspect to be dealt with is the way in which Mr. Kindler was extradited, no notice being taken of the request that the author should not be extradited prior to the Committee forwarding its final views on the communication to the State party (v) made by the Special Rapporteur on New Communications under rule 86 of the rules of procedure of

the Human Rights Committee. On ratifying the Optional Protocol, Canada undertook, with the other States parties, to comply with the procedures followed in connection therewith. In extraditing Mr. Kindler without taking into account the Special Rapporteur's request, Canada failed to display the good faith which ought to prevail among the parties to the Protocol and the Covenant.

24. Moreover, this fact gives rise to the possibility that there may also have been a violation of article 26 of the Covenant. Canada has given no explanation as to why the extradition was carried out so rapidly once it was known that the author had submitted a communication to the Committee. By its censurable action in failing to observe its obligations to the international community, the State party has prevented the enjoyment of the rights which the author ought to have had as a person under Canadian jurisdiction in relation to the Optional Protocol. In so far as the Optional Protocol forms part of the Canadian legal order, all persons under Canadian jurisdiction enjoy the right to submit communications to the Human Rights Committee so that it may hear their complaints. Since it appears that Mr. Kindler was extradited on account of his nationality (w) and in so far as he has been denied the possibility of enjoying its protection in accordance with the Optional Protocol, I find that the State party has also violated article 26 of the Covenant.

25. In conclusion, I find Canada to be in violation of article 5, paragraph 2, and articles 6 and 26 of the International Covenant on Civil and Political Rights. I agree with the majority opinion that there has been no violation of article 7 of the Covenant.

San Rafael de Escazú, Costa Rica, 12 August 1993  
Geneva, Switzerland, 25 October 1993 (Revision)

[Done in Spanish]



**International Court of Justice**

**Arrest Warrant of 11 April 2000  
(Democratic Republic of the Congo v. Belgium)  
Judgment**

***I.C.J. Reports 2002, paras. 56-61***

56. The Court will now address Belgium's argument that immunities accorded to incumbent Ministers for Foreign Affairs can in no case protect them where they are suspected of having committed war crimes or crimes against humanity. In support of this position, Belgium refers in its Counter-Memorial to various legal instruments creating international criminal tribunals, to examples from national legislation, and to the jurisprudence of national and international courts.

Belgium begins by pointing out that certain provisions of the instruments creating international criminal tribunals state expressly that the official capacity of a person shall not be a bar to the exercise by such tribunals of their jurisdiction.

Belgium also places emphasis on certain decisions of national courts, and in particular on the judgments rendered on 24 March 1999 by the House of Lords in the United Kingdom and on 13 March 2001 by the Court of Cassation in France in the *Pinochet* and *Qaddafi* cases respectively, in which it contends that an exception to the immunity rule was accepted in the case of serious crimes under international law. Thus, according to Belgium, the *Pinochet* decision recognizes an exception to the immunity rule when Lord Millett stated that "[i]nternational law cannot be supposed to have established a crime having the character of a *ius cogens* and at the same time to have provided an immunity which is co-extensive with the obligation it seeks to impose", or when Lord Phillips of Worth Matravers said that "no established rule of international law requires state immunity *ratione materiae* to be accorded in respect of prosecution for an international crime". As to the French Court of Cassation, Belgium contends that, in holding that, "under international law as it currently stands, the crime alleged [acts of terrorism], irrespective of its gravity, does not come within the exceptions to the principle of immunity from jurisdiction for incumbent foreign Heads of State", the Court explicitly recognized the existence of such exceptions.

57. The Congo, for its part, states that, under international law as it currently stands, there is no basis for asserting that there is any exception to the principle of absolute immunity from criminal process of an incumbent Minister for Foreign Affairs where he or she is accused of having committed crimes under international law.

In support of this contention, the Congo refers to State practice, giving particular consideration in this regard to the *Pinochet* and *Qaddafi* cases, and concluding that such practice does not correspond to that which Belgium claims but, on the contrary, confirms the absolute nature of the immunity from criminal process of Heads of State and Ministers for Foreign Affairs. Thus, in the *Pinochet* case, the Congo cites Lord Browne-Wilkinson's statement that "[t]his immunity enjoyed by a head of state in power and an ambassador in post is a complete immunity attached to the person of the head of state or ambassador and rendering him immune from all actions or prosecutions . . .". According to the Congo, the

French Court of Cassation adopted the same position in its *Qaddafi* judgment, in affirming that "international custom bars the prosecution of incumbent Heads of State, in the absence of any contrary international provision binding on the parties concerned, before the criminal courts of a foreign State".

As regards the instruments creating international criminal tribunals and the latter's jurisprudence, these, in the Congo's view, concern only those tribunals, and no inference can be drawn from them in regard to criminal proceedings before national courts against persons enjoying immunity under international law.

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58. The Court has carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation. It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.

The Court has also examined the rules concerning the immunity or criminal responsibility of persons having an official capacity contained in the legal instruments creating international criminal tribunals, and which are specifically applicable to the latter (see Charter of the International Military Tribunal of Nuremberg, Art. 7; Charter of the International Military Tribunal of Tokyo, Art. 6; Statute of the International Criminal Tribunal for the former Yugoslavia, Art. 7, para. 2; Statute of the International Criminal Tribunal for Rwanda, Art. 6, para. 2; Statute of the International Criminal Court, Art. 27). It finds that these rules likewise do not enable it to conclude that any such an exception exists in customary international law in regard to national courts.

Finally, none of the decisions of the Nuremberg and Tokyo international military tribunals, or of the International Criminal Tribunal for the former Yugoslavia, cited by Belgium deal with the question of the immunities of incumbent Ministers for Foreign Affairs before national courts where they are accused of having committed war crimes or crimes against humanity. The Court accordingly notes that those decisions are in no way at variance with the findings it has reached above.

In view of the foregoing, the Court accordingly cannot accept Belgium's argument in this regard.

59. It should further be noted that the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction. Thus,

although various international conventions or the prevention and punishment of certain serious crimes impose or States obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions.

60. The Court emphasizes, however, that the *immunity* from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy *impunity* in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.

61. Accordingly, the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances.

First, such persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries' courts in accordance with the relevant rules of domestic law.

Secondly, they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity.

Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.

Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in Article 27, paragraph 2, that "[i]mmunities or special procedural rules which may attach to the

official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person".

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62. Given the conclusions it has reached above concerning the nature and scope of the rules governing the immunity from criminal jurisdiction enjoyed by incumbent Ministers for Foreign Affairs, the Court must now consider whether in the present case the issue of the arrest warrant of 11 April 2000 and its international circulation violated those rules. The Court recalls in this regard that the Congo requests it, in its first final submission, to adjudge and declare that:

"[B]y issuing and internationally circulating the arrest warrant of 11 April 2000 against Mr. Abdoulaye Yerodia Ndombasi, Belgium committed a violation in regard to the Democratic Republic of the Congo of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers; in so doing, it violated the principle of sovereign equality among States."

63. In support of this submission, the Congo maintains that the arrest warrant of 11 April 2000 as such represents a "coercive legal act" which violates the Congo's immunity and sovereign rights, inasmuch as it seeks to "subject to an organ of domestic criminal jurisdiction a member of a foreign government who is in principle beyond its reach" and is fully enforceable without special formality in Belgium.

The Congo considers that the mere issuance of the warrant thus constituted a coercive measure taken against the person of Mr. Yerodia, even if it was not executed.

64. As regards the international circulation of the said arrest warrant, this, in the Congo's view, not only involved further violations of the rules referred to above, but also aggravated the moral injury which it suffered as a result of the opprobrium "thus cast upon one of the most prominent members of its Government". The Congo further argues that such circulation was a fundamental infringement of its sovereign rights in that it significantly restricted the full and free exercise, by its Minister for Foreign Affairs, of the international negotiation and representation functions entrusted to him by the Congo's former President. In the Congo's view, Belgium "[thus] manifests an intention to have the individual concerned arrested at the place where he is to be found, with a view to procuring his extradition". The Congo emphasizes moreover that it is necessary to avoid any confusion between the arguments concerning the legal effect of the arrest warrant abroad and the question of any responsibility of the foreign authorities giving effect to it. It points out in this regard that no State has acted on the arrest warrant, and that accordingly



**International Court of Justice**

**Armed Activities on the Territory of  
the Congo (Democratic Republic of  
the Congo *v.* Uganda)  
Judgment**

*I.C.J. Reports 2005*, paras. 215-221

deliberate policy of terror, confirmed in its view by the almost total impunity of the soldiers and officers responsible for the alleged atrocities committed on the territory of the DRC, the Court, in the absence of specific evidence supporting this claim, does not consider that this allegation has been proven. The Court, however, wishes to stress that the civil war and foreign military intervention in the DRC created a general atmosphere of terror pervading the lives of the Congolese people.

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213. The Court turns now to the question as to whether acts and omissions of the UPDF and its officers and soldiers are attributable to Uganda. The conduct of the UPDF as a whole is clearly attributable to Uganda, being the conduct of a State organ. According to a well-established rule of international law, which is of customary character, “the conduct of any organ of a State must be regarded as an act of that State” (*Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999 (I)*, p. 87, para. 62). The conduct of individual soldiers and officers of the UPDF is to be considered as the conduct of a State organ. In the Court’s view, by virtue of the military status and function of Ugandan soldiers in the DRC, their conduct is attributable to Uganda. The contention that the persons concerned did not act in the capacity of persons exercising governmental authority in the particular circumstances, is therefore without merit.

214. It is furthermore irrelevant for the attribution of their conduct to Uganda whether the UPDF personnel acted contrary to the instructions given or exceeded their authority. According to a well-established rule of a customary nature, as reflected in Article 3 of the Fourth Hague Convention respecting the Laws and Customs of War on Land of 1907 as well as in Article 91 of Protocol I additional to the Geneva Conventions of 1949, a party to an armed conflict shall be responsible for all acts by persons forming part of its armed forces.

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215. The Court, having established that the conduct of the UPDF and of the officers and soldiers of the UPDF is attributable to Uganda, must now examine whether this conduct constitutes a breach of Uganda’s international obligations. In this regard, the Court needs to determine the rules and principles of international human rights law and international humanitarian law which are relevant for this purpose.

216. The Court first recalls that it had occasion to address the issues of the relationship between international humanitarian law and interna-

tional human rights law and of the applicability of international human rights law instruments outside national territory in its Advisory Opinion of 9 July 2004 on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. In this Advisory Opinion the Court found that

“the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.” (*I.C.J. Reports 2004*, p. 178, para. 106.)

It thus concluded that both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration. The Court further concluded that international human rights instruments are applicable “in respect of acts done by a State in the exercise of its jurisdiction outside its own territory”, particularly in occupied territories (*ibid.*, pp. 178-181, paras. 107-113).

217. The Court considers that the following instruments in the fields of international humanitarian law and international human rights law are applicable, as relevant, in the present case:

- Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 18 October 1907. Neither the DRC nor Uganda are parties to the Convention. However, the Court reiterates that “the provisions of the Hague Regulations have become part of customary law” (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 172, para. 89) and as such are binding on both Parties;
- Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949. The DRC’s (at the time Republic of the Congo (Léopoldville)) notification of succession dated 20 February 1961 was deposited on 24 February 1961, with retroactive effect as from 30 June 1960, the date on which the DRC became independent; Uganda acceded on 18 May 1964; International Covenant on Civil and Political Rights of 19 December 1966. The DRC (at the time Republic of Zaire) acceded to the Covenant on 1 November 1976; Uganda acceded on 21 June 1995; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. The DRC (at the time Republic of

- Zaire) acceded to the Protocol on 3 June 1982; Uganda acceded on 13 March 1991;
- African Charter on Human and Peoples' Rights of 27 June 1981. The DRC (at the time Republic of Zaire) acceded to the Charter on 20 July 1987; Uganda acceded on 10 May 1986;
- Convention on the Rights of the Child of 20 November 1989. The DRC (at the time Republic of Zaire) ratified the Convention on 27 September 1990 and Uganda on 17 August 1990;
- Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict of 25 May 2000. The Protocol entered into force on 12 February 2002. The DRC ratified the Protocol on 11 November 2001; Uganda acceded on 6 May 2002.

218. The Court moreover emphasizes that, under common Article 2 of the four Geneva Conventions of 12 August 1949,

“[i]n addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”

219. In view of the foregoing, the Court finds that the acts committed by the UPDF and officers and soldiers of the UPDF (see paragraphs 206-211 above) are in clear violation of the obligations under the Hague Regulations of 1907, Articles 25, 27 and 28, as well as Articles 43, 46 and 47 with regard to obligations of an occupying Power. These obligations are binding on the Parties as customary international law. Uganda also violated the following provisions of the international humanitarian law and international human rights law instruments, to which both Uganda and the DRC are parties:

- Fourth Geneva Convention, Articles 27 and 32 as well as Article 53 with regard to obligations of an occupying Power;
- International Covenant on Civil and Political Rights, Articles 6, paragraph 1, and 7;
- First Protocol Additional to the Geneva Conventions of 12 August 1949, Articles 48, 51, 52, 57, 58 and 75, paragraphs 1 and 2;
- African Charter on Human and Peoples' Rights, Articles 4 and 5;
- Convention on the Rights of the Child, Article 38, paragraphs 2 and 3;
- Optional Protocol to the Convention on the Rights of the Child, Articles 1, 2, 3, paragraph 3, 4, 5 and 6.

220. The Court thus concludes that Uganda is internationally responsible for violations of international human rights law and international humanitarian law committed by the UPDF and by its members in the territory of the DRC and for failing to comply with its obligations as an occupying Power in Ituri in respect of violations of international human rights law and international humanitarian law in the occupied territory.

221. The Court finally would point out that, while it has pronounced on the violations of international human rights law and international humanitarian law committed by Ugandan military forces on the territory of the DRC, it nonetheless observes that the actions of the various parties in the complex conflict in the DRC have contributed to the immense suffering faced by the Congolese population. The Court is painfully aware that many atrocities have been committed in the course of the conflict. It is incumbent on all those involved in the conflict to support the peace process in the DRC and other peace processes in the Great Lakes area, in order to ensure respect for human rights in the region.

\* \* \*

#### ILLEGAL EXPLOITATION OF NATURAL RESOURCES

222. In its third submission the DRC requests the Court to adjudge and declare:

“3. That the Republic of Uganda, by engaging in the illegal exploitation of Congolese natural resources, by pillaging its assets and wealth, by failing to take adequate measures to prevent the illegal exploitation of the resources of the DRC by persons under its jurisdiction or control, and/or failing to punish persons under its jurisdiction or control having engaged in the above-mentioned acts, has violated the following principles of conventional and customary law:

- the applicable rules of international humanitarian law;
- respect for the sovereignty of States, including over their natural resources;
- the duty to promote the realization of the principle of equality of peoples and of their right of self-determination, and consequently to refrain from exposing peoples to foreign subjugation, domination or exploitation;
- the principle of non-interference in matters within the domestic jurisdiction of States, including economic matters.”

223. The DRC alleges that, following the invasion of the DRC by



**Human Rights Committee**

**Amirov v. Russian Federation**  
**Views of 2 April 2009**

**Communication No. 1447/2006**



**International covenant  
on civil and  
political rights**

Distr.  
RESTRICTED\*

CCPR/C/95/D/1447/2006  
22 April 2009

Original: ENGLISH

HUMAN RIGHTS COMMITTEE  
Ninety-fifth session  
16 March – 3 April 2009

**IEWS**

**Communication No. 1447/2006**

Submitted by:

Mr. Abubakar Amirov (represented by counsel,  
Mr. Boris Wijkström, World Organization  
Against Torture, and Ms. Doina Straisteanu,  
Stichting Russian Justice Initiative)

Alleged victims:

The author and his wife Mrs. Aizan Amirova

State party:

Russian Federation

Date of communication:

9 January 2006 (initial submission)

Document references:

Special Rapporteur's rule 97 decision, transmitted  
to the State party on 26 January 2006 (not issued  
in document form)

Date of adoption of Views:

2 April 2009

*Subject matter:* Deprivation of life of a Russian national of Chechen origin in the course  
of a military operation; failure to conduct an adequate investigation and to initiate proceedings  
against the perpetrators; denial of justice.

*Substantive issues:* Right to life; torture, cruel, inhuman or degrading treatment or  
punishment; denial of justice; effective remedy.

*Procedural issues:* Non-substantiation of claims; exhaustion of domestic remedies.

*Articles of the Covenant:* 2, paragraph 1; 6; 7; 9; 26 and 2, paragraph 3, read in  
conjunction with 6, 7, 9 and 26.

*Articles of the Optional Protocol:* 2; 5, paragraph 2(b)

On 2 April 2009, the Human Rights Committee adopted the annexed text as the  
Committee's Views, under article 5, paragraph 4, of the Optional Protocol in respect of  
communication No. 1447/2006.

[ANNEX]

\* Made public by decision of the Human Rights Committee.

**ANNEX**

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights

Ninety-fifth session  
concerning

**Communication No. 1447/2006\*\***

Submitted by: Mr. Abubakar Amirov (represented by counsel,  
Mr. Boris Wijkström, World Organization  
Against Torture, and Ms. Doina Stratsteanu,  
Stichting Russian Justice Initiative)

Alleged victims: The author and his wife Mrs. Aizan Amirova

State party: Russian Federation

Date of communication: 9 January 2006 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 2 April 2009,

Having concluded its consideration of communication No. 1447/2006, submitted to the Human Rights Committee by Mr. Abubakar Amirov in his own name and on behalf of Mrs. Aizan Amirova under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

**Views under article 5, paragraph 4, of the Optional Protocol**

1.1 The author of the communication, Mr. Abubakar Amirov, a Russian national of Chechen origin born in 1953, is the husband of Mrs. Aizan Amirova (deceased), also a Russian national of Chechen origin born in 1965. Mrs. Amirova's body was found on 7 May 2000 in Grozny. The

\*\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Lazhari Bouzid, Ms. Iulia Antoanella Motoc, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

author acts on his own behalf and on behalf of his wife, and claims a violation by the Russian Federation of his wife's rights and of his own rights under article 2, paragraph 1; article 6; article 7; article 9 and article 26; as well as under article 2, paragraph 3, read in conjunction with article 6; article 7; article 9 and article 26, of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for the State party on 1 January 1992. The author is represented by Mr. Boris Wijkström and Ms. Doina Stratsteanu.

1.2 On 16 August 2006, the State party requested the Committee to examine the admissibility of the communication separately from its merits, in accordance with Rule 97, paragraph 3, of the Committee's rules of procedure. On 1 February 2007, the Special Rapporteur for New Communications and Interim Measures decided, on behalf of the Committee, to examine the admissibility of the communication together with the merits.

**The facts as presented by the author**

2.1 The author and Mrs. Amirova were married in 1989 and lived in Grozny until 1999 when the Russian Federation's second military operation in the Chechen Republic began. Shortly after, author and family moved to the village of Zakan-Yurt for safety reasons. In mid-November 1999, the author returned to Grozny to collect family belongings. He returned to Zakan-Yurt on or around 18 November 1999, but did not find his family and was unable to determine their whereabouts.

2.2 Not knowing about the whereabouts of wife and children, the author travelled to the village of Achkhoy-Martan, where he had relatives. He remained in Achkhoy-Martan because it was impossible for him to continue searching for his family due to heavy fighting in the area from November 1999 to early February 2000.<sup>1</sup>

2.3 On an unspecified date, he found his children at their place of temporary residence in Nagornoe village, but his wife was not with them. He learned that at some point in early January 2000 his wife, who was eight months pregnant at the time, had left for Grozny in order to retrieve some belongings that had been left in their apartment and to attempt to look for him. On 11 January 2000, she registered with the local police for permission to cross checkpoint No. 53 in Grozny.

2.4 After Grozny was occupied by Russian federal forces in early February 2000, the author returned Grozny. On an unspecified date, not having heard of his wife's whereabouts since her departure for Grozny, he informed the authorities of her disappearance. The search for his wife officially started on 28 March 2000.

<sup>1</sup> The author provides copies of 35 reports on the 1999 – 2003 military operation of the Russian Federal forces in the Chechen Republic published by Amnesty International, Chechnya Justice Project of the Stichting Russian Justice Initiative, Parliamentary Assembly of the Council of Europe, Human Rights Watch, "Memorial" Human Rights Centre, United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, High Commissioner for Human Rights, Working Group on Enforced or Involuntary Disappearances, United Nations Commission on Human Rights and World Organisation Against Torture.

2.5 On 7 May 2000, the body of a woman was found by residents of Grozny in the basement of a storehouse in Grozny. According to the testimony of one of the residents, the body had started to decompose and the basement looked as if there had been some sort of explosion in it. Investigators of the Staropromyslovsky Temporary Department of Internal Affairs of Grozny and agents of the Ministry of Emergency Situations were called to the crime scene.

2.6 The same day, the author was informed by his family that an unidentified body had been found in Grozny which could be that of his wife. The author immediately visited the office of the Ministry of Emergency Situations in Grozny, where he asked for a car to be taken where the body had been found. At the crime scene, he identified the body and informed the agents of the Ministry of Emergency Situations that it was indeed his wife. He asked for an autopsy to be performed. The agents of the Ministry of Emergency Situations allegedly replied that he should be grateful to have found her remains. At the author's insistence, however, agents of the Ministry of Emergency Situations issued a statement attesting to the state of his wife's body. According to this statement, the body presented three perforations on the chest (two) and on the neck (one). There was a cut on the left side of the abdomen measuring 20-25 centimetres, made by a sharp object. There was no underwear on the body, pullover and dress were unbuttoned and some buttons were missing.

2.7 On 7 May 2000, investigators of the Staropromyslovsky Temporary Department of Internal Affairs of Grozny filed two reports on the discovery of Mrs. Amirova's body, as well as a record on the examination of the crime scene. The author claims that the investigators did not take photographs of the body, did not remove clothing or otherwise examined the body for further clues about the circumstances of her death, and did not bring the body to a hospital or morgue for an autopsy.

2.8 On 8 May 2000, the author took his wife's body to the village of Dolinskoe and buried her the same day.

2.9 On an unspecified date, the Head of the Staropromyslovsky Temporary Department of Internal Affairs of Grozny closed the official inquiry into the case of Mrs. Amirova's disappearance, as her remains had been identified on 7 May 2000.

2.10 On 19 May 2000, an investigator of the Grozny Prosecutor's Office initiated a criminal investigation into the circumstances of Mrs. Amirova's death. The prosecutor explained that "[a]s a result of the initial examinations, the investigator has come to the conclusion that the elements of a crime are present in this case and therefore, in application of articles 108, 109, 112, 115, 126 of the Code of Criminal Procedure of the Russian Federation a preliminary inquiry should be opened in this case". The same day, the investigator requested the Head of the Staropromyslovsky Temporary Department of Internal Affairs of Grozny to carry out a number of investigative actions. The same day, the same investigator requested the Head of the Territorial Department of the Ministry of Emergency Situations of the Chechen Republic to indicate the location of Mrs. Amirova's grave, to proceed to exhume her body and carry out a forensic medical examination. The author submits that, in the end, forensic medical examination of his wife's body was not performed, because, according to the authorities, they did not know where to find his wife's body.

2.11 At the end of May 2000, a number of witnesses' statements were taken by the investigators. The author submits that these statements, many of which were from Mrs. Amirova's relatives, appear to be formulaic in nature, and contain no information of interest to the criminal investigation. Thus, witnesses were not questioned about the state of her body when it was found, nor asked other relevant questions which could have shed light on the circumstances of her death. The author argues that the investigation failed to identify other persons who remained in Staropromyslovsky District during the period from December 1999 to February 2000, and who could have possibly testified about the activities of Russian federal forces in the area. Although the author had alleged that his wife had been raped and killed by the Russian federal forces, and although it was known that these forces took control of Staropromyslovsky District at the time of her death, no efforts were made to establish the identity of the Russian military unit operating in the area in order to question its commanding officers.

2.12 On 1 June 2000, the Deputy Minister of the Ministry of Emergency Situations replied to the investigator's request of 19 May 2000, stating that Mrs. Amirova's burial was not listed in the Ministry's register. The author argues that the investigator did not ask the Ministry of Emergency Situations for information on how to reach Mrs. Amirova's immediate family in order to find her grave, nor did the Ministry offer to provide this information.

2.13 On 19 June 2000, investigator closed the criminal case for lack of "evidence of a crime", since "the body of the victim was not observed to bear signs of a violent death" and Mrs. Amirova "was not a victim of a crime but rather died from pregnancy complications, since in January 2000 she was 8 months pregnant." The author submits that the investigator did not specify what evidence was collected during the investigation, or how such evidence justified his decision. The unfounded nature of the investigator's conclusion on the cause of his wife's death is evident from the fact that no autopsy was ever performed, absent which it was not possible to establish that Mrs. Amirova had indeed died from pregnancy complications.

2.14 On 21 June 2000, the author petitioned the Special Representative of the President of the Russian Federation for the Promotion of Human and Civil Rights and Freedoms in the Chechen Republic, and requested his assistance in reopening the investigation. The author stated in his petition that his wife was last seen on 12 January 2000 at the "Tashkala" bus stop, when she and the other two women were "taken captive by military officers". On 7 July 2000, the appeal was forwarded to the Office of the Military Prosecutor of the Northern Caucasus Military District.

2.15 On 17 August 2000, a senior prosecutor of the Grozny Prosecutor's Office refused to reopen the investigation, claiming that the author himself had obstructed the inquiry by burying his wife before an autopsy could be performed, and by acting against the exhumation of Mrs. Amirova's body. The author claims that in fact he requested an autopsy to be performed when he identified his wife's body, but his request was denied. For this reason, he had insisted that the agents of the Ministry of Emergency Situations issue a statement attesting to the state of Mrs. Amirova's body when it was found. Another reason advanced by the prosecutor in justification for his refusal to reopen the investigation was that at the time of Mrs. Amirova's death there were no Russian troops in the Staropromyslovsky district of Grozny.

2.16 In August 2000, two months after the investigation had been closed the first time, the author was accorded the status of “victim” under Russian criminal procedure.<sup>2</sup> This meant that he did not have the right to present his testimony, demonstrate evidence, have access to the investigation materials, or complain or appeal actions taken by the prosecutors until after the initial investigation had already been suspended.

2.17 On 31 August 2001, Mrs. Amirova’s death certificate was issued by the Civilian Registry Office of the Staropromyslovsky District. The certificate stated that she died from a gunshot wound to the chest on 12 January 2000.

2.18 On 5 November 2000, the author requested the Prosecutor of the Chechen Republic to inform him of the results of the investigation. The same day, he requested the Central Office of the Military Prosecutor of the Russian Federation to resume the investigation, claiming specifically that his pregnant wife was raped and then atrociously killed by the Russian federal servicemen. On 30 January 2001, the author requested the Prosecutor of Grozny to inform him of the decision in his wife’s case. All these requests were re-transmitted to the prosecutorial authorities in Grozny.

2.19 On 24 March 2001, the Grozny Deputy Prosecutor concluded that the decision of 19 June 2000 to close the investigation into Mrs. Amirova’s death had violated the Criminal Procedure Code. Specifically, he established the person in charge of the case at the time had failed to “undertake any judicial investigation” of the case prior to its closure, and that his conclusion about the non-violent nature of Mrs. Amirova’s death was “not based on the evidence of the criminal case”. The Deputy Prosecutor also noted that despite the need to perform a forensic medical examination to establish the cause of death of the author’s wife, such an examination was never performed. Given the author’s testimony about the traces of gunshot wounds on Mrs. Amirova’s body, the investigator should have interrogated witnesses. On 28 March 2001, the investigation was assigned to an investigator of the Grozny Prosecutor’s Office. On 4 April 2001, the Military Prosecutor informed the author that the criminal investigation of his wife’s case had been officially resumed.

2.20 On 14 April 2001, the author requested the Prosecutor of Grozny to provide him with a copy of criminal case file contents. On 24 April 2001, the investigator decided to suspend the preliminary investigation, as it was impossible to identify the perpetrator/s, despite the investigative and operational measures undertaken.

2.21 On 28 August 2001, the author again requested the Prosecutor of Grozny to resume the investigation. On 12 September 2001, the investigation was resumed for the third time by the same Grozny Deputy Prosecutor who had reopened it on 24 March 2001. Once again, he established that the preliminary investigation had been prematurely suspended and specifically requested the identification and interrogation of the individuals “who were present at the post-mortem examination of Mrs. Amirova’s body” and of “the agents of the Ministry of Emergency Situations who carried out the burial of her body”. This time, the author himself took steps to identify witnesses for the prosecution and wrote to the Prosecutor of Grozny on 6, 11, 14, 17 September and 11 October 2001, urging him to interrogate these witnesses. On 14 September

<sup>2</sup> Article 53 of the Criminal Procedure Code.

2001, he requested the Prosecutor of Grozny to conduct a thorough search of the crime scene to collect evidence.

2.22 The author submits that a certain number of witnesses were indeed questioned and their testimonies added to the case record to no avail. On 12 October 2001, the Prosecutor of Grozny suspended the investigation, stating that it was impossible to identify the perpetrator, despite the measures taken. This decision did not explain what measures had been taken and/or why they were unsuccessful. It mentioned that Mrs. Amirova’s body bore “marks of violent death” on it when discovered. The same day, the author was informed in writing that the case was “temporarily suspended”.

2.23 The author continued to try to ascertain the outcome of the investigation in 2002 and 2003. His last effort in this regard took place in 2004 when he went to the Grozny Prosecutor’s Office, where he was told that the Prosecutor’s Office “was tired of hearing [his] complaints” and that he should “wait until the war in Chechnya comes to an end” and then they would help him find those responsible for the crime. About a week after his inquiry he was beaten up by persons in military uniform who came to his home and whom he believes were sent by the State party’s authorities to intimidate him into silence. As a result of this attack, the author has changed his place of residence and has ceased his efforts to enquire about the investigation out of fear for his life and that of his children.

2.24 In 2001, Human Rights Watch submitted an application to the European Court of Human Rights on the author’s behalf. One year after the application was made, the Court requested additional information on the application from the author. As the author had changed his place of residence, he was unaware of the Court’s request and did not reply on time. In the absence of a reply from the author, his dossier was closed.

2.25 After the last suspension of the investigation in Mrs. Amirova’s criminal case on 12 October 2001, it appears that some additional investigative actions were made, including a forensic analysis on 23 October 2001 of a piece of an explosive device found in the basement where the body of the author’s wife had been discovered. Since the beginning of 2003 the author has not received more information about the status of the investigation and believes that the State party’s authorities were never serious about pursuing the criminal investigation.

2.26 On the issue of exhaustion of domestic remedies, the author submits that he took all possible steps to ensure that a proper investigation was conducted into the cause and circumstances of his wife’s death and that there are no available remedies for the victims of human rights violations of Chechen origin in the Chechen Republic. He argues that the lack of accountability for perpetrators of the most serious human rights violations in the Chechen Republic is extensively documented.<sup>3</sup>

2.27 The author submits that the State party’s law enforcement authorities have engaged in the systematic practice of failing to follow-up allegations of crimes committed in the Chechen Republic with serious investigations. Prosecutions of military and police authorities are

<sup>3</sup> Supra n.1. The Parliamentary Assembly of the Council of Europe has stated that “the prosecuting bodies are either unwilling or unable to find and bring to justice the guilty parties.” Parliamentary Assembly of the Council of Europe, Resolution 1315, 2003, paragraph 5.

extremely rare and convictions merely anecdotic. According to NGO reports, “[a]lthough in many instances, local prosecutors do launch criminal investigations into civilians’ complaints of serious abuses, they routinely suspend these investigations shortly afterwards claiming that it is impossible to establish the identity of the perpetrator.”<sup>4</sup> The author refers to the Committee’s jurisprudence, according to which there is a duty to exhaust domestic remedies only to the extent that they are available, effective<sup>5</sup> and not unreasonably prolonged.<sup>6</sup> The author argues that the recitation of facts above and submitted supporting documents<sup>7</sup> clearly demonstrate that remedies are neither available nor effective in his case. The fact that five years have elapsed between Mrs. Amirova’s death and the submission of the present communication to the Committee, during which no effective investigation has been conducted, demonstrates that remedies in the Russian Federation are unreasonably prolonged.

2.28 The author argues that a submission of civil claim for damages is *ab initio* ineffective, because under the State party’s law, the civil court has no power to identify those responsible for a crime or to hold them accountable. A civil remedy faces serious obstacles if those responsible for the crime have not already been identified in criminal proceedings. He concludes that an application to a civil court is neither an alternative nor is it an effective remedy in his case.

2.29 The author claims that the Russian federal forces were the “material authors” of the human rights violations in his case and their actions are attributable directly to the State party. He invokes the decision of the Inter-American Court of Human Rights in *Velásquez Rodríguez*,<sup>8</sup> in which the Court concluded that the responsibility of a State for a given crime will be proven whenever (1) it can be shown that there was an official practice of a certain kind of violation of human rights in the country, carried out by the Government or at least tolerated by it, and (2) the abuse committed against a specific victim can be linked to that practice.<sup>9</sup> He argues that these two elements are met in his case: the Russian federal forces engaged in, or at a very minimum, tolerated, a consistent practice of massive and systematic human rights violations during the military operation in the Chechen Republic;<sup>10</sup> and the circumstances surrounding Mrs. Amirova’s death are consistent with these well-documented practices.<sup>11</sup>

2.30 Lastly, the author submits that the State party’s obligations under article 2 of the Covenant are both negative and positive in nature. States parties must not only refrain from committing

<sup>4</sup> Chechnya Justice Project, Annual Report 2003, Moscow, Nazran, Utrecht, 2004, p. 10.

<sup>5</sup> Communications Nos. 210/1986 & 225/1987, *Pratt & Morgan v. Jamaica*, Views adopted on 6 April 1989.

<sup>6</sup> Communication No. 336/1988, *Fillastre & Bizoarn v. Bolivia*, Views adopted on 5 November 1991.

<sup>7</sup> *Supra* n.1.

<sup>8</sup> *Velásquez Rodríguez v. Honduras*, Judgment of July 29, 1988, Series C No. 4, paragraph 124.

<sup>9</sup> *Ibid*, paragraph 126.

<sup>10</sup> The author refers to the Human Rights Watch report entitled “Civilian Killings in Staropromyslovsky District of Grozny”, documenting that the district of Grozny where Mrs. Amirova was killed, was an area that came under a particularly intensive attack by the Russian federal forces, who systematically killed unarmed civilians, mostly women and elderly people.

<sup>11</sup> The author refers specifically to the same geographic location, same moment in time, same pattern of killing and same method of cover-up.

violations, they must also take actions to prevent their occurrence. The positive duties of prevention apply regardless of whether the source of the violation is an agent of the State or a private individual. The more serious the violation, e.g. one relating to the right to life and the right to be free from torture and ill-treatment, the more compelling the duty of due diligence<sup>12</sup> owed by the State party to prevent their occurrence and investigate and punish the perpetrators. The author contends that the State party’s responsibility is engaged regardless of the identity of the perpetrator.

### The complaint

3.1 The author submits that the State party violated his and his wife’s rights under article 2, paragraph 1; article 6; article 7; article 9 and article 26; as well as under article 2, paragraph 3, read in conjunction with article 6; article 7; article 9 and article 26 of the Covenant.

3.2 The author refers to the Committee’s jurisprudence, according to which in cases involving the arbitrary deprivation of life, the obligation to provide effective remedies entails: (a) investigating the acts constituting the violation, (b) bringing to justice any person found to be responsible for the death of the victim, (c) paying compensation to the surviving families, and (d) ensuring that similar violations do not occur again.<sup>13</sup> He argues that the first element of the remedy, i.e. the investigation, is critical to ensuring the subsequent ones and notes that the investigative obligation is one of process, not outcome. The State party is not obliged to prosecute and convict someone in every single criminal case. However, the State party is obligated to initiate an investigation that is *capable of leading to the prosecution and punishment*<sup>14</sup> of the guilty parties.<sup>15</sup> As a direct result of the failure of the State party’s authorities to initiate a good faith investigation into the killing of his wife, no suspect(s) were ever identified, questioned, or charged, and no one was prosecuted, tried, let alone convicted for her torture and death, and the author has received no compensation for his loss. This demonstrates a breach of the right to a remedy guaranteed by article 2, paragraph 3, read in conjunction with article 6; article 7; article 9 and article 26.

3.3 As to the claim under article 6 of the Covenant, the author refers to the Committee’s General Comment on this article, in which the Committee explained that “[...] States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their security forces. The deprivation of life by the authorities of the State is a matter of the utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities.”<sup>16</sup> He claims that the fact that Mrs. Amirova was arbitrarily deprived of her life is conclusively established by

<sup>12</sup> Human Rights Committee, General Comment No. 31, CCPR/C/21/Rev.1/Add.13, 26 May 2004, paragraph 8.

<sup>13</sup> Communications Nos.146/1983 & 148-154/1983, *Baboeram-Adhin et al. v. Suriname*, Views adopted on 4 April 1985, paragraphs 15 and 16; Communication No. 778/1997, *José Antonio Coronel et al. v. Colombia*, Views adopted on 24 October 2002, paragraph 10.

<sup>14</sup> The italicized language reflects that standard of the ECHR, see *Khashiyev and Akayeva v. Russia* judgment of 24 February 2005, paragraph 153.

<sup>15</sup> Human Rights Committee, General Comment No. 20, paragraph 14.

<sup>16</sup> Human Rights Committee, General Comment No. 6, paragraph 3.

the numerous documents, including the statement issued by the Ministry of Emergency Situations attesting to the state of Mrs. Amirova's body when it was found and her death certificate which attributes her death to a "gunshot wound to the chest". This description is consistent with his account of the facts as described in the multiple letters he wrote the authorities, and by the State party's authorities' numerous references in their decisions to Mrs. Amirova's "murder", "violent death", etc. The circumstances of her death prove that she was killed by state agents. The author, therefore, submits that his wife's killing by the Russian federal forces and the subsequent failure of the State party's authorities to take appropriate measures to investigate her murder constitute a violation of the negative obligations under article 6 to prevent arbitrary deprivation of life at the hands of state security forces, and a violation of the positive duty to take measures to prevent, investigate, punish and redress such violations.

3.4 The author adds that his wife was first severely tortured and ill-treated before she was killed. He argues that the infliction of a knife wound of 20 to 25 centimetres in length in the abdomen of Mrs. Amirova, is an act which also clearly rises to the threshold of torture. Considering that she was 8 months pregnant at the time, it is reasonable to conclude that the infliction of such an injury was deliberately intended to provoke, and must in fact have provoked, an extreme suffering both physical and psychological in the moments preceding her death. The fact that she was not wearing any underwear when she died indicates that she was most likely subjected to sexual violence, possibly rape, before her death. The author claims, that the rape or the threat of rape of a person in the custody of state agents amounts to a violation of article 7. In her case, the violation was particularly egregious considering the advanced state of her pregnancy.

3.5 The author also claims that his wife was the victim of a violation of her right to security. The Committee has held that right to security of a person must be protected even outside the detention context and that any person subject to the State party's jurisdiction is entitled to benefit from this right.<sup>17</sup> The failure of the State party to adopt adequate measures to ensure the individual's security constitutes a breach of article 9 because States have not only negative obligations to refrain from violating this right but also positive duties to ensure an individual's liberty and security. The author invokes the Committee's jurisprudence.<sup>18</sup>

3.6 The author adds that in the case of civilian victims of human rights abuses of Chechen origin at the hands of the Russian federal forces, the State party failed to respect the equal protection and non-discrimination principles by systematically denying the protections and remedies afforded by its domestic law to them on the ground of their national origin. The author contends, in particular, that the facts of the case clearly reveal that he was a victim of this kind of discrimination in his attempts to secure a remedy for the murder of his wife. He argues, therefore, that his case reveals a joint violation by the State party of its obligations under article 2, paragraph 1, and article 26, of the Covenant.

<sup>17</sup> Communication No. 195/1985, *Delgado Páez v. Colombia*, Views adopted on 12 July 1990.

<sup>18</sup> Communication No. 859/1999, *Luis Asdríbal Jiménez Vaca v. Colombia*, Views adopted on 25 March 2002, paragraph 7.1.

### State party's observations on admissibility and merits

4.1 On 16 August 2006, the State party challenged the admissibility of the communication, arguing that the author did not exhaust domestic remedies, as according to the Supreme Court of the Chechen Republic in the period between 2002 and 2006, he did not appeal to a court any decisions of the investigation authorities related to the suspension of the investigation in the criminal case concerning the discovery of his wife's body.

4.2 On the merits, the State party reiterates that on 19 May 2000, an investigator of the Grozny Prosecutor's Office initiated a criminal case concerning the discovery on 7 May 2000 of Mrs. Amirova's body. The case was opened under article 105 of the Criminal Code (murder). The State party submits that the author's allegation about its failure to conduct the investigation in good faith is contrary to the facts and to case file materials. It describes in detail the authorities' efforts to examine the crime scene on 7 May 2000, and notes that it was impossible to identify the age of the victim and the time of her death, due to the decomposition of her body. No signs of violent death were discovered and no photographs of the crime scene were taken. The State party claims that it was impossible to conduct a forensic medical examination of Mrs. Amirova's body at a later stage, as requested by the investigator, since under local custom, her body was buried by her relatives the day it was discovered. The investigator questioned all the witnesses mentioned in the author's letters to the authorities but it was the author himself who refused to allow the exhumation of his wife's body and to communicate the location of her grave. The State party submits that the author, in numerous complaints to various bodies, requested the questioning of various individuals capable of corroborating his claim that his wife's body bore knife and gunshot wounds. But at no stage did he communicate the location of her grave or request the exhumation of her body and a forensic medical examination. The State party argues that only these examinations could have shed light on the real cause of Mrs. Amirova's death. The author's own testimony and that of agents of the Ministry of Emergency Situation are insufficient to conclude that the wounds were inflicted when Mrs. Amirova was still alive, as none of them has specialized knowledge on the matter. Moreover, their testimony contradicts that of other witnesses also present at the crime scene.

4.3 For the State party, the author's allegations that his wife's death is imputable to the Russian federal forces are inconsistent and unfounded for the following reasons. Firstly, the causes of Mrs. Amirova's death have not been established; secondly, there is no reliable information in the case file that would suggest that her death was caused by federal servicemen; thirdly, there was no mention of the signs of violent death during the author's initial testimony of 31 May 2000. In fact, the first ever reference by the author to the fact that the Russian federal servicemen have raped and then atrociously killed his pregnant wife appears in the letter to the Prosecutor of the Chechen Republic dated 5 November 2000.

4.4 The State party notes that on 1 May 2006, the decision of the Prosecutor of Grozny of 12 October 2001 to suspend the investigation into the circumstances of Mrs. Amirova's death was revoked as being premature upon instruction of the Office of the General Prosecutor to examine the new arguments raised by the author in his communication to the Committee. The State party specifically refers to the author's agreement to allow an exhumation and a forensic medical examination of his wife's body, as well as a necessity to investigate the author's allegations of him being beaten up by persons in military uniform in 2004, as a result of which he changed his

place of residence. The same day, the resumed investigation was handed over to the investigator of the Prosecutor's Office of the Staropromyslovsky District, which sought to establish the author's whereabouts, as for the last two years he has not been living at the address indicated in the communication.

4.5 The State party considers that the absence of positive results in the investigation does not mean that the investigation was not conducted in good faith. The investigation was influenced by other objective factors, such as the situation in which the inquiry was carried out, the influence of ethnographic factors, local customs, and the realistic possibility of participation by specialists in certain investigatory and forensic procedures. The opening of a criminal case under article 105 of the Criminal Code does not necessarily mean that the investigation established the circumstances of the victim's death and confirmed that it was a violent one.

#### **Author's comments on the State party's observations**

5.1 On 14 December 2006, the author refutes the State party's arguments and draws the Committee's attention to the fact that the State party has presented no evidence in support of its assertions, while he does refer to specific documentation that corroborates his allegations.

5.2 The State party argued that it could not proceed with the forensic examination of Amirova's body due to the author's refusal to communicate the location of his wife's place of burial. The author challenges this statement and recalls that on 7 May 2000 when he recognized the body of his wife, he informed the agents of the Ministry of Emergency Situations and asked that an autopsy be performed. Only the next day, on 8 May 2000, the author took his wife's body to Dolinskoe and buried her. The place of burial was no secret, as well as the address of his place of residence where prosecutors could have contacted him about the exhumation. The State party's claim that the author refused to communicate the place of his wife's burial is untrue. He was not asked by any representative of the law enforcement agencies to indicate the place of burial and to agree with the exhumation. Normally this would be in a form of written protocol signed by investigator and the author. No such document was attached to the State party's observations in support of its claim. The State party's argument that the author did not inform law enforcement agencies about his wife's place of burial in his many complaints is inconsistent. The author requested an investigation into the cause of his wife's death but how that investigation should have been performed was within the State party's own remit.

5.3 The State party denies the Russian federal forces' involvement in his wife's death. The author submits, however, that this statement alone does not suffice to overturn his well founded suspicions and evidence which directly point to the Russian federal forces' responsibility for his wife's death.

5.4 The author regrets that the decision of the Prosecutor of Grozny of 1 May 2006 to resume the investigation into the circumstances of his wife's death was taken because of his communication to the Committee. All his attempts over five years to revoke the suspension of the investigations had been fruitless. The author therefore does not consider this resumption of the investigation to have been done in good faith. In the Author's opinion, the objective factors invoked by the State party could in no way excuse the State party from the obligation of conducting an effective investigation. There was no state of emergency declared on the territory of the Chechen Republic and no derogations were adopted from the legislation in force.

5.5 The author argues that the fact that "the body of the victim was not observed to bear traces of a violent death" is due to the unprofessional work of the Staropromyslovsky Temporary Department of Internal Affairs of Grozny. Now the State party interprets this omission in its favour declaring that "there is no violent death" which in itself contradicts the case facts. The author refutes the State party's argument that "under local custom the body had been buried by relatives the day it was discovered". He submits that investigators of the Staropromyslovsky Temporary Department of Internal Affairs left the crime scene saying nothing about the autopsy to him even after he requested one. The author took his wife's body on 8 March 2000, i.e. one day after the discovery of the body. The author also submits that the State party failed to explain numerous omissions in the preliminary investigation that were indicated in his initial submission.

5.6 As to the State party's claim that the communication is inadmissible for failure to exhaust domestic remedies, the author argues that appeal of the prosecutor's decision to close the case is an ineffective remedy, incapable to repair the omissions of the investigation. He submits that this remedy is provided in article 125 of the Criminal Procedure Code. A complaint against the inquirer, investigator, or the prosecutor's omissions or actions can be filed with the appropriate court by the applicant, his defense lawyer, his legal or another representative. The court is obliged to hear the case within five days from receiving the complaint and the judge shall pass a decision to confirm or dismiss the complaint. A copy of the decision shall be sent to the applicant and the prosecutor.

5.7 The author submits, based on the experience of Stichting Russian Justice Initiative, that this remedy is not effective in the Chechen Republic. The Stichting Russian Justice Initiative and its numerous applicants whom it represents have lodged complaints under article 125 of the Criminal Procedure Code against prosecuting and investigating bodies with various courts in the Chechen Republic in more than 30 separate cases. However, the complaints have not yielded any results, as in most cases, the complaints went unanswered. The author considers that there is no requirement that he pursue this domestic remedy since it has proved to be illusory, inadequate and ineffective and since, *inter alia*, the incident complained of was carried out by and under the responsibility of State agents.

5.8 The author explains that the ongoing investigation is a *pro forma* exercise and submits that while this domestic remedy exists on paper, it is ineffective. He argues that there is a well-founded fear against pursuing such remedies in so far as there is: a) a lack of genuine investigations by public prosecutors and other competent authorities; b) positive discouragement of those attempting to pursue remedies; c) an official attitude of legal unaccountability towards the Russian federal forces, and d) a lack of prosecutions against members of the Russian federal forces for alleged extra-judicial killings.

#### **Supplementary State party's submissions on the author's comments**

6.1 On 25 May 2007, the State party submits that on 1 June 2006, the Prosecutor's Office of the Staropromyslovsky District decided to suspend the investigation into the circumstances of Mrs. Amirova's death on the basis of article 208, paragraph 1, part 1, of the Criminal Procedure Code, as it was impossible to identify the perpetrator/s.

6.2 On the facts, the State party adds that subsequently to the discovery of Mrs. Amirova's body, a number of supplementary examinations of the crime scene were carried out. These

examinations, however, did not produce any positive results. The State party reiterates that, according to the criminal case file, the author has never petitioned for the forensic medical examination of his wife's body. On the contrary, the case file contains the protocol of the author's examination of 14 April 2001, in which he refuses to allow an exhumation of Mrs. Amirova's body and to communicate the location of her grave. The State party claims that the author has refused to sign this protocol.

6.3 The State party further submits that in the absence of the forensic medical examination, it was impossible to objectively ascertain whether Mrs. Amirova's body bore gunshot wounds. At the same time, the author's testimony corroborated by that of the agent of the Ministry of Emergency Situations, give reasons to believe that Mrs. Amirova's death was violent. Therefore, the criminal case was initiated under article 105, part 1 (murder), of the Criminal Code and the investigation is not yet completed. The preliminary investigation, however, did not establish any objective evidence of the involvement of federal servicemen in this crime.

6.4 The State party adds that, given the author's agreement to allow an exhumation and to communicate the location of his wife's place of burial, on 29 March 2007, the Prosecutor's Office of the Chechen Republic revoked the decision of the Prosecutor's Office of the Staropromyslovsky District of 1 June 2006 to suspend the investigation into the circumstances of Mrs. Amirova's death. In accordance with article 37 of the Criminal Procedure Code, the Prosecutor's Office of the Chechen Republic ordered a number of investigative actions, such as supplementary interrogation of the author and of the agent of the Ministry of Emergency Situations, interrogation of investigators of the Department of Internal Affairs who examined the crime scene on 7 May 2000, and the medical forensic examination of Mrs. Amirova's body.

6.5 The State party refutes the claim that the referral of the case to courts of the Chechen Republic is an ineffective remedy. It argues that all the complaints filed with the courts of the Chechen Republic under article 125 of the Criminal Procedure Code have been examined. For example, out of the 39 complaints examined in 2006, 17 were granted. The State party submits that under article 127 of the Criminal Procedure Code, decisions of the court of first instance can be appealed on cassation (chapters 42-45 of the Criminal Procedure Code) and through the supervisory review procedure (chapters 48-49 of the Criminal Procedure Code). During 2004-2006, decisions of the district courts were appealed to the Supreme Court of the Chechen Republic.

#### **Authors' comments on the State party's supplementary submissions**

7. On 20 December 2007, with reference to the State party's submissions of 27 May 2007, the author notes that the State party has simply repeated the arguments it had made in its prior submission of 17 August 2006 and once again has not backed up its claims with any concrete evidence. As the State party raises the same issues, the author refers the Committee to his prior comments of 14 December 2006.

#### **Further submissions from the State party and the author**

8.1 On 19 March 2008, the State party submits that on 2 April 2007 the resumed investigation was handed over to an investigator of the Prosecutor's Office of the Staropromyslovsky District. On 13 April 2007, this investigator requested the Head of the Department of Internal Affairs of

the Staropromyslovsky District, to reinvestigate the efforts to identify the perpetrator/s of the crime, witnesses and eyewitnesses, as well as to secure appearance in the prosecutor's office for interrogation of the two agents of the Ministry of Emergency Situations and of the three officers of the Staropromyslovsky Temporary Department of Internal Affairs of Grozny who were present at or examined the crime scene on 7 May 2000.

8.2 On 26 April 2007, the Head of the Department of Internal Affairs of the Staropromyslovsky District replied that reinvigorated efforts to identify the perpetrator/s of the crime, witnesses and eyewitnesses did not produce any positive results so far; it was impossible to secure appearance of the three officers of the Staropromyslovsky Temporary Department of Internal Affairs of Grozny, because these officers have left the Chechen Republic at the end of their assignment and their current whereabouts were unknown; efforts to establish the whereabouts and to secure the appearance of the two agents of the Ministry of Emergency Situations did not produce any positive results so far. At the time of supplementary interrogation of 25 April 2007, the author stated that the protocol of his examination of 14 April 2001 was contrary to the facts. The State party argues that during supplementary interrogation of 25 April 2007 the author did not deny that he had refused to sign the protocol of 14 April 2001, which proves that he indeed was examined by the prosecutor and refused to allow an exhumation of Mrs. Amirova's body and to communicate the location of her place of burial.

8.3 The State party adds that although the author himself does not presently object against the exhumation of his wife's body, he must be aware that Mrs. Amirova's relatives do object against it, as being contrary to the Muslim customs. The State party specifically refers to the protocol of interrogation of Mrs. Amirova's sister of 27 April 2007. On 2 May 2007, the investigator of the Prosecutor's Office of the Staropromyslovsky District decided to suspend the investigation into the circumstances of Mrs. Amirova's death on the basis of article 208, paragraph 1, part 1, of the Criminal Procedure Code, as it was impossible to identify the perpetrator/s. The author and Mrs. Amirova's sister were informed of the decision in writing.

9. On 24 July 2008, with reference to the State party's submissions of 19 March 2008, the author notes that the State party has simply repeated the arguments it had made in its prior submissions and has not yet provided any concrete evidence to the case. Because the State party raises the same issues, the author refers the Committee to his prior comments of 14 December 2006.

#### **Issues and proceedings before the Committee:**

##### **Consideration of admissibility**

10.1 Before considering any claim contained in the communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

10.2 The Committee notes that the same matter is not being examined under any other international procedure, in line with the requirements of article 5, paragraph 2(a), of the Optional Protocol.

10.3 Regarding the exhaustion of domestic remedies, pursuant to article 5, paragraph 2(b), of the Optional Protocol, the Committee is precluded from considering any communication unless it has been ascertained that all available domestic remedies have been exhausted; this rule does not, however, apply if it is established that the application of domestic remedies has been or would be unreasonably prolonged or would be unlikely to bring effective relief to the presumed victim.

10.4 The State party has argued that the communication is inadmissible for failure to exhaust domestic remedies. In support of its argument, the State party has noted that the author has failed to appeal to a court any decisions of the investigation authorities related to the suspension of the investigation in the criminal case concerning the discovery of Mrs. Amirova's body. The author claims, however, that the referral to the courts of the Chechen Republic is an ineffective remedy, incapable to repair the omissions of the investigation. Furthermore, he argues, there is a well-founded fear against pursuing such remedies in so far as there is: a) a lack of genuine investigations by public prosecutors and other competent authorities; b) positive discouragement of those attempting to pursue remedies; c) an official attitude of legal unaccountability towards the Russian federal forces, and d) a lack of prosecutions against members of the Russian federal forces for alleged extra-judicial killings. In addition, the author refers to the experience of Stichting Russian Justice Initiative that has lodged complaints under article 125 of the Criminal Procedure Code on behalf of other persons whom it represented; in most cases these complaints went unanswered. The Committee notes that the State party challenges the author's claim about the ineffectiveness of the judicial remedies in the Chechen Republic, without, however, providing any evidence that any investigation initiated pursuant to a court decision had led to the effective prosecution and punishment of the perpetrator/s. In the circumstances, the Committee considers that the question of exhaustion of domestic remedies in the present communication is so closely linked to the merits of the case that it is inappropriate to determine it at the present stage of the proceedings and that it should be joined to the merits.

10.5 In relation to the alleged violation of article 2, paragraph 1, and article 26 of the Covenant, in that the State Party has failed to respect the equal protection and non-discrimination principles by systematically denying the protections and remedies to, generally, civilian victims of human rights abuses of the Chechen origin and, specifically, to the author, on the ground of their national origin, the Committee considers that these claims have been insufficiently substantiated, for purposes of admissibility. They are thus inadmissible under article 2 of the Optional Protocol.

10.6 Concerning the author's claim of a violation of article 9, in that the State party failed to adopt adequate measures to ensure Mrs. Amirova's liberty and security even outside the detention context, the Committee considers that this claim has not been sufficiently substantiated, for purposes of admissibility, and is inadmissible under article 2 of the Optional Protocol.

10.7 The Committee considers that the author's claims under article 6 and article 7, as well as under article 2, paragraph 3, read in conjunction with article 6 and article 7, of the Covenant, have been sufficiently substantiated, for purposes of admissibility, and declares them admissible.

### Consideration of the merits

11.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties, as provided for under article 5, paragraph 1, of the Optional Protocol.

11.2 With regard to the author's claim that article 6 was violated, the Committee recalls its General Comment No. 6 on article 6, which states that the right enshrined in this article is the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation.<sup>19</sup> The Committee recalls its jurisprudence that criminal investigation and consequential prosecution are necessary remedies for violations of human rights such as those protected by article 6.<sup>20</sup> It further recalls its General Comment No. 31, that where investigations reveal violations of certain Covenant rights States parties must ensure that those responsible are brought to justice.<sup>21</sup>

11.3 The Committee notes that in its submissions of 25 May 2007 and 19 March 2008, the State party concedes that the author's testimony corroborated by that of the agent of the Ministry of Emergency Situations give reasons to believe that Mrs. Amirova's death was violent. The Committee also notes that Mrs. Amirova's death certificate of 31 August 2001 issued by the Civilian Registry Office of the Staropromyslovsky District states that she died from a gunshot wound to the chest on 12 January 2000. The Committee further notes the author's claim, attested by the death certificate, that her death occurred at the same time and in the same place as the second military operation in the Chechen Republic conducted by the Russian federal forces and that in his communication to the Committee and numerous letters to the State party's authorities, the author attributed his wife's arbitrary deprivation of life to the State party's federal forces. As regards the subsequent investigation, it was suspended on 2 May 2007 for the fifth time since 2000, for failure to identify the perpetrator/s. However, the investigation has not been completed, thereby preventing the author from pursuing his claim for compensation. The Committee notes that the author and the State party accuse each other of either failing or obstructing to carry out the exhumation and forensic medical examination of Mrs. Amirova's body. The Committee also notes that, as transpires from the facts presented by the author and uncontested by the State party, the author did ask for an autopsy to be performed the same day when his wife's body was discovered but his request was denied.

11.4 The Committee considers that the death by firearms warranted at the very minimum an effective investigation of the potential involvement of the State party's federal forces in Mrs. Amirova's death, besides an uncorroborated statement that there was no objective evidence of the involvement of federal servicemen in this crime. The Committee notes the failure of the State party even to secure the testimony of the agents of the Ministry of Emergency Situations and of the Staropromyslovsky Temporary Department of Internal Affairs of Grozny who were present at the crime scene on 7 May 2000. The Committee also notes the uncontested evidence submitted by the author of a pattern of alleged violations by the State party of the sort asserted in the present case, as well as a pattern of perfunctory and unproductive investigations whose genuineness is doubtful. The facts of the present case exemplify this pattern. The Committee further observes that although over nine years have elapsed since Mrs. Amirova's death, the author still does not know the exact circumstances surrounding his wife's death and the State party's authorities have not indicted, prosecuted or brought to justice anyone. The criminal case remains suspended without any indication from the State party when it will be completed. The

<sup>19</sup> Supra n.16, paragraph 1.

<sup>20</sup> Communication No.1436/2005, *Sathasivam v. Sri Lanka*, Views adopted on 8 July 2008, paragraph 6.4. See also, supra n.12, paragraphs 15 and 18.

<sup>21</sup> Supra n.12, paragraph 18.

Committee also notes that a civil claim for compensation, even if could provide adequate reparation, faces serious obstacles if those responsible for the crime have not already been identified in criminal proceedings. The State party must accordingly be held to be in breach of its obligation, under article 6, read in conjunction with article 2, paragraph 3, properly to investigate the death of the author's wife and take appropriate action against those found responsible.

11.5 As to the author's attribution of his wife's arbitrary deprivation of life to the State party's federal forces, the Committee recalls its jurisprudence<sup>22</sup> that the burden of proof cannot rest alone on the authors of the communication, especially considering that the authors and the State party do not always have equal access to evidence and that frequently the State party alone has access to relevant information. It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities, and to furnish to the Committee the information available to it. In addition, the deprivation of life by the authorities of the State is a matter of utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities.<sup>23</sup> The Committee takes into account the evidence provided by the author pointing to the State party's direct responsibility for Mrs. Amirova's death, but considers that, the evidence does not reach the threshold that would allow a finding that there has been a direct violation of article 6, with regard to Mrs Amirova.

11.6 The author claimed that his wife was severely tortured, ill-treated and most likely subjected to sexual violence before she was killed. These allegations were presented both to the State party's authorities, i.e. the Central Office of the Military Prosecutor of the Russian Federation, and in the context of the present communication. The Committee recalls that once a complaint about ill-treatment contrary to article 7 has been filed, a State party must investigate it promptly and impartially.<sup>24</sup> In the present case, the State party refused the author's allegation by stating that there was no objective evidence of the involvement of federal servicemen in this crime. In the absence of any information by the State party, specifically in relation to any inquiry made by the authorities both in the context of the criminal investigation or in the context of the present communication to address the allegations advanced by the author in a substantiated way, due weight must be given to the author's allegations. In these circumstances, the Committee considers that State party has failed in its duty to adequately investigate the allegations put forward by the author and concludes that the facts as presented disclose a violation of article 7, read in conjunction with article 2, paragraph 3, of the Covenant. For the same reasons mentioned in the previous paragraph in respect of article 6, the Committee considers that the evidence does not reach the threshold that would allow a finding of a direct violation of article 7 of the Covenant.

11.7 As to the author's claim also to be a victim of violations of the Covenant, the Committee recalls its jurisprudence according to which the close family of victims of enforced disappearance may also be victims of a violation of the prohibition of ill-treatment under article

<sup>22</sup> Communication No. 30/1978, *Bleier v. Uruguay*, Views adopted on 24 March 1980, paragraph 13.3, Communication No. 84/1981, *Dermitt Berbato et al. v. Uruguay*, Views adopted on 21 October 1982, paragraph 9.6.

<sup>23</sup> Supra n.16, paragraph 3.

<sup>24</sup> Supra n.15, paragraph 14.

7. This is because of the unique nature of the anxiety, anguish and uncertainty for those to the direct victim. That is the inexorable consequence of an enforced disappearance. Without wishing to spell out all the circumstances of indirect victimisation, the Committee considers that the failure of a State party responsibly to discharge its obligations to investigate and clarify the circumstances of the harm suffered by the direct victim will be usually be a factor. Additional factors may be necessary. In the present case, the Committee notes the horrific conditions in which the author came to find his wife's mutilated remains, as attested at the time by public officials (see paragraph 2.6), followed by the dilatory, sporadic measures undertaken to investigate the circumstances that have led to the above findings of violations of articles 6 and 7, read together with article 2, paragraph 3. The Committee considers that, taken together, the circumstances require the Committee to conclude that the author's own rights under article 7 have also been violated.

12. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation in respect of Mrs. Amirova by the Russian Federation of article 6 and article 7, read in conjunction with article 2, paragraph 3, of the Covenant, and a violation in respect of the author of article 7.

13. Under article 2, paragraph 3(a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy in the form, *inter alia*, of an impartial investigation in the circumstances of his wife's death, prosecution of those responsible, and adequate compensation. The State party is also under an obligation to prevent similar violations in the future.

14. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

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**International Court of Justice**

**Ahmadou Sadio Diallo**

**(Republic of Guinea *v.* Democratic Republic of the Congo)  
Judgment**

***I.C.J. Reports 2010, paras. 63-85***

that he was not prevented from engaging in written correspondence. The letter of 30 November 1995 is therefore in no way conclusive.

59. Accordingly, the Court concludes that Mr. Diallo remained in continuous detention for 66 days, from 5 November 1995 to 10 January 1996.

60. On the other hand, the Court does not accept the Applicant's assertion that Mr. Diallo was rearrested on 14 January 1996 and remained in detention until he was expelled on 31 January. This claim, which is contested by the Respondent, is not supported by any evidence at all; the Court also observes that, in the written proceedings, Guinea stated the date of this alleged arrest to be 17 and not 14 January. The Court therefore cannot regard the second period of detention claimed by the Applicant, lasting 17 days, as having been established. However, since the DRC has acknowledged that Mr. Diallo was detained, at the latest, on 25 January 1996, the Court will take it as established that he was in detention between 25 and 31 January 1996.

61. Nor can the Court accept the allegations of death threats said to have been made against Mr. Diallo by his guards, in the absence of any evidence in support of these allegations.

62. As regards the question of compliance of the authorities of the DRC with their obligations under Article 36 (1) (b) of the Vienna Convention on Consular Relations, the relevant facts will be examined at a later stage, when the Court deals with that question (see paragraphs 90-97 below).

## 2. *Consideration of the facts in the light of the applicable international law*

63. Guinea maintains that the circumstances in which Mr. Diallo was arrested, detained and expelled in 1995-1996 constitute in several respects a breach by the DRC of its international obligations.

First, the expulsion of Mr. Diallo is said to have breached Article 13 of the International Covenant on Civil and Political Rights (hereinafter the "Covenant") of 16 December 1966, to which Guinea and the DRC became parties on 24 April 1978 and 1 February 1977 respectively, as well as Article 12, paragraph 4, of the African Charter on Human and Peoples' Rights (hereinafter the "African Charter") of 27 June 1981, which entered into force for Guinea on 21 October 1986, and for the DRC on 28 October 1987.

Second, Mr. Diallo's arrest and detention are said to have violated Article 9, paragraphs 1 and 2, of the Covenant, and Article 6 of the African Charter.

Third, Mr. Diallo is said to have suffered conditions in detention comparable to forms of inhuman or degrading treatment that are prohibited by international law.

Fourth and last, Mr. Diallo is said not to have been informed, when he

was arrested, of his right to request consular assistance from his country, in violation of Article 36 (1) (b) of the Vienna Convention on Consular Relations of 24 April 1963, which entered into force for Guinea on 30 July 1988 and for the DRC on 14 August 1976.

The Court will examine in turn whether each of these assertions is well-founded.

### (a) *The alleged violation of Article 13 of the Covenant and Article 12, paragraph 4, of the African Charter*

64. Article 13 of the Covenant reads as follows:

"An alien lawfully in the territory of a State party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority."

Likewise, Article 12, paragraph 4, of the African Charter provides that:

"A non-national legally admitted in a territory of a State party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law."

65. It follows from the terms of the two provisions cited above that the expulsion of an alien lawfully in the territory of a State which is a party to these instruments can only be compatible with the international obligations of that State if it is decided in accordance with "the law", in other words the domestic law applicable in that respect. Compliance with international law is to some extent dependent here on compliance with internal law. However, it is clear that while "accordance with law" as thus defined is a necessary condition for compliance with the above-mentioned provisions, it is not the sufficient condition. First, the applicable domestic law must itself be compatible with the other requirements of the Covenant and the African Charter; second, an expulsion must not be arbitrary in nature, since protection against arbitrary treatment lies at the heart of the rights guaranteed by the international norms protecting human rights, in particular those set out in the two treaties applicable in this case.

66. The interpretation above is fully corroborated by the jurisprudence of the Human Rights Committee established by the Covenant to ensure compliance with that instrument by the States parties (see for example, in this respect, *Maroufidou v. Sweden*, No. 58/1979, para. 9.3; *Human Rights*

*Committee, General Comment No. 15: The Position of Aliens under the Covenant*).

Since it was created, the Human Rights Committee has built up a considerable body of interpretative case law, in particular through its findings in response to the individual communications which may be submitted to it in respect of States parties to the first Optional Protocol, and in the form of its “General Comments”.

Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled.

67. Likewise, when the Court is called upon, as in these proceedings, to apply a regional instrument for the protection of human rights, it must take due account of the interpretation of that instrument adopted by the independent bodies which have been specifically created, if such has been the case, to monitor the sound application of the treaty in question. In the present case, the interpretation given above of Article 12, paragraph 4, of the African Charter is consonant with the case law of the African Commission on Human and Peoples’ Rights established by Article 30 of the said Charter (see, for example, *Kenneth Good v. Republic of Botswana*, No. 313/05, para. 204; *World Organization against Torture and International Association of Democratic Lawyers, International Commission of Jurists, Inter-African Union for Human Rights v. Rwanda*, No. 27/89, 46/91, 49/91, 99/93).

68. The Court also notes that the interpretation by the European Court of Human Rights and the Inter-American Court of Human Rights, respectively, of Article 1 of Protocol No. 7 to the (European) Convention for the Protection of Human Rights and Fundamental Freedoms and Article 22, paragraph 6, of the American Convention on Human Rights — the said provisions being close in substance to those of the Covenant and the African Charter which the Court is applying in the present case — is consistent with what has been found in respect of the latter provisions in paragraph 65 above.

69. According to Guinea, the decision to expel Mr. Diallo first breached Article 13 of the Covenant and Article 12, paragraph 4, of the African Charter because it was not taken in accordance with Congolese domestic law, for three reasons: it should have been signed by the President of the Republic and not by the Prime Minister; it should have been preceded by consultation of the National Immigration Board; and it should have indicated the grounds for the expulsion, which it failed to do.

70. The Court is not convinced by the first of these arguments. It is true that Article 15 of the Zairean Legislative Order of 12 September 1983 concerning immigration control, in the version in force at the time, conferred on the President of the Republic, and not the Prime Minister, the power to expel an alien. However, the DRC explains that since the entry into force of the Constitutional Act of 9 April 1994, the powers conferred by particular legislative provisions on the President of the Republic are deemed to have been transferred to the Prime Minister — even though such provisions have not been formally amended — under Article 80 (2) of the new Constitution, which provides that “the Prime Minister shall exercise regulatory power by means of decrees deliberated upon in the Council of Ministers”.

The Court recalls that it is for each State, in the first instance, to interpret its own domestic law. The Court does not, in principle, have the power to substitute its own interpretation for that of the national authorities, especially when that interpretation is given by the highest national courts (see, for this latter case, *Serbian Loans, Judgment No. 14, 1929, P.C.I.J., Series A, No. 20*, p. 46 and *Brazilian Loans, Judgment No. 15, 1929, P.C.I.J., Series A, No. 21*, p. 124). Exceptionally, where a State puts forward a manifestly incorrect interpretation of its domestic law, particularly for the purpose of gaining an advantage in a pending case, it is for the Court to adopt what it finds to be the proper interpretation.

71. That is not the situation here. The DRC’s interpretation of its Constitution, from which it follows that Article 80 (2) produces certain effects on the laws already in force on the date when that Constitution was adopted, does not seem manifestly incorrect. It has not been contested that this interpretation corresponded, at the time in question, to the general practice of the constitutional authorities. The DRC has included in the case file, in this connection, a number of other expulsion decrees issued at the same time and all signed by the Prime Minister. Consequently, although it would be possible in theory to discuss the validity of that interpretation, it is certainly not for the Court to adopt a different interpretation of Congolese domestic law for the purposes of the decision of this case. It therefore cannot be concluded that the decree expelling Mr. Diallo was not issued “in accordance with law” by virtue of the fact that it was signed by the Prime Minister.

72. However, the Court is of the opinion that this decree did not comply with the provisions of Congolese law for two other reasons.

First, it was not preceded by consultation of the National Immigration Board, whose opinion is required by Article 16 of the above-mentioned Legislative Order concerning immigration control before any expulsion measure is taken against an alien holding a residence permit. The DRC has not contested either that Mr. Diallo’s situation placed him within the scope of this provision, or that consultation of the Board was neglected. This omission is confirmed by the absence in the decree of a citation mentioning the Board’s opinion, whereas all the other expulsion decrees included in the case file specifically cite such an opinion, in accordance

with Article 16 of the Legislative Order, moreover, which concludes by stipulating that the decision “shall mention the fact that the Board was consulted”.

Second, the expulsion decree should have been “reasoned” pursuant to Article 15 of the 1983 Legislative Order; in other words, it should have indicated the grounds for the decision taken. The fact is that the general, stereotyped reasoning included in the decree cannot in any way be regarded as meeting the requirements of the legislation. The decree confines itself to stating that the “presence and conduct [of Mr. Diallo] have breached Zairean public order, especially in the economic, financial and monetary areas, and continue to do so”. The first part of this sentence simply paraphrases the legal basis for any expulsion measure according to Congolese law, since Article 15 of the 1983 Legislative Order permits the expulsion of any alien “who, by his presence or conduct, breaches or threatens to breach the peace or public order”. As for the second part, while it represents an addition, this is so vague that it is impossible to know on the basis of which activities the presence of Mr. Diallo was deemed to be a threat to public order (in the same sense, *mutatis mutandis*, see *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, *Judgment*, I.C.J. Reports 2008, p. 231, para. 152).

The formulation used by the author of the decree therefore amounts to an absence of reasoning for the expulsion measure.

73. The Court thus concludes that in two important respects, concerning procedural guarantees conferred on aliens by Congolese law and aimed at protecting the persons in question against the risk of arbitrary treatment, the expulsion of Mr. Diallo was not decided “in accordance with law”.

Consequently, regardless of whether that expulsion was justified on the merits, a question to which the Court will return later in this Judgment, the disputed measure violated Article 13 of the Covenant and Article 12, paragraph 4, of the African Charter.

74. Furthermore, the Court considers that Guinea is justified in concluding that the right afforded by Article 13 to an alien who is subject to an expulsion measure to “submit the reasons against his expulsion and to have his case reviewed by . . . the competent authority” was not respected in the case of Mr. Diallo.

It is indeed certain that, neither before the expulsion decree was signed on 31 October 1995, nor subsequently but before the said decree was implemented on 31 January 1996, was Mr. Diallo allowed to submit his defence to a competent authority in order to have his arguments taken into consideration and a decision made on the appropriate response to be given to them.

It is true, as the DRC has pointed out, that Article 13 of the Covenant provides for an exception to the right of an alien to submit his reasons where “compelling reasons of national security” require otherwise. The Respondent maintains that this was precisely the case here. However, it

has not provided the Court with any tangible information that might establish the existence of such “compelling reasons”. In principle, it is doubtless for the national authorities to consider the reasons of public order that may justify the adoption of one police measure or another. But when this involves setting aside an important procedural guarantee provided for by an international treaty, it cannot simply be left in the hands of the State in question to determine the circumstances which, exceptionally, allow that guarantee to be set aside. It is for the State to demonstrate that the “compelling reasons” required by the Covenant existed, or at the very least could reasonably have been concluded to have existed, taking account of the circumstances which surrounded the expulsion measure.

In the present case, no such demonstration has been provided by the Respondent.

On these grounds too, the Court concludes that Article 13 of the Covenant was violated in respect of the circumstances in which Mr. Diallo was expelled.

(b) *The alleged violation of Article 9, paragraphs 1 and 2, of the Covenant and Article 6 of the African Charter*

75. Article 9, paragraphs 1 and 2, of the Covenant provides that:

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

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.”

Article 6 of the African Charter provides that:

“Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.”

76. According to Guinea, the above-mentioned provisions were violated when Mr. Diallo was arrested and detained in 1995-1996 for the purpose of implementing the expulsion decree, for a number of reasons.

First, the deprivations of liberty which he suffered did not take place “in accordance with such procedure as [is] established by law” within the meaning of Article 9, paragraph 1, of the Covenant, or on the basis of “conditions previously laid down by law” within the meaning of Article 6 of the African Charter.

Second, they were “arbitrary” within the meaning of these provisions.

Third, Mr. Diallo was not informed, at the time of his arrests, of the

reasons for those arrests, nor was he informed of the charges against him, which constituted a violation of Article 9, paragraph 2, of the Covenant.

The Court will examine in turn whether each of these assertions is well-founded.

77. First of all, it is necessary to make a general remark. The provisions of Article 9, paragraphs 1 and 2, of the Covenant, and those of Article 6 of the African Charter, apply in principle to any form of arrest or detention decided upon and carried out by a public authority, whatever its legal basis and the objective being pursued (see in this respect, with regard to the Covenant, the Human Rights Committee's General Comment No. 8 of 30 June 1982 concerning the right to liberty and security of person (*Human Rights Committee, CCPR General Comment No. 8: Article 9 (Right to Liberty and Security of Person)*). The scope of these provisions is not, therefore, confined to criminal proceedings; they also apply, in principle, to measures which deprive individuals of their liberty that are taken in the context of an administrative procedure, such as those which may be necessary in order to effect the forcible removal of an alien from the national territory. In this latter case, it is of little importance whether the measure in question is characterized by domestic law as an "expulsion" or a "*refoulement*". The position is only different as regards the requirement in Article 9, paragraph 2, of the Covenant that the arrested person be "informed of any charges" against him, a requirement which is only meaningful in the context of criminal proceedings.

78. The Court now turns to the first of Guinea's three allegations, namely, that Mr. Diallo's arrest and detention were not in accordance with the requirements of the law of the DRC. It should first be noted that Mr. Diallo's arrest on 5 November 1995 and his detention until 10 January 1996 (see paragraph 58 above) were for the purpose of enabling the expulsion decree issued against him on 31 October 1995 to be effected. The second arrest, on 25 January 1996 at the latest, was also for the purpose of implementing that decree: the mention of a "*refoulement*" on account of "illegal residence" in the notice served on Mr. Diallo on 31 January 1996, the day when he was actually expelled, was clearly erroneous, as the DRC acknowledges.

79. Article 15 of the Legislative Order of 12 September 1983 concerning immigration control, as in force at the time of Mr. Diallo's arrest and detention, provided that an alien "who is likely to evade implementation" of an expulsion measure may be imprisoned for an initial period of 48 hours, which may be "extended by 48 hours at a time, but shall not exceed eight days". The Court finds that Mr. Diallo's arrest and detention were not in accordance with these provisions. There is no evidence that the authorities of the DRC sought to determine whether Mr. Diallo was "likely to evade implementation" of the expulsion decree and, therefore, whether it was necessary to detain him. The fact that he made no attempt to evade expulsion after he was released on 10 January 1996 sug-

gests that there was no need for his detention. The overall length of time for which he was detained — 66 days following his initial arrest and at least six more days following the second arrest — greatly exceeded the maximum period permitted by Article 15. In addition, the DRC has produced no evidence to show that the detention was reviewed every 48 hours, as required by that provision.

80. The Court further finds, in response to the second allegation set out above (see paragraph 76 above), that Mr. Diallo's arrest and detention were arbitrary within the meaning of Article 9, paragraph 1, of the Covenant and Article 6 of the African Charter.

81. Admittedly, in principle an arrest or detention aimed at effecting an expulsion decision taken by the competent authority cannot be characterized as "arbitrary" within the meaning of the above-mentioned provisions, even if the lawfulness of the expulsion decision might be open to question. Consequently, the fact that the decree of 31 October 1995 was not issued, in some respects, "in accordance with law", as the Court has noted above in relation to Article 13 of the Covenant and Article 12, paragraph 4, of the African Charter, is not sufficient to render the arrest and detention aimed at implementing that decree "arbitrary" within the meaning of Article 9, paragraph 1, of the Covenant and Article 6 of the African Charter.

82. However, account should be taken here of the number and seriousness of the irregularities tainting Mr. Diallo's detentions. As noted above, he was held for a particularly long time and it would appear that the authorities made no attempt to ascertain whether his detention was necessary.

Moreover, the Court can but find not only that the decree itself was not reasoned in a sufficiently precise way, as was pointed out above (see paragraph 72), but that throughout the proceedings, the DRC has never been able to provide grounds which might constitute a convincing basis for Mr. Diallo's expulsion. Allegations of "corruption" and other offences have been made against Mr. Diallo, but no concrete evidence has been presented to the Court to support these claims. These accusations did not give rise to any proceedings before the courts or, *a fortiori*, to any conviction. Furthermore, it is difficult not to discern a link between Mr. Diallo's expulsion and the fact that he had attempted to recover debts which he believed were owed to his companies by, amongst others, the Zairean State or companies in which the State holds a substantial portion of the capital, bringing cases for this purpose before the civil courts. Under these circumstances, the arrest and detention aimed at allowing such an expulsion measure, one without any defensible basis, to be effected can only be characterized as arbitrary within the meaning of Article 9, paragraph 1, of the Covenant and Article 6 of the African Charter.

83. Finally, the Court turns to the allegation relating to Article 9, paragraph 2, of the Covenant.

For the reasons discussed above (see paragraph 77), Guinea cannot effectively argue that at the time of each of his arrests (in November 1995 and January 1996), Mr. Diallo was not informed of the “charges against him”, as the Applicant contends is required by Article 9, paragraph 2, of the Covenant. This particular provision of Article 9 is applicable only when a person is arrested in the context of criminal proceedings; that was not the case for Mr. Diallo.

84. On the other hand, Guinea is justified in arguing that Mr. Diallo’s right to be “informed, at the time of arrest, of the reasons for his arrest” — a right guaranteed in all cases, irrespective of the grounds for the arrest — was breached.

The DRC has failed to produce a single document or any other form of evidence to prove that Mr. Diallo was notified of the expulsion decree at the time of his arrest on 5 November 1995, or that he was in some way informed, at that time, of the reason for his arrest. Although the expulsion decree itself did not give specific reasons, as pointed out above (see paragraph 72), the notification of this decree at the time of Mr. Diallo’s arrest would have informed him sufficiently of the reasons for that arrest for the purposes of Article 9, paragraph 2, since it would have indicated to Mr. Diallo that he had been arrested for the purpose of an expulsion procedure and would have allowed him, if necessary, to take the appropriate steps to challenge the lawfulness of the decree. However, no information of this kind was provided to him; the DRC, which should be in a position to prove the date on which Mr. Diallo was notified of the decree, has presented no evidence to that effect.

85. The same applies to Mr. Diallo’s arrest in January 1996. On that date, it has also not been established that Mr. Diallo was informed that he was being forcibly removed from Congolese territory in execution of an expulsion decree. Moreover, on the day when he was actually expelled, he was given the incorrect information that he was the subject of a “*refoulement*” on account of his “illegal residence” (see paragraph 50 above). This being so, the requirement for him to be informed, laid down by Article 9, paragraph 2, of the Covenant, was not complied with on that occasion either.

(c) *The alleged violation of the prohibition on subjecting a detainee to mistreatment*

86. Guinea maintains that Mr. Diallo was subjected to mistreatment during his detention, because of the particularly tough conditions thereof, because he was deprived of his right to communicate with his lawyers and with the Guinean Embassy, and because he received death threats from the guards.

**International Court of Justice**

**Question Relating to the Obligation to  
Prosecute or Extradite (Belgium *v.* Senegal)  
Judgment**

***I.C.J. Reports 2012, paras. 96-105***

accordance with its internal law. In the cases provided for in Article 5, the State can consent to extradition. This is a possibility afforded by the Convention, and, according to Belgium, that is the meaning of the maxim "*aut dedere aut iudicare*" under the Convention. Thus, if the State does not opt for extradition, its obligation to prosecute remains unaffected. In Belgium's view, it is only if for one reason or another the State concerned does not prosecute, and a request for extradition is received, that that State has to extradite if it is to avoid being in breach of this central obligation under the Convention.

93. For its part, Senegal takes the view that the Convention certainly requires it to prosecute Mr. Habré, which it claims it has endeavoured to do by following the legal procedure provided for in that instrument, but that it has no obligation to Belgium under the Convention to extradite him.

94. The Court considers that Article 7, paragraph 1, requires the State concerned to submit the case to its competent authorities for the purpose of prosecution, irrespective of the existence of a prior request for the extradition of the suspect. That is why Article 6, paragraph 2, obliges the State to make a preliminary inquiry immediately from the time that the suspect is present in its territory. The obligation to submit the case to the competent authorities, under Article 7, paragraph 1, may or may not result in the institution of proceedings, in the light of the evidence before them, relating to the charges against the suspect.

95. However, if the State in whose territory the suspect is present has received a request for extradition in any of the cases envisaged in the provisions of the Convention, it can relieve itself of its obligation to prosecute by acceding to that request. It follows that the choice between extradition or submission for prosecution, pursuant to the Convention, does not mean that the two alternatives are to be given the same weight. Extradition is an option offered to the State by the Convention, whereas prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the State.

## **2. The temporal scope of the obligation laid down in Article 7, paragraph 1**

96. A Member of the Court asked the Parties, first, whether the obligations incumbent upon Senegal under Article 7, paragraph 1, of the Convention applied to offences alleged to have been committed before 26 June 1987, the date when the Convention entered into force for Senegal, and, secondly, if, in the circumstances of the present case, those obligations extended to offences allegedly committed before 25 June 1999, the date when the Convention entered into force for Belgium (see paragraph 19 above). Those questions relate to the temporal application of Article 7, paragraph 1, of the Convention, according to the time when the offences are alleged to have been committed and the dates of entry into force of the Convention for each of the Parties.

97. In their replies, the Parties agree that acts of torture are regarded by customary international law as international crimes, independently of the Convention.

98. As regards the first aspect of the question put by the Member of the Court, namely whether the Convention applies to offences committed before 26 June 1987, Belgium contends that the alleged breach of the obligation *aut dedere aut iudicare* occurred after the entry into force of the Convention for Senegal, even though the alleged acts occurred before that date. Belgium further argues that Article 7, paragraph 1, is intended to strengthen the existing law by laying down specific procedural obligations, the purpose of which is to ensure that there will be no impunity and that, in these circumstances, those procedural obligations could apply to crimes committed before the entry into force of the Convention for Senegal. For its part, the latter does not deny that the obligation provided for in Article 7, paragraph 1, can apply to offences allegedly committed before 26 June 1987.

99. In the Court's opinion, the prohibition of torture is part of customary international law and it has become a peremptory norm (*ius cogens*).

That prohibition is grounded in a widespread international practice and on the *opinio juris* of States. It appears in numerous international instruments of universal application (in particular the Universal Declaration of Human Rights of 1948, the 1949 Geneva Conventions for the protection of war victims; the International Covenant on Civil and Political Rights of 1966; General Assembly resolution 3452/30 of 9 December 1975 on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), and it has been introduced into the domestic law of almost all States; finally, acts of torture are regularly denounced within national and international fora.

100. However, the obligation to prosecute the alleged perpetrators of acts of torture under the Convention applies only to facts having occurred after its entry into force for the State concerned. Article 28 of the Vienna Convention on the Law of Treaties, which reflects customary law on the matter, provides:

"Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of that treaty with respect to that party."

The Court notes that nothing in the Convention against Torture reveals an intention to require a State party to criminalize, under Article 4, acts of torture that took place prior to its entry into force for that State, or to establish its jurisdiction over such acts in accordance with Article 5. Consequently, in the view of the Court, the obligation to prosecute, under Article 7, paragraph 1, of the Convention does not apply to such acts.

101. The Committee against Torture emphasized, in particular, in its decision of 23 November 1989 in the case of *O.R., M.M. and M.S. v. Argentina* (Communications Nos. 1/1988, 2/1988 and 3/1988, decision of 23 November 1989, para. 7.5, *Official Documents of the General Assembly, Forty-Fifth Session, Supplement No. 44* (UN doc. A/45/44, Ann. V, p. 112)) that

“‘torture’ for purposes of the Convention can only mean torture that occurs subsequent to the entry into force of the Convention”. However, when the Committee considered Mr. Habré’s situation, the question of the temporal scope of the obligations contained in the Convention was not raised, nor did the Committee itself address that question (*Guegzeung et al. v. Senegal* (Communication No. 181/2001, decision of 17 May 2006, UN doc. CAT/C/36/D/181/2001)).

102. The Court concludes that Senegal’s obligation to prosecute pursuant to Article 7, paragraph 1, of the Convention does not apply to acts alleged to have been committed before the Convention entered into force for Senegal on 26 June 1987. The Court would recall, however, that the complaints against Mr. Habré include a number of serious offences allegedly committed after that date (see paragraphs 17, 19-21 and 32 above). Consequently, Senegal is under an obligation to submit the allegations concerning those acts to its competent authorities for the purpose of prosecution. Although Senegal is not required under the Convention to institute proceedings concerning acts that were committed before 26 June 1987, nothing in that instrument prevents it from doing so.

103. The Court now comes to the second aspect of the question put by a Member of the Court, namely, what was the effect of the date of entry into force of the Convention, for Belgium, on the scope of the obligation to prosecute. Belgium contends that Senegal was still bound by the obligation to prosecute Mr. Habré after Belgium had itself become party to the Convention, and that it was therefore entitled to invoke before the Court breaches of the Convention occurring after 25 July 1999. Senegal disputes Belgium’s right to engage its responsibility for acts alleged to have occurred prior to that date. It considers that the obligation provided for in Article 7, paragraph 1, belongs to “the category of divisible *erga omnes* obligations”, in that only the injured State could call for its breach to be sanctioned. Senegal accordingly concludes that Belgium was not entitled to rely on the status of injured State in respect of acts prior to 25 July 1999 and could not seek retroactive application of the Convention.

104. The Court considers that Belgium has been entitled, with effect from 25 July 1999, the date when it became party to the Convention, to request the Court to rule on Senegal’s compliance with its obligation under Article 7, paragraph 1. In the present case, the Court notes that Belgium invokes Senegal’s responsibility for the latter’s conduct starting in the year 2000, when a complaint was filed against Mr. Habré in Senegal (see paragraph 17 above).

105. The Court notes that the previous findings are also valid for the temporal application of Article 6, paragraph 2, of the Convention.

### 3. Implementation of the obligation laid down in Article 7, paragraph 1

106. Belgium, while recognizing that the time frame for implementation of the obligation to prosecute depends on the circumstances of each case, and in particular on the evidence gathered, considers that the State in whose territory the suspect is present cannot indefinitely delay performing the obligation incumbent upon it to submit the matter to its competent authorities for

the purpose of prosecution. Procrastination on the latter’s part could, according to Belgium, violate both the rights of the victims and those of the accused. Nor can the financial difficulties invoked by Senegal (see paragraphs 28-29 and 33 above) justify the fact that the latter has done nothing to conduct an inquiry and initiate proceedings.

107. The same applies, according to Belgium, to Senegal’s referral of the matter to the African Union in January 2006, which does not exempt it from performing its obligations under the Convention. Moreover, at its seventh session in July 2006 (see paragraph 23 above), the Assembly of Heads of State and Government of the African Union mandated Senegal “to prosecute and ensure that Hissène Habré is tried, on behalf of Africa, by a competent Senegalese court with guarantees for fair trial” (African Union, doc. Assembly/AU/Dec. 127 (VII), para. 5).

108. With regard to the legal difficulties which Senegal claims to have faced in performing its obligations under the Convention, Belgium contends that Senegal cannot rely on its domestic law in order to avoid its international responsibility. Moreover, Belgium recalls the judgment of the ECOWAS Court of Justice of 18 November 2010 (see paragraph 35 above), which considered that Senegal’s amendment to its Penal Code in 2007 might be contrary to the principle of non-retroactivity of criminal laws, and deemed that proceedings against Hissène Habré should be conducted before an *ad hoc* court of an international character, arguing that this judgment cannot be invoked against it. Belgium emphasizes that, if Senegal is now confronted with a situation of conflict between two international obligations as a result of that decision, that is the result of its own failings in implementing the Convention against Torture.

109. For its part, Senegal has repeatedly affirmed, throughout the proceedings, its intention to comply with its obligation under Article 7, paragraph 1, of the Convention, by taking the necessary measures to institute proceedings against Mr. Habré. Senegal contends that it only sought financial support in order to prepare the trial under favourable conditions, given its unique nature, having regard to the number of victims, the distance that witnesses would have to travel and the difficulty of gathering evidence. It claims that it has never sought, on these grounds, to justify the non-performance of its conventional obligations. Likewise, Senegal contends that, in referring the matter to the African Union, it was never its intention to relieve itself of its obligations.

110. Moreover, Senegal observes that the judgment of the ECOWAS Court of Justice is not a constraint of a domestic nature. While bearing in mind its duty to comply with its conventional obligation, it contends that it is nonetheless subject to the authority of that court. Thus, Senegal points out that that decision required it to make fundamental changes to the process begun in 2006, designed to result in a trial at the national level, and to mobilize effort in order to create an *ad hoc* tribunal of an international character, the establishment of which would be more cumbersome.

111. The Court considers that Senegal’s duty to comply with its obligations under the Convention cannot be affected by the decision of the ECOWAS Court of Justice.

